

THE TASMANIAN WILDERNESS WORLD HERITAGE AREA: PROTECTED BY THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999*?

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The theme of the 2008 ALTA Conference, ‘The Law, the Environment, Indigenous Peoples: Climate for Change?’ is timely indeed.¹ Twenty-five years ago, in July 1983, the High Court handed down its landmark judgment in *Commonwealth v Tasmania*.² Consequently, the Franklin River continues to flow free, past ancient Aboriginal caves and through the heart of the Tasmanian Wilderness World Heritage Area (‘TWWHA’).

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (‘EPBC Act’) has since rewritten Federal environmental law and now, inter alia, implements the *World Heritage Convention* in Australia. This paper examines key EPBC Act provisions applying to the TWWHA.

In this context, the provisions of the EPBC Act regarding regional forest agreement (‘RFA’) forestry operations are a major concern. These provisions effectively exempt RFA forestry operations from the Act. Law reform is needed.

I. INTRODUCTION

Environmental law matters. On 1 July 1983, the High Court of Australia delivered its much-anticipated decision in the *Tasmanian Dam Case*, upholding by the narrowest of majorities the Commonwealth’s right to prevent the State’s dam. Consequently, the Franklin River and its Aboriginal caves, such as the famous Kuta Kina, escaped submersion.

Further World Heritage cases followed, demonstrating the considerable extent of the legislative power vested in the Commonwealth through the external affairs power.

Publicly funded construction of inappropriate dams still continues in Tasmania³ and other States such as Queensland. However, the most controversial industry in Tasmania today is forestry. Yet RFA forestry operations are exempt from the nation’s pre-eminent environmental statute, the EPBC Act. This is particularly problematic in Tasmania where an RFA applies across the State.

Part II of this paper considers the primary obligations under the *Convention Concerning the Protection of the World Cultural and Natural Heritage*.⁴ Part III notes the High Court cases regarding the TWWHA, confirming the Commonwealth’s power to implement the Convention. Part IV examines how, and the extent to which, this is now done through the EPBC Act. Part V considers exemptions in the Act for RFA forestry operations. It is argued that these exemptions undermine the Commonwealth’s responsibility, and hard won capacity, to protect those parts of Australia’s natural and cultural heritage which are today threatened by forestry operations.

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2 (1983) 158 CLR 1 (‘*Tasmanian Dam Case*’).

3 See, eg, the *Meander Dam Project Act 2003* (Tas) which, inter alia: overrides the rejection of the Meander Dam by Tasmania’s Resource Management and Planning Appeal Tribunal; rules out any review or appeal of the dam under any Tasmanian law; and prevails over any other Tasmanian law.

4 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) (‘*World Heritage Convention*’).

II. WORLD HERITAGE CONVENTION OBLIGATIONS

A. Primary Obligations Under the Convention — Articles 4 and 5

The preamble to the *World Heritage Convention* notes that ‘deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world’.⁵

Therefore, the *World Heritage Convention*, art 4, imposes a duty on each State Party to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage⁶ situated within its territory.

In addition, art 5 provides:

To ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country ... to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.

B. The World Heritage List

The *World Heritage Convention* provides for the World Heritage Committee⁷ to establish, keep up to date and publish a ‘World Heritage List’, being ‘a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which [the Committee considers have] outstanding universal values in terms of such criteria as it shall have established.’⁸

C. Nomination of Properties to the World Heritage List

A property may only be included in the World Heritage List if it is nominated by the national government of the country where the property is located. Thus, an Australian property can only be put on the World Heritage List if the Commonwealth submits a nomination to the World Heritage Committee recommending that the property be listed.

The *World Heritage Convention* requires each State Party, ‘in so far as possible, [to] submit to the World Heritage Committee an inventory of property forming part of the

⁵ Ibid 1.

⁶ Ibid arts 1-2, which define ‘cultural heritage’ and ‘natural heritage’ as follows:

Article 1

For the purposes of this Convention, the following shall be considered as “cultural heritage”:

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

Article 2

For the purposes of this Convention, the following shall be considered as “natural heritage”:

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

⁷ Ibid art 8, which provides for establishment of an Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (‘the World Heritage Committee’) made up of 21 of the State parties to the Convention. Countries are elected to the Committee for terms of approximately three years. The Committee’s role includes deciding if a property is to be added to the World Heritage List.

⁸ Ibid art 11(2).

cultural and natural heritage, situated in its territory and suitable for inclusion in the [World Heritage List].⁹

The final decision as to whether a nominated property is inscribed on the list rests with the World Heritage Committee.

III. HIGH COURT CASES REGARDING THE TASMANIAN WILDERNESS WORLD HERITAGE AREA

Australia ratified the *World Heritage Convention* in 1974. When inscribed on the World Heritage List in 1982, the TWWHA met all four of the (then) criteria for natural heritage and three of the six criteria for cultural heritage. This represented the greatest number of World Heritage criteria satisfied by any listed property.

Controversy over the Tasmanian Government's scheme to dam the Franklin River for hydro-electric power contributed to the election of the Hawke Labor government, which had promised to stop the dam. The *World Heritage Properties Conservation Act 1983* (Cth) ('WHPC Act') was enacted, then unsuccessfully challenged by Tasmania. The 4-3 High Court decision¹⁰ of 1 July 1983 was the first of a series of significant World Heritage cases¹¹ which represented 'some of the most contentious disputes in recent Australian legal history.'¹² The cases¹³ clearly established the right of the Commonwealth to implement treaty obligations under the external affairs power,¹⁴ overriding recalcitrant States where necessary.¹⁵

The cases also had significant implications on the ground. For example, following the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth) and the High Court's ruling in the *Tasmanian Forests Case*,¹⁶ the TWWHA was expanded in 1989.

9 Ibid art 11(1).

10 *Tasmanian Dam Case* (1983) 158 CLR 1.

11 *Richardson v Forestry Commission* (1988) 164 CLR 261 ('*Tasmanian Forests Case*'); *Queensland v Commonwealth* (1989) 167 CLR 232 ('*Wet Tropics Case*'). See also *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 77 FCR 153 (Northrop, Burchett and Hill JJ) (Full Court of the Federal Court), and the High Court's refusal of the applicant's special leave application: *Friends of Hinchinbrook Society Inc v Minister for Environment* [1998] 6 Leg Rep SL8a (Gaudron and McHugh JJ, 13 March 1998) ('*Port Hinchinbrook Case*').

12 Lee Godden, 'Preserving Natural Heritage: Nature as Other' (1998) 22 *Melbourne University Law Review* 719, 733. For discussion of these cases see also, eg, Ben Boer, 'World Heritage Disputes in Australia' (1992) 7 *Journal of Environmental Law and Litigation* 247; Tim Bonyhady (ed), *Environmental Protection and Legal Change* (1992); Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (1993); Phillip Toyne, *The Reluctant Nation: Environmental Law and Politics in Australia* (1994); Donald Rothwell and Ben Boer, 'The Influence of International Environmental Law on Australian Courts' (1998) 7 *Review of European Community and International Environmental Law* 31; Jacqueline Peel, 'Heritage of Humankind: A Call for Reform of World Heritage Protection and Management in Australia' (1998) 14 *Queensland University of Technology Law Journal* 220; David Haigh, 'Hinchinbrook — In Defence of World Heritage' (1999) 6 *The Australasian Journal of Natural Resources Law and Policy* 47; Alison Cochrane, 'The Great Barrier Reef — World Heritage in Danger?' (1999) 4 *Asia Pacific Journal of Environmental Law* 251; and numerous articles in the *Environmental and Planning Law Journal*.

13 See also, eg, outside the environmental context, cases such as: *Polyukovich v Commonwealth* (1991) 172 CLR 501; *Horta v Commonwealth* (1994) 181 CLR 183; *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*').

14 *Commonwealth of Australia Constitution Act 1900* (Cth) s 51(xxix).

15 See James Crawford, 'The Constitution and the Environment' (1991) 13 *Sydney Law Review* 11; Garfield Barwick, 'The External Affairs Power of the Commonwealth and the Protection of World Heritage' (1995) 25 *Western Australian Law Review* 233; Cheryl Saunders, 'The Constitutional Division of Powers with Respect to the Environment in Australia' in Kenneth M Holland, F L Morton and Brian Galligan (eds), *Federalism and the Environment: Environmental Policy Making in Australia, Canada and the United States* (1996) 55; Richard Marlin, 'The External Affairs Power and Environmental Protection in Australia' (1996) 24 *Federal Law Review* 71; Rothwell and Boer, above n 12; and Senate Environment, Communications, Information Technology and the Arts References Committee, Australia, *Commonwealth Environment Powers* (1999).

16 *Richardson v Forestry Commission* (1988) 164 CLR 261. See, eg, Ben Boer, 'Lemonthyme Inquiry Act Valid' (1988) 5 *Environmental and Planning Law Journal* 173; Martin Tsamenyi and Juliet Bedding, 'The World Heritage Convention in the High Court: A Commentary on the *Tasmanian Forests Case*' (1988) 5 *Environmental and Planning Law Journal* 232; Martin Tsamenyi, Juliet Bedding and Lindi Wall, 'Determining the World Heritage Values of the Lemonthyme and Southern Forests: Lessons from the Helsham Inquiry' (1989) 6 *Environmental and Planning Law Journal* 79.

IV. APPLICATION OF THE EPBC ACT TO WORLD HERITAGE PROPERTIES

A. EPBC Act Applies Cooperative Federalism to World Heritage

Australia's constitutional battles over World Heritage properties were won by a Labor Commonwealth government against conservative State governments. Roles were reversed during the decade of the Howard Government, which opted for an omnibus environmental statute heavily reliant on cooperative federalism (in contrast to that Government's approach to, say, industrial relations). The WHPC Act and a suite of other Commonwealth environmental statutes were replaced by the EPBC Act,¹⁷ which now governs Australian World Heritage properties.

A cooperative approach permeates the EPBC Act, even extending to matters the subject of international agreement. For example, one object of the EPBC Act is 'to assist in the *co-operative* implementation of Australia's international environmental responsibilities' (*emphasis added*).¹⁸ In the context of Australian World Heritage litigation, this goal represents a substantial departure from previous practice. The various cases fought under the WHCP Act demonstrated little by way of cooperation from the States in 'implementation of Australia's international environmental responsibilities'.

The EPBC Act lists World Heritage first in its 'matters of national significance', clearly identifying its protection as a Commonwealth legal responsibility. Even in this area, however, the Act provides mechanisms for Commonwealth accreditation (eg, through bilateral agreements)¹⁹ of State and Territory environmental assessment and decision-making processes.

B. Nomination of World Heritage Properties Under the EPBC Act

The EPBC Act, pt 15 div 1, imposes specific requirements on the Commonwealth government in relation to the nomination of World Heritage properties.

Before a property is submitted to the World Heritage Committee for inclusion in the World Heritage List, the Commonwealth Environment Minister ('the Minister') must be satisfied that the Commonwealth has used its best endeavours to reach agreement on the proposed nomination and management arrangements for the property with:

- (1) the owners or occupiers of any land to be included in the proposed nomination; and
- (2) the relevant State or Territory.²⁰

The Minister must notify various decisions regarding World Heritage nominations in the *Gazette*.²¹

C. A 'Declared World Heritage Property' Under the Act

Under the EPBC Act, all properties that have been inscribed on the World Heritage List are automatically 'declared World Heritage properties'.²² Under s 14, the Minister also has the power to declare other properties where:

- the Commonwealth has nominated the property for inclusion on the World Heritage List, but the property has not yet been inscribed on the list;²³ or

17 The WHPC Act was repealed by the *Environment Reform (Consequential Provisions) Act 1999* (Cth) sch 6, item 1. Schedule 6, items 2-4, contain savings and transitional provisions. The *World Heritage Convention* is now implemented in Australian legislation through the EPBC Act.

18 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) para 3(1)(e).

19 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ch 3: Bilateral agreements. See specifically s 51: Agreements relating to declared World Heritage properties.

20 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 314. However, a failure to comply with s 314 does not affect submission of a property for inclusion in the World Heritage List or the status of a property as a declared World Heritage Property: s 314(3).

21 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 315.

22 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 13(1).

23 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(1)(a).

- the property has not been nominated for World Heritage listing but the Minister believes that the property contains world heritage values and that some or all of those values are under threat.²⁴

Before making a declaration under s 14, the Minister must give the appropriate State or Territory Minister a reasonable opportunity to comment.²⁵ However, if satisfied that the threat is imminent, the Minister is under no obligation to consult the State or Territory Minister.²⁶ A declaration under s 14 comes into force when it is published in the *Gazette*.²⁷ Where the Minister makes a declaration under s 14 concerning a property that is not included on the World Heritage List, the declaration must specify the period for which the declaration will remain in force.²⁸ Where the Commonwealth has submitted a nomination in respect of the declared property to the World Heritage Committee, the Minister may specify the period that the Minister believes the Committee will need to decide whether or not to include the property in the World Heritage List.²⁹ If no nomination has been submitted, the Minister may only specify such a period as the Commonwealth needs to decide whether or not the property has world heritage values and to submit a nomination to the World Heritage Committee.³⁰ This period must not be longer than 12 months.³¹

A declaration relating to a nominated property must not specify the property after the Commonwealth has withdrawn the nomination.³² A declaration in relation to a property that has not been nominated must be amended or revoked if the Minister has decided it does not have world heritage values or that the values are not under threat.³³

Section 14 is a valid exercise of Commonwealth power under the principles of the *Tasmanian Forests Case*.³⁴ However, stronger protection could be provided by adding a provision enabling extension, in appropriate circumstances, of the 12-month time limit imposed by s 14(7).

D. Meaning of 'World Heritage Values' Under the Act

Under the EPBC Act, the world heritage values of a property are 'the natural heritage and cultural heritage contained in the property'.³⁵ The terms 'natural heritage' and 'cultural heritage' have the same meaning in the Act as in the *World Heritage Convention*.³⁶

The Australian Government's Department of the Environment, Water, Heritage and the Arts has published a Values Table for each declared World Heritage property in Australia. The Values Table sets out an indicative list of the property's world heritage values, grouped under the *World Heritage Convention's* natural and/or cultural criteria for which the property was inscribed on the World Heritage List.³⁷ The Values Tables' lists of world heritage values are non-exhaustive since the EPBC Act's protections extend to all 'world heritage values' as that term is defined in the Act, even if not included in the Values Tables.

²⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(1)(b).

²⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(2).

²⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(3).

²⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(5)(a).

²⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(6).

²⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(6)(a).

³⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(6)(b).

³¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(7).

³² *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 15(1).

³³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 15(3).

³⁴ *Richardson v Forestry Commission* (1988) 164 CLR 261. See above n 16 for articles discussing the case.

³⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12(3).

³⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12(4). In this respect, the Act retains the definitions of 'natural heritage' and 'cultural heritage' that applied under s 3(1) of the WHCP Act, which also gave these terms the same meanings as in the *World Heritage Convention*.

³⁷ See, eg, [Department of the Environment, Water, Heritage and the Arts](http://www.environment.gov.au/heritage/places/world/tasmanian-wilderness/values.html), 'Tasmanian Wilderness World Heritage values' (2008) Australian Government, <<http://www.environment.gov.au/heritage/places/world/tasmanian-wilderness/values.html>> at 18 December 2008.

E. Prohibited Actions Relating to Declared World Heritage Properties

The EPBC Act, in s 12(1), provides that a person must not take an action that:

- a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or
- b) is likely to have a significant impact on the world heritage values of a declared world heritage property.

Maximum civil penalties for breaches of s 12(1) are about \$550,000 for individuals and about \$5,500,000 for corporations.

F. Offences Relating to Declared World Heritage Properties

Furthermore, the EPBC Act makes it an offence for a person to take an action that results in, or will result in,³⁸ or is likely to have,³⁹ a significant impact on the world heritage values of a declared World Heritage property.

Criminal penalties for individuals breaching s 15A are imprisonment for up to seven years and/or a fine.

G. Defences

There are certain circumstances in which a person may lawfully take an action that has, will have, or is likely to have, a significant impact, despite ss 12(1) and 15A. These circumstances include:

- Where the person has obtained approval from the Commonwealth Environment Minister for the taking of the action.⁴⁰
- Where the Minister has decided that the action is not a 'controlled action' for the purposes of this section (and hence does not require approval).⁴¹
- Where a bilateral agreement,⁴² ministerial declaration, accredited management arrangement or authorisation process⁴³ provides that the action does not require approval.
- Where the person undertakes RFA forestry operations in accordance with a regional forest agreement.⁴⁴
- Where the action is taken in the Great Barrier Reef Marine Park and the person is authorised to take the action in the place where he or she takes it by an instrument made or issued under the *Great Barrier Reef Marine Park Act 1975* (or under an instrument [including regulations] made or issued under that Act).⁴⁵
- Pre-existing uses.⁴⁶
- Where the action is an action described in s 160(2) (foreign aid or aviation operations subject to a special approval process).⁴⁷

H. Where World Heritage Triggers EIA Under the Act

The environmental impact assessment ('EIA') and approval provisions of the EPBC Act applying to declared World Heritage properties are outlined below.

38 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s15A(1).

39 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s15A(2).

40 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(a), 15A(4)(a).

41 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(c), 15A(4)(c).

42 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 29-31.

43 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 32-37M.

44 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 38-42. 'RFA forestry operations' and 'regional forest agreement' have the same meaning as in the *Regional Forest Agreements Act 1999*: s 38(2).

45 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 43.

46 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 43A-43B.

47 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(d), 15A(4)(d).

An action is a ‘controlled action’ requiring approval if it would otherwise be prohibited by Part 3;⁴⁸ i.e. actions that have, will have, or are likely to have, a significant impact on a matter of national environmental significance.

A person or government agency proposing to take an action can refer the proposed action to the Minister to obtain a decision on whether the action requires approval. For example, if a person proposes to take an action that is likely to have a significant impact on the world heritage values of a declared World Heritage property, they must first refer the action to the Minister for a decision on whether an approval is required.⁴⁹

Where a person proposes to take an action that they believe may need approval, they must refer the proposal to the Minister.⁵⁰ If the person believes the action will not require approval, they can still refer the proposal to the Minister for a determination on whether or not approval is required.⁵¹

A referral of a proposed action by another party can be made by a State or Territory⁵² or government agency⁵³ that has administrative responsibilities relating to the action. A person may also receive a request from the Minister to make a referral.⁵⁴

If the Minister decides that the action is a ‘controlled action’, then it is subject to EPBC Act assessment and approval requirements. If the Minister decides that the action is not a ‘controlled action’, then the action may lawfully be taken without such assessment or approval.

I. Constitutionality of the Act’s World Heritage Provisions

The EPBC Act does not expressly state the constitutional heads of power under which it is enacted. There is no constitutional requirement that an Act do so:

A law enacted by a Parliament with power to enact it, cannot be unlawful. The question is not one of intention but of power, from whatever source devised. ... [A provision of a statute] can be justified, in my opinion, if it is competent under any of the powers vested in Parliament, whatever the title of the Act, and whatever indications there are in the Act as to the precise power under which it may be suggested that Parliament purported to act.⁵⁵

The EPBC Act contains plenty of indications that it is intended, inter alia, to constitute the primary⁵⁶ Australian statute for domestic implementation of the *World Heritage Convention* (and various other conventions). In addition to the reference in its objects to ‘Australia’s international environmental responsibilities’,⁵⁷ the EPBC Act contains multiple express references to relevant conventions.

The Commonwealth Parliament is empowered to enact legislation that conforms to and gives effect to a bona fide treaty to which Australia is a party, irrespective of whether failure to do so would have constituted a contravention of the treaty.⁵⁸ However, Commonwealth legislation enacted pursuant to the external affairs power must be reasonably appropriate and adapted to implementing the treaty.⁵⁹

The *World Heritage Convention*, eg, art 4, imposes a stringent environmental duty on Australia which, as a well-resourced, developed nation with considerable experience and

⁴⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 67.

⁴⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 67A.

⁵⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68(1).

⁵¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68(2).

⁵² *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 69.

⁵³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 71.

⁵⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 70.

⁵⁵ *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 135 (Starke J).

⁵⁶ Some World Heritage properties are also governed by other specific statutes: see, eg, the *Great Barrier Reef Marine Park Act 1975* (Cth) and the *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* (Cth).

⁵⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(e).

⁵⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 131, 170, 219, 258-9 (Mason, Murphy, Brennan, Deane JJ).

⁵⁹ *Tasmanian Dam Case* (1983) 158 CLR 1, 131 (Mason J).

expertise in World Heritage management,⁶⁰ could reasonably be expected to pursue the highest level of protection for its World Heritage properties. Given its circumstances, this high level of environmental obligation applies to Australia even in respect of those obligations which allow a certain level of discretion as ‘appropriate’ for each country.⁶¹

If the EPBC Act fails to discharge all of Australia’s obligations under the *World Heritage Convention*, this would not of itself invalidate the Act. Failure to comply with all of the obligations assumed under a treaty only prevents a law being supported by the external affairs power if the deficiency is sufficiently substantial to prevent the law being properly characterised as implementing the treaty.⁶²

Accordingly, given High Court precedents,⁶³ it is submitted that the *World Heritage Convention* and the external affairs power provide ample Commonwealth legislative power to support full implementation of the Convention. In addition to the external affairs power, World Heritage (and many other) provisions of the EPBC Act can also find support from other heads of power, eg, the corporations power.⁶⁴

The live question regarding the EPBC Act’s World Heritage provisions is whether they go far enough to fully implement the Convention and its stringent protective obligations.

J. Limits in the EPBC Act for World Heritage Protection

One limitation of the EPBC Act in respect of World Heritage is that its protections apply only to a significant impact on the ‘world heritage values’⁶⁵ of a ‘declared World Heritage property’.⁶⁶ Subsections 12(3)-(4) of the EPBC Act provide:

(3) A property has **world heritage values** only if it contains natural heritage or cultural heritage. The **world heritage values** of the property are the natural heritage and cultural heritage contained in the property.

(4) In this section:

cultural heritage has the meaning given by the World Heritage Convention.

natural heritage has the meaning given by the World Heritage Convention. [emphasis in original]

Thus, the EPBC Act does not protect all the area of a ‘declared World Heritage property’, nor even all of its values. The Act protects only the ‘natural heritage’ or ‘cultural heritage’ contained in the property. Given the definitions of these two terms in the *World Heritage Convention*⁶⁷ (including the requirement that they be of outstanding universal value from a specified point of view), the Act’s limitation to the ‘world heritage values’ of a declared World Heritage property (instead of protecting the property itself) can leave much of a property unprotected.⁶⁸

Australia’s ‘values approach’ to the *World Heritage Convention* and its *Operational Guidelines*⁶⁹ has been rejected by the expert advisory body the International Union for the Conservation of Nature (IUCN), and by the World Heritage Committee.⁷⁰ David Haigh argues that the embodiment of the ‘values approach’ in the EPBC Act renders its World

60 David Haigh, ‘Australian World Heritage, the Constitution and International Law’ (2005) 22 *Environmental and Planning Law Journal* 385, 385-386.

61 See, eg, the *World Heritage Convention*, opened for signature 16 November 1972, 1037 UNTS 151, art 5 (entered into force 17 December 1975).

62 *Industrial Relations Act Case* (1996) 187 CLR 416, 488.

63 For example, *Tasmanian Dam Case* (1983) 158 CLR; *Tasmanian Forests Case* (1988) 164 CLR 261; *Wet Tropics Case* (1989) 167 CLR 232; *Industrial Relations Act Case* (1996) 187 CLR 416.

64 *Commonwealth of Australia Constitution Act 1900* (Cth) s 51(xx).

65 As defined in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12(3).

66 As defined in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 13.

67 *World Heritage Convention*, opened for signature 16 November 1972, 1037 UNTS 151, arts 1-2.

68 See, eg, David Haigh, ‘World Heritage — Principle and Practice: A Case for Change’ (2000) 17 *Environmental and Planning Law Journal* 199; and Haigh, above n 60.

69 World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention* <<http://whc.unesco.org/en/guidelines/>> at 18 December 2008.

70 Haigh, above n 60, 390-392.

Heritage provisions unconstitutional insofar as they fail to implement the Convention and the *Operational Guidelines*.⁷¹

Similarly unprotected are ‘natural heritage’ or ‘cultural heritage’ that is not ‘contained in’ a declared World Heritage property. Unless the Minister chooses to make and act upon a temporary declaration under s 14 of the EPBC,⁷² this leaves areas of outstanding universal value outside the boundaries of a declared World Heritage area unprotected.⁷³

It is difficult to see how the Act’s limitations to World Heritage protections comply with Australia’s obligations under the *World Heritage Convention*, eg, arts 4 and 5, and the Convention’s requirements for sympathetic management of World Heritage buffer zones. Even without determining Haigh’s argument as to the constitutionality of the EPBC Act, his case for amendment of its World Heritage provisions to expressly protect the whole of, and the integrity and/or authenticity of, each declared World Heritage property⁷⁴ is persuasive.

K. Too Much Reliance on State and Territory Law?

It could be questioned whether the EPBC Act’s considerable scope for reliance on State or Territory laws through bilateral agreements and bilaterally accredited management plans is a valid exercise of Commonwealth legislative power. However, in the *Port Hinchinbrook Case*, the Full Court of the Federal Court held that the Minister had not erred in being satisfied of certain matters under the WHPC Act by reason of arrangements that had been put in place under Queensland legislation.⁷⁵

Justice Branson considers it ‘doubtful the provisions of the [EPBC] Act concerning bilateral agreements are accurately described as provisions allowing the Commonwealth to delegate its environmental assessment powers to the States and Territories.’⁷⁶ Rather, Her Honour suggests, the EPBC Act provisions allowing bilateral agreements and bilaterally accredited management plans

may well be regarded by the courts as a legislative framework not for delegation of the Commonwealth’s environment assessment powers but rather as a legislative framework within which the Commonwealth may fulfil its duty under Article 4 of the *World Heritage Convention* by a means other than itself conducting an environmental assessment.⁷⁷

If the courts follow Her Honour’s approach and construe bilateral agreements and bilaterally accredited management plans as a legislative framework within which the Commonwealth may fulfil its duty under art 4 of the *World Heritage Convention*, then relevant provisions of the EPBC Act (and indeed, bilateral agreements and management plans) should be judicially interpreted so as to fulfil Australia’s stringent obligations under art 4. Otherwise, Australia could be in breach of the Convention.

71 Ibid 393-395.

72 See above Part IVC for discussion of the Minister’s power to temporarily declare a World Heritage property under s 14.

73 Note, however, that in *Booth v Bosworth* [2001] FCA 1453 (the ‘*Flying Fox Case*’), the killing of spectacled flying foxes when they ventured outside the boundaries of the Wet Tropics World Heritage Area was held to constitute a significant impact on the world heritage values of that declared World Heritage property.

74 Haigh, above n 60, 395.

75 *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 77 FCR 153 (Northrop, Burchett and Hill JJ) (Full Court of the Federal Court), and see the High Court’s refusal of the applicant’s special leave application: *Friends of Hinchinbrook Society Inc v Minister for Environment* [1998] 6 Leg Rep SL8a (Gaudron and McHugh JJ, 13 March 1998).

76 Justice Catherine Branson, ‘The *Environmental Protection and Biodiversity Conservation Act 1999* – Some Key Constitutional and Administrative Issues’ (1999) 6 *Australasian Journal of Natural Resources Law and Policy* 33, 43.

77 Ibid.

V. EXEMPTION OF RFA FORESTRY OPERATIONS

A. RFA Forestry Operations Exempt from the EPBC Act

The EPBC Act exempts from its protection regimes forestry operations undertaken pursuant to the *Regional Forest Agreements Act 2002* (Cth) regime. The previously mentioned civil penalty provisions and offences are contained in pt 3 of the EPBC Act, along with similar provisions designed to protect other matters of national environmental significance. However, s 38 of the EPBC Act provides:

- (1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.
- (2) In this Division:

RFA or **regional forest agreement** has the same meaning as in the *Regional Forest Agreements Act 2002*.

RFA forestry operation has the same meaning as in the *Regional Forest Agreements Act 2002*.

Subsection 40(1) provides:

- (1) A person may undertake forestry operations in an RFA region in a State or Territory without approval under Part 9 for the purposes of a provision of Part 3 if there is not a regional forest agreement in force for any of the region.

Note 1: This section does not apply to some forestry operations. See section 42.

Note 2: The process of making a regional forest agreement is subject to assessment under the *Environment Protection (Impact of Proposals) Act 1974*, as continued by the *Environmental Reform (Consequential Provisions) Act 1999*.

In s 40(1):

forestry operations means any of the following done for commercial purposes:

- (a) the planting of trees;
- (b) the managing of trees before they are harvested;
- (c) the harvesting of forest products;

and includes any related land clearing, land preparation and regeneration (including burning) and transport operations. For the purposes of paragraph (c), **forest products** means live or dead trees, ferns or shrubs, or parts thereof.⁷⁸

Thus, all such ‘forestry operations’ are exempted from the pt 3 prohibitions and offences, without requiring EPBC Act approval — even where such operations significantly impact on matters of national environmental significance (eg, nationally listed threatened species).⁷⁹

They are also exempted from the EPBC Act’s environmental assessment and approval processes by s 75(2B). This prohibits the Minister, in deciding if an action is a controlled action, from considering ‘any adverse impacts of’ any RFA forestry operation exempted by s 38. Subsection 75(2B) was applied by then Environment Minister Malcolm Turnbull in his assessment of Gunns’ proposed pulp mill to avoid considering any adverse impacts of RFA forestry operations to supply woodchips to the mill. The lawfulness of this approach was upheld by majority in the full Federal Court.⁸⁰

⁷⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40(2).

⁷⁹ *Forestry Tasmania v Brown* [2007] FCAFC 186 (the ‘*Wielangta Case*’). See Shashi Sivayoganathan, ‘*Forestry Tasmania v Brown: Biodiversity Protection — An Empty Promise?*’ (2007) 3 *National Environmental Law Review* 21 and <<http://www.on-trial.info>> at 18 December 2008.

⁸⁰ *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175 (‘*Pulp Mill Case*’).

B. Potential Impacts of the RFA Exemptions on the TWWHA

The example of Recherche Bay, in Far South Tasmania, demonstrates how a National Heritage-listed cultural landscape, of arguably World Heritage significance, could have been logged after its National Heritage listing — due to the EPBC Act’s exemption for RFA forestry operations.⁸¹ It is submitted that Recherche Bay should now be added as an extension to the TWWHA.

The ss 38 and 75(2B) exemptions do not apply to forestry operations ‘in a property included in the World Heritage List’.⁸² Such operations would require ministerial approval under the EPBC Act and do not currently occur in declared World Heritage properties. However, RFA forestry operations just outside the boundary of such properties are exempt from the Act under s38 — even if they significantly impact on world heritage values of the declared World Heritage area, or areas of ‘natural heritage’ or ‘cultural heritage’ outside the boundary.⁸³

The Australian Government’s February 2008 state of conservation report for the TWWHA referred inter alia to the *Wielangta* litigation⁸⁴ and Gunns Limited’s Tamar Valley pulp mill proposal, noting that neither location was near the TWWHA.⁸⁵ However, the report did not detail the extent to which legislative amendments⁸⁶ relevant to these cases⁸⁷ have exempted RFA forestry operations from the EPBC Act.

In March 2008, a three-member World Heritage monitoring mission visited Tasmania to view forestry operations adjoining parts of the eastern and northern boundaries of the TWWHA. The mission consisted of a representative from the UNESCO World Heritage Centre, the International Council of Monuments and Sites (ICOMOS) and the IUCN. Groups making representations to the mission included a number of environmental NGOs and the Tasmanian Aboriginal Land and Sea Council. They argued that RFA forestry operations adjacent to these boundaries were compromising (eg, through edge effects, the risk of regeneration burns escaping, etc) natural heritage and cultural heritage, just outside the TWWHA boundaries, and also the integrity of the TWWHA itself. Industry organisations and the Tasmanian and Commonwealth governments denied this, arguing that the TWWHA and adjacent forestry operations were well-managed.

In July 2008, the twenty-one member World Heritage Committee (currently including Australia), held its 32nd session in Quebec City, Canada. The meeting’s business included consideration of the TWWHA monitoring mission’s report and subsequent advice from the IUCN. In its decision on the TWWHA, the World Heritage Committee takes note of the monitoring mission’s findings and, inter alia:

Reiterates its request to the State Party to consider, at its own discretion, extension of the property to include appropriate areas of tall eucalyptus forest, having regard to the advice of IUCN; and also further requests the State Party to consider, at its own discretion, extension of the property to include appropriate cultural sites reflecting the wider context of Aboriginal land-use practices, and the possibility of re-nominating the property as a cultural landscape.⁸⁸

81 See Tom Baxter, ‘What Price National Heritage? A Call for Change’ (Paper presented to the Australia New Zealand Society for Ecological Economics 2007 Conference, Noosaville, 3-6 July)

<<http://www.anzsee.org/anzsee2007papers/Abstracts/Baxter.Tom.pdf>> at 18 December 2008.

82 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 42(a).

83 See *Flying Fox Case* [2001] FCA 1453, which, inter alia, held that an action taken outside the boundaries of a declared World Heritage property could significantly impact the world heritage values of the property.

84 *Wielangta Case* [2007] FCAFC 186.

85 Australian Government, *State Party Report on the State of Conservation of the Tasmanian Wilderness World Heritage Area (Australia)* (2008) 20-21 <<http://www.environment.gov.au/heritage/publications/strategy/tas-state-party-report-feb08.htm>> at 18 December 2008. Review of the report, which was criticised by NGOs, is beyond the scope of this article.

86 The insertion of *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2B) and the amendment of the Tasmanian Regional Forest Agreement following the judgment of Marshall J in *Brown v Forestry Tasmania* [2006] FCA 1729. See <<http://www.on-trial.info>> at 18 December 2008 for details of the latter.

87 *Pulp Mill Case* [2007] FCAFC 175; and *Wielangta Case* [2007] FCAFC 186.

88 *Tasmanian Wilderness (Australia) (C/N 181 bis)*, World Heritage Comm, Decision 32 COM 7B.41, 32nd sess, 78, WHC-08/32.COM/24, (2008) at <<http://whc.unesco.org/archive/2008/whc08-32com-24e.doc>> at 18 December 2008.

The decision was seized on by environmental NGOs which demanded

a moratorium on logging ... while a proper process is enacted to ensure areas such as the Weld, Styx and Upper Florentine Valleys and the Great Western Tiers are protected and incorporated as part of the WHA.⁸⁹

Environment Minister, Peter Garrett also welcomed the World Heritage Committee's consideration of the mission's report on the TWWHA but stated, inter alia, 'The Australian Government has no plans to extend the current boundary into production forests.'⁹⁰

VI. CONCLUSION

The *World Heritage Convention* imposes stringent obligations on State parties, particularly a developed nation such as Australia which possesses considerable expertise in natural and cultural heritage management. In the past, Commonwealth implementation of obligations under the *World Heritage Convention* was a source of high-profile constitutional controversy, with a succession of High Court cases confirming the breadth of the Commonwealth's external affairs power.

The EPBC Act is now the primary legislation for domestic implementation of Australia's obligations under the *World Heritage Convention* (and various other treaties). Given the stringency of *World Heritage Convention* duties and the extent of Commonwealth constitutional power in this area, the EPBC Act should be amended so as to further and better implement convention obligations. For example, the EPBC Act's focus on 'world heritage values' needs to be addressed as Haigh suggests.⁹¹

Of major concern in the Tasmanian context are ss 38-42 and s 75(2B) of the EPBC Act, which exempt RFA forestry operations from the Act's environmental assessment and approval requirements. These exemptions enable RFA forestry operations to significantly impact matters of national environmental significance, be they: world heritage (as arguably occurs adjacent to parts of the TWWHA's eastern and northern boundaries); national heritage (eg, Recherche Bay); or nationally listed threatened species (as in the *Wielangta Case*⁹²). Such forestry operations can legally occur without even requiring the Commonwealth ministerial approval which the EPBC Act would demand of any other industry having such significant impacts.

A further problem is that the Australian Labor Party's National Platform, passed at its 2007 National Conference, promises, inter alia, that:

Labor will introduce a climate change trigger in the Environment Protection and Biodiversity Conservation Act so that major new projects are assessed for their climate change impact as part of any environmental assessment process.⁹³

Since being elected in November 2007, the Rudd Labor Government has said little about such a climate change trigger — despite Labor having introduced a Bill for such a trigger when in Opposition.⁹⁴ Presumably the Government has been pre-occupied with the development of its 'Carbon Pollution Reduction Scheme'.

89 The Wilderness Society (Tasmania) Inc, 'World Heritage Committee calls for increased protection of Tasmania's World Class Forests', Media Release, 7 July 2008, <<http://www.wilderness.org.au/articles/world-heritage-committee-calls-for-increased>> at 18 December 2008.

90 The Hon Peter Garrett MP, *Minister for the Environment, Heritage and the Arts*, 'International Experts Conclude Tasmanian Wilderness is Well-Managed' Media Release, 7 July 2008, <<http://www.environment.gov.au/minister/garrett/2008/pubs/mr20080707a.pdf>> at 18 December 2008. See also, Matthew Denholm, 'Peter Garrett rejects heritage call to protect eucalypt forests', *The Australian*, 8 July 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23985607-5006788,00.html>> at 18 December 2008.

91 Haigh, above n 60, 395.

92 *Wielangta Case* [2007] FCAFC 186.

93 Australian Labor Party, *National Platform and Constitution 2007* (2007) 137 <http://www.alp.org.au/download/2007_national_platform.pdf> at 18 December 2008.

94 Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005 (Cth). See also Commonwealth parliamentary debates regarding the *Environment and Heritage Legislation Amendment Act 2006* (Cth).

When the Government does progress the important issue of a climate change trigger, it should ensure that the EPBC Act's exemptions for RFA forestry operations do not apply to the climate change trigger in the same way that RFA forestry is exempted from the Act's other triggers (ie 'matters of national environmental significance').

Through ss 38-42 and 75(2B), the EPBC Act has largely abandoned the field in the regulation of RFA forestry operations, precluding the proper protection which the EPBC Act purports to provide for matters of national environmental significance. This situation is untenable and should be addressed by forthcoming Senate⁹⁵ and statutory⁹⁶ inquiries into the operation of the Act.

95 Senate Standing Committee on Environment, Communications and the Arts, 'Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999*' (2008) <http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/> at 18 December 2008.
96 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) 522A.

