30 May 2014

Dr Braulio F. de Souza Dias
Executive Secretary,
Convention on Biological Diversity
413, Saint Jacques Street, suite 800
Montreal QC H2Y 1N9
Canada

Dear Dr Dias

Petition to the Secretariat of the Convention on Biological Diversity

I write on behalf of the Australian organisations listed below to send a Petition and supporting documents concerning Australia's failure to act consistently with provisions of the Convention on Biological Diversity (the Convention). The petitioning organisations are particularly concerned about the Australian government's plan to devolve almost all its powers and accountabilities for protecting biodiversity to the States and Territories in the coming months. States and Territories have no obligations under international law.

Our organisations consider that the Australian government's actions have the potential to cause irreversible damage to Australia's iconic wildlife and environments and may thereby bring the Convention into disrepute.

We ask that the Secretariat take action, outlined in the Petition, to encourage Australia to meet its commitments under the Convention. We would be pleased to provide additional information as needed.

Yours sincerely

F. Millner

Felicity Millner
Director of Litigation

on behalf of:

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Environment East Gippsland
Environmental Justice Australia
Australian Conservation Foundation
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30 May 2014

Convention on Biological Diversity (CBD)
Petition to the Secretariat

1. Australia signed the CBD on 5 June 1992 and ratified it on 18 June 1993.

2. The over-arching objective of the Convention is the conservation of biological diversity and the sustainable use of its components. In other words, the key objective of the Convention is to protect ecosystems and the biodiversity of ecosystems from decline over the long-term.

Legal regimes in Australia

3. Regulation and management of Australia's environment occurs within a federal political structure where matters for which Australia has obligations under international law, known as 'matters of national environmental significance', are the responsibility of the Australian government. These matters of national environmental significance are regulated through the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The EPBC Act applies to all actions that have a significant impact on biodiversity, so that, theoretically, the Australian government can ensure that it acts consistently with its obligations under the CBD. Australia's eight States and Territories have responsibility for all remaining aspects of environmental law and regulation.

4. Native forest logging is effectively exempted from the EPBC Act and is instead governed by separate, purpose-built provisions that accredit State forest management and decision-making processes for the purposes of the EPBC Act. These Regional Forest Agreements (RFAs) remove the power of the Australian government to protect biodiversity in native forests subject to logging. The accreditation is based on environmental impact assessments done when RFAs were first agreed between 1997 and 2001. There is no requirement to update the RFAs on the basis of new information, even if there is evidence of serious decline in the health of a species. The RFAs have been in place for 15 years.

5. There is strong evidence that the level of protection for forest biodiversity delivered under the purpose-built RFA forestry regime is of a lower standard than if the EPBC Act applied directly. This evidence comes from detailed examination of court cases, annual reports, audits and reviews presented in the *One Stop Chop* report (attached). The report attributes the failure of the RFA regimes to protect biodiversity to States' refusal to properly implement and ensure compliance with biodiversity protection measures.

6. The *One Stop Chop* report shows that the failure to meet standards is intrinsic to the devolution of control over matters of national environmental significance, including biodiversity, from the Australian government to the States. It cannot be addressed by differently wording the RFAs or strengthening the States' obligations.

7. There is evidence that, as a result of the RFAs, native forest logging is having an unacceptable impact on biodiversity in Australia's native forests, and that biodiversity within native forests is in decline. Some examples are given in the attached statements by scientists.

8. The EPBC Act itself has also failed to halt serious biodiversity decline since its inception in 2000. This failure is detailed in successive National Reports under the CBD. Australia's recently submitted *5th National Report* says: "in general, population size, geographic range and genetic

diversity are decreasing in a wide range of species across all groups of plants, animals and other forms of life". (p.2)

9. The Australian government is implementing a new *One Stop Shop* system under the EPBC Act to 'streamline' environmental assessment and approvals. It is intended to apply to the widest possible range of ecosystem types and activities. It would operate in a similar way to the RFA regime which governs native forest logging by accrediting State and Territory processes for environmental decision-making and removing the requirement for Australian government approval. Additional proposed amendments, currently before the parliament, would allow the States and Territories in turn to delegate their decision-making power to any authorised person or organisation.

10. The Australian government plans to implement the *One Stop Shop* system by the end of 2014. If this happens, it will further weaken Australia's biodiversity protection and cause irreversible damage to Australia's iconic wildlife and environments. A letter signed by 29 legal professionals strongly supports this conclusion (attached).

Our submission

11. We submit that Australia, through the RFA regime and the proposal to devolve almost all powers and accountabilities under the EPBC to the States and Territories, is acting contrary to the CBD. Specifically, Australia is acting inconsistently with the following provisions of the CBD:

    (a) Article 8(k) of the CBD, by not maintaining necessary legislation and other regulatory provisions for the protection of threatened species in forests specifically, and potentially in the country as a whole.
    (b) As a direct consequence of acting inconsistently with Article 8(k), ecosystems are being destroyed and species placed at risk of extinction. This is contrary to Article 8(d) and to the over-arching objective of the Convention (Article 1) and makes it highly unlikely that Australia can meet the Aichi targets to which it has committed.
    (c) Article 10 (b), because the RFAs and the proposal to devolve powers to the states do not genuinely constitute measures relating to the use of biological resources that avoid or minimize adverse impacts on biological diversity;
    (d) Article 14 (a), because the environmental impact assessment under the RFAs is not appropriate, in that the significant impacts of native forest logging are not properly assessed on an ongoing basis and consideration of new information and public participation only meaningfully occurs once every 20 years.
    (e) In addition, the RFA regime and the proposal to devolve powers to the states are inconsistent with the overall objectives of the CBD, discussed in paragraph 2, above.

12. In addition, and perhaps most crucially, the Australian government is effectively giving away its powers to ensure that its obligations under the CBD are complied with. States and Territories have no obligations under international law. The proposal to devolve the powers and responsibilities under the EPBC Act makes it legally and politically difficult for the Australian Government to reclaim its powers from the states, in the event that the states are not implementing Australia's CBD obligations. This offends reaffirmations about responsibility made by Australia when the CBD was signed.

13. Australia hosts between 7 and 10% of all species on Earth. If, as a developed country party to the CBD, it can ignore its obligations under the Convention, the Convention itself is brought into disrepute.

14. Australia submitted its *5th National Report* on 9 May 2014, four days before a new budget was announced that made substantial cuts to biodiversity funding. Contrary to the Guidelines, there was no broad-based consultation with stakeholders and the community in preparing the Report (brief *Comments on the Report* are attached).

Mechanisms for reviewing implementation of the Convention

15. The Secretariat supports the implementation of the Convention, including by compiling national reports on compliance by domestic authorities. Such reports and information are transmitted to the Conference of Parties.

16. In 2004, recognising the need for a mechanism to review implementation of the Convention, the Conference of Parties established the Ad Hoc Open-ended Working Group on Review of Implementation of the Convention (WGRI). The WGRI will hold its 5th meeting in June 2014 in Montreal.

17. The need for stronger auditing of compliance with multilateral environmental agreements has been recognised. In September 2013, UNEP and the International Organisation of Supreme Audit Institutions (INTOSAI) Working Group on Environmental Auditing (WGEA) signed an MOU to track progress in implementing multilateral environmental agreements covering issues including biodiversity.

18. Australia's Supreme Audit Institution, the Australian National Audit Office, has never explicitly audited Australia's compliance with the Biodiversity Convention.

Urgency

19. Regional Forest Agreements are reaching the end of their 20-year life with the first due for renewal in 2017.

20. The *One Stop Shop* system is planned to take effect in some States from as early as June 2014 .

21. By the end of 2014, the States and Territories will be responsible, under Australia's national environment law, for almost all assessments and approvals of projects and activities likely to have a significant impact on biodiversity including nationally listed threatened species, migratory species, Ramsar-listed wetlands and World Heritage.

22. Through these measures Australia has failed to meet its obligations under the Biodiversity Convention and is deliberately weakening the already inadequate protection provided by its national biodiversity law.

Request

We ask the Secretariat of the Biodiversity Convention to:

a) provide a copy of this petition to the Science, Assessment and Monitoring division of the Secretariat, for the division to consider when assessing Australia's National Report;

b) prepare a report on Australia's compliance with its obligations under the Convention, specifically with respect to Article 8 (k) and (d);

c) provide this report to the 5th meeting of the Working Group on Review of Implementation in June 2014 and to the 12th Conference of Parties in October 2014;

d) request the Australian government to carry out a detailed audit of its compliance with the Convention through the Australian National Audit Office before taking any action to renew Regional Forest Agreements or to give states the power to approve actions under the EPBC Act.

Attachments

1. *One Stop Chop: How Regional Forest Agreements Streamline Environmental Destruction,* report prepared by the Environment Defenders Offices in 2013
2. Reports prepared by scientists on impacts of native forestry on biodiversity
3. Letter to former Prime Minister Kevin Rudd, dated 3 September 2013 and signed by 29 lawyers
4. Comments on the *5th National Report*

Signatures

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ONE STOP CHOP

HOW REGIONAL FOREST AGREEMENTS STREAMLINE ENVIRONMENTAL DESTRUCTION



This report was prepared by Environment Defenders Offices in Tasmania, Victoria and NSW, and edited by Lawyers for Forests, with special thanks to Environment East Gippsland, MyEnvironment and the South East Region Conservation Alliance. It was made possible by support from the Fouress Foundation.

We dedicate this report to the many thousands of people who have fought for the forests over decades in the bush, the courts, the parliaments and the community.

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Environment Defenders Offices are community legal centres specialising in public interest environmental and planning law.
www.edo.org.au

Lawyers for Forests is an association of legal professionals working towards the protection and conservation of Australia's remaining native forests.
www.lawyersforforests.asn.au

Environment East Gippsland Inc has been working to protect East Gippsland's environment and wildlife since the early 1980s. With a strong membership and supporter base of around 1000, EEG is now in the courts challenging the illegalities of forest logging and management. We network closely with both regional, state and national environment groups.
www.eastgippsland.net.au

MyEnvironment Inc. is a hub for the latest information on community projects, science, environmental philanthropy, environmental law and green design in Australia. We bring people and ideas together for the conservation of Australia's natural places through science, law, design and the community. We are a volunteer based organisation made up of innovative metropolitan and regional members.
www.myenvironment.net.au

The South East Region Conservation Alliance (SERCA) Inc is an alliance of conservation groups from the south coast of New South Wales engaged in research, lobbying and action on native forests and forestry policies, with particular emphasis on the importance of native forests for climate, water and biodiversity. SERCA Inc is a founding member of the Australian Forests & Climate Alliance.
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The full report with annexures is available at: www.edovic.org.au/blog/RFA-report

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Tall wet forest, Errinundra Plateau, East Gippsland, photo by Jude Deland
Logging coupe, Powelltown, photo by Sarah Rees

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INTRODUCTION

Throughout Australia, the area of public native forest in which wood production is currently permitted has been estimated at 9.4 million hectares.[1]

Native forest logging has a direct and long-lasting impact on forests and their dependent wildlife. It is the only activity and only ecosystem type given an entirely separate purpose-built legal and management regime.

Native forestry operations are treated differently from other actions that may impact on matters of national environmental significance otherwise protected by Australia's principal piece of environment legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). Unlike other actions, forestry activities covered by a Regional Forest Agreement (**RFA**) are not required to obtain approval under the EPBC Act.

RFAs are 20-year agreements between State and Commonwealth governments outlining responsibilities in relation to native forest management, which aim to balance the competing goals of protection of native forests, and ecologically sustainable wood production in native forests and plantations.[2] Between 1997 and 2001 RFAs were introduced in four States - New South Wales, Tasmania, Victoria and Western Australia following a review in the affected regions of ecological, economic, social and cultural values associated with native forest areas.

Recently, amendments to the EPBC Act that seek to increase the use of strategic impact assessments and to accredit State environmental approval processes have been proposed. Such proposals represent a fundamental shift in the operation of the EPBC Act, and have the potential to compromise the ability of the Act to minimise adverse impacts on matters of national environmental significance.

The RFA regime effectively accredits State forest management processes. In this way, the operation of the RFA process over the past 15 years provides a practical example of the potential consequences of accrediting regimes under the EPBC Act. This report examines the operation of the RFA regime to identify risks and benefits and review whether delegation of responsibilities to the State governments has compromised nationally significant environmental assets.

The report draws on data from relevant court cases and information from readily available sources such as annual reports, five-yearly RFA reviews, and State Government audits and reports, and comprises the following parts:

- an examination of the history of RFAs, the legal context in which they operate and recommendations from recent reviews of the RFA regime under the EPBC Act;
- an overview of the forest management regimes in each of the RFA States (Annexure 1);
- an assessment of environment outcomes under these forest management regimes, particularly in relation to matters of national environmental significance;
- a review of compliance standards in each of the RFA States;
- a review of enforcement activities in each of the RFA States; and
- commentary regarding the extent to which the RFA regime has reduced conflict in respect of forestry activities.

A summary of relevant cases addressing forestry issues for each of the RFA States is set out in Annexure 2.

The fundamental question that this report seeks to address is whether the RFA regime delivers equivalent environment protection standards to those likely to be achieved if the EPBC Act applied directly to forestry operations in RFA areas. In assessing this issue, we focus primarily on biodiversity, particularly those threatened species which are matters of national environmental significance.

KARRI FOREST AT DAWN, WESTERN AUSTRALIA.
PHOTO: SIMON NEVILLE.

SUMMARY OF FINDINGS

As Justice Marshall pointed out in the *Wielangta* case, the RFA regime provides an alternative to the normal assessment process under the EPBC Act and should achieve the same standards.[3] Similarly, in all RFA States, activities covered by the forest management regime are excluded from other environmental and planning approval requirements and, in NSW and Tasmania, from the operation of the threatened species legislation. This supposes that the standard of environmental impact assessment and regulation offered under the forest management regime should be equivalent to the protections provided under other legislation.

This report finds that protection of forests' biodiversity and threatened species would be of a higher standard if regulated by the EPBC Act than under the RFA regime.

This is for several reasons, as detailed in the dot points below.

- **Inadequacy of state threatened species protections accredited by RFAs**

In Victoria, Action Statements for threatened species are the principal mechanism for protection under the forest management regime. However, Action Statements have not been prepared for over half of the listed threatened species and those Action Statements that have been prepared vary in quality. Similarly in Tasmania, listing statements and recovery plans have not been developed, or updated, for many species. The adequacy of standard prescriptions developed under the Forest Practices Code to manage impacts on threatened species has been seriously questioned in a number of cases and reviews. It is also clear that the regulatory requirements in NSW are lower than those imposed by the EPBC Act.

In WA there is no comprehensive set of threatened species laws.

In NSW and Tasmania, the RFAs mean that forestry operations are exempt from State-based threatened species laws. The Victorian Government recently put a proposal to grant exemptions from the operation of the *Flora and Fauna Guarantee Act 1988* to forestry operators on a case-by-case basis, then shelved it without further consultation. However, conservation groups remain concerned that similar exemptions could be included in the government's foreshadowed forestry biodiversity project.[4]

- **Insufficient provision for adaptive management and dealing with site specific or new information**

RFAs accredit very general threatened species and biodiversity protection measures for twenty years. Adaptive management and the ability to take into account new information or impacts not foreseen in the strategic agreements are essential to ensure that RFAs do not 'lock in' bad environmental outcomes.

The approach of the State governments to compliance with the RFAs and systems accredited under the RFAs has been mechanistic: known detrimental and significant impacts of forestry on biodiversity are often are not taken into account or managed, so long as there is compliance with the systems accredited under the RFAs.

- **Inadequate reviews**

RFAs, and the forest management regimes accredited by the agreements, are not reviewed on time or with sufficient regularity, and when reviewed, the review is inadequate.

Reviews have failed to ensure that the RFAs are being complied with and are responsive to new scientific data, changes in circumstances and any critique of their efficacy. The Australian Environment Act Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*: Final Report (**the Hawke Review**)[5] indicated that, in the absence of regular reviews and oversight, it is not possible to ensure that RFAs are meeting the necessary standards to justify the exclusion of RFA forestry operations from the normal operation of the EPBC Act.

- **Deficient monitoring, compliance and enforcement**

On-ground compliance is a major deficiency. All States displayed a high level of non-compliance with forestry regulations, and a low level of monitoring and enforcement activity by the regulatory authorities.

Without more rigorous oversight by government agencies, RFAs will not achieve protection or sustainable management of environmental values, simply because measures accredited under the RFAs to protect the environment and biodiversity are not being implemented and complied with.

- **Limited third party participation rights**

In each of the RFA States, public participation in assessment of forestry activities was limited, and significant procedural barriers exist for third party enforcement. "Third party" refers to a non-government participant. Those individuals and conservation groups that have undertaken enforcement activities are frequently subject to costs orders – where the unsuccessful party in a court case pays the costs that the successful party has incurred – further restricting their capacity to take action where government has failed to. As a result, conflict in relation to forest management remains high in all the RFA States.

OVERALL FINDING

RFAs have never delivered the benefits claimed for them, for a mix of political, economic, cultural and legal reasons.

From a legal perspective, the main reason the RFAs have failed is that the States do not take the regulatory and legal actions required to adequately protect matters of national significance. This failing cannot be addressed by differently wording the RFA and strengthening States' obligations: rather, the failure is fundamental to the concept of the RFAs and of devolving control of matters of national environmental significance from the Commonwealth to the States.



BOWER BIRD BOWER, EAST GIPPSLAND, VICTORIA
PHOTO: PETER HALAZ

PART 1 BACKGROUND AND LEGAL CONTEXT



TRAIN LOADED TO TAKE LOGS TO GEELONG FOR EXPORT, BAIRNSDALE RAIL HEAD, VICTORIA. PHOTO: EMANUELA CREMONA.

1.1 EPBC ACT

Constitutionally, native forests are under the jurisdiction of State governments. However, the Commonwealth Government has various powers to intervene.[6] Most of these powers derive from international environmental agreements to which Australia is a party, which aim to protect Australia's most important environmental assets.

The EPBC Act is the main piece of Federal environmental law and enacts most of Australia's international environmental obligations. The EPBC Act applies to 'matters of national environmental significance'. Examples of matters of national environmental significance include threatened species and World Heritage sites. If something is a matter of national environmental significance, it is against the law to take any action that will have a significant impact on that place or matter unless the Federal Environment Minister has approved it first.

The Commonwealth environmental laws apply differently to native forestry than to other environmental matters. In 1997, the Commonwealth agreed with the States to enter into RFAs in relation to native forestry. The EPBC Act provides that if an RFA is in place, separate approval of an action under the EPBC Act that will have an impact on a matter of national environmental significance is not required.[7]

1.2 REGIONAL FOREST AGREEMENTS

1.2.1 History of RFAs

In 1992, the Commonwealth, State and Territory Governments agreed on the objectives and policies in the *National Forest Policy Statement* that would govern the regulation of native forest conservation and wood production in both native forests and plantations.[8] The *National Forest Policy Statement* established a framework under which native forest resources were to be protected while also permitting ecologically sustainable wood production. The policy makes clear that it is the Commonwealth's role to coordinate national goals for forest management,[9] which will be pursued at a regional level by the States. Social, environmental and economic considerations were addressed in this document in an attempt to strike a balance between conserving and increasing Australia's forest areas on the one hand, and maintaining their use for forest-based industries on the other.[10]

The *National Forest Policy Statement* was implemented through the RFAs between the Commonwealth and relevant State governments.

RFAs are agreements for a term of 20 years that provide for future management of forest areas throughout Australia.

Table 1.1 **CURRENT REGIONAL FOREST AGREEMENTS**

Victoria	East Gippsland	February 1997
Victoria	Gippsland	March 2000
Victoria	Central Highlands	March 1998
Victoria	North East	August 1999
Victoria	West	March 2000
NSW	Eden	August 1999
NSW	North East	March 2000
NSW	Southern	April 2001
Tasmania	Tasmania	November 1997
Western Australia	South West	May 1999

Currently there are ten RFAs in four States - Western Australia, Victoria, Tasmania and New South Wales[11] - which were signed between February 1997 and April 2001.[12]

RFAs were developed in four stages, beginning with an initial assessment of government obligations and regional objectives, including the nature and scope of forest use. The second stage involved the identification and assessment of environmental and heritage values, economic opportunities and social impacts of resource use options, known as Comprehensive Regional Assessment. Thirdly, forest use options were generated based on the environmental, heritage, economic and social assessments. Finally the RFA was negotiated.[13]

1.2.2 Purpose

The broad purpose of the RFAs is to protect certain forest areas, through the forest reserve system, while maintaining and developing native forest logging industries that are sustainable ecologically and economically.[14] The RFAs are intended to provide certainty for the forestry industry by allowing for forestry activities to take place in non-reserved State forests, through a variety of mechanisms that are intended to guarantee that a minimum volume of wood products is available to be harvested per annum in the RFA areas.[15] Forests are supposed to be managed in accordance with the principles of Ecologically Sustainable Forest Management. There is an inherent tension between achieving Ecologically Sustainable Forest Management and the States' requirement to deliver stipulated volumes of wood products under the RFAs.

The RFAs were also designed to streamline and coordinate government decision making in relation to forests, with a central objective being to reduce uncertainty, duplication and fragmentation.[16]

To this end, the Commonwealth accredits the State and Territory environmental assessment processes and approval systems for forestry activities that take place in forests that are subject to an RFA. Thus, the EPBC Act does not apply to forestry operations undertaken in accordance with an RFA.[17]

1.2.3 Legal status

RFAs are given legislative status through the *Regional Forest Agreements Act 2002* (Cth). With the exception of the East Gippsland Regional Forest Agreement, RFAs consist of three parts:

1. Part 1 sets out the overall context and framework for the agreement (including information sharing and dispute resolution provisions), and affirms the parties' commitment to the National Forest Policy Statement. Part 1 is legally binding, but imposes few obligations;
2. Part 2 sets out a range of provisions regarding assessment, creation of reserves and maintenance of a permanent native forest estate, review procedures and implementation of Ecologically Sustainable Forest Management systems. Part 2 is explicitly expressed not to be legally binding;
3. Part 3 includes commitments in relation to forest management practices, financial assistance provided to the State, compensation where actions by the Commonwealth Government are inconsistent with the RFA, and termination provisions. Part 3 creates legally binding obligations on the parties.

To ensure accountability, section 10(6) of the *Regional Forest Agreements Act 2002* requires that reports be prepared annually in the first five years, and that a review of the performance of each RFA is conducted every five years.[18] While some States have met this obligation, most have failed to complete the required reviews in their entirety.

Under the RFAs, the Commonwealth undertakes to refrain from exercising its legislative powers under the EPBC Act in a manner that is inconsistent with the RFA for the duration of the agreement.[19]

It has been noted that, although the interaction between the EPBC Act and forestry operations is often referred to as an exemption, this is not entirely accurate. The Hawke review (see section 1.4.1 below) states that rather than being an exemption from the Act, the establishment of RFAs actually constitutes a form of assessment and approval for the purposes of the Act.[20]

The Hawke Review went on to say:

> *Correspondingly, like other activities assessed and approved under the Act, RFAs should be regularly monitored and audited to ensure they continue to meet the agreed conditions of that approval. The weakness in this area needs to be rectified.*[21]

As discussed below in this report, lack of monitoring and enforcement continues to be a fundamental weakness of the RFA regime.

1.3 ECOLOGICALLY SUSTAINABLE FORESTRY MANAGEMENT AND COMMONWEALTH ACCREDITATION

Ecologically Sustainable Forest Management is at the heart of the *National Forest Policy Statement* but included only in the non-binding section of the RFAs.

Each RFA provides that the Commonwealth accredits the States' current forest management system for each of the RFA areas.

Under each of the RFAs the Commonwealth and the States agree that Ecologically Sustainable Forest Management is an objective which requires a long-term commitment to continuous improvement and that the key elements for achieving it are:

- the establishment of a 'CAR' (comprehensive, adequate and representative) Reserve System;
- the development of internationally competitive forest products industries; and
- a fully integrated and strategic forest management system capable of responding to new information.

Each RFA also provides that the States' forest management systems (including its legislation, policies, codes, plans and management practices) provide for continuing improvement in relation to Ecologically Sustainable Forest Management.

1.4 EPBC ACT REFORM AND RFAS

1.4.1 Hawke Review

In October 2008, the Federal Government began the process for the 10 year review of the EPBC Act.[22] The government commissioned Dr Alan Hawke and a team of experts to prepare an independent review of the operation of the EPBC Act and to make recommendations for reform (**the Hawke review**).[23]

The Hawke review specifically addressed the issue of RFAs. The review found that the RFAs had gone some way to reducing conflict around forestry and had achieved some good environmental outcomes through the reserve system. However, the review found that the RFAs had not been properly implemented, particularly by the States. It also found that the transparency and accountability of forestry done pursuant to the RFAs was lacking and, as a result, public faith in the system was eroded and conflict around forestry remained an issue.

To overcome these issues, the Hawke review recommended that RFAs remain in place, subject to rigorous compliance, auditing and reporting mechanisms, and sanctions for serious non-compliance. The review noted that required reviews of the RFAs had not been occurring and recommended both that these reviews be undertaken, and also expanded to involve a comprehensive performance review of the RFAs. The review made clear that the continued exclusion of RFA forestry from the operation of the EPBC Act should be contingent upon improved performance and recommended that the Environment Minister be given the power to apply 'the full protections' under the EPBC Act in areas covered by RFAs in the event that reviews are not conducted on time, or where performance reviews identified serious non-performance of RFA requirements.

The review also recommended, in relation to the operation of the EPBC Act, that there be increased use of strategic impact assessments and that the Federal Government accredit State processes proven to provide good environmental outcomes.

In its response to the Hawke review, the Commonwealth Government decided not to adopt the recommendations in relation to RFAs, but did acknowledge the accountability issues that had been identified. The government stated it would deal with these issues as part of the renewals process for the East Gippsland and Tasmanian RFAs, due in 2017. Since the completion of the Hawke review, a number of RFA reviews remain outstanding.

The Federal Government agreed with the recommendations in relation to making greater use of strategic assessment and accreditation of State processes. At the Council of Australian Governments' meeting in April 2012, the Federal and State governments, following consultation with the Business Advisory Forum, agreed to work towards the accreditation of State approval processes for actions that will impact on matters of national environmental significance. Under such a proposal, the Federal Minister would no longer be in a position to determine whether actions that will significantly impact upon matters of national environmental significance should go ahead, and on what terms.

The RFA process provides an example of both strategic impact assessment and accreditation of State approval processes, which is important to consider in light of the proposed changes to the operation of the EPBC Act discussed above.

1.4.2 Strategic Impact Assessment

Strategic impact assessments allow the Federal Environmental Minister to approve the taking of actions, or a class of actions, if these actions are done in accordance with an approved policy, plan or program. If the actions



LEADBEATER'S POSSUM, VICTORIA. PHOTO: DAN HARLEY.

are done in accordance with the approved policy, plan or program, approval of individual actions under Part 9 of the EPBC Act is not required.

One of the main advantages of strategic impact assessments, as opposed to assessment of individual actions, is that they allow cumulative impacts to be properly considered and managed.

On the other hand, strategic assessments done at a regional scale often overlook, and do not provide adequate management mechanisms for, individual, project-specific environmental impacts. Strategic assessments are also less responsive to changing circumstances or information. RFAs are demonstrative of this. As will be discussed below, there are several examples of species decline occurring under the RFA regime, because the prescriptions (ie forest and species management and protection requirements) formulated for the purposes of the RFAs over a decade ago do not require unforeseen or specific impacts to be considered and managed, so long as the broad requirements are complied with.

1.4.3 Likely outcome of accreditation of State approvals

The RFAs provide a cautionary tale for allowing States to assess and approve actions that will impact on matters of national environmental significance, as will occur should States be given approval powers under the EPBC Act.

Since signing the RFAs, the Commonwealth Government is largely powerless to take compliance and enforcement action in relation to breaches of the RFAs. Their powers to respond to breaches or lack of action by the States are limited to 'behind the scenes' negotiations and processes. While the Commonwealth may cancel the RFA, unless the State Government consents to the termination, the cancellation cannot take effect until protracted dispute resolution procedures have been undertaken. This is the case even if the actions (or failures to act) by the States cause significant decline in matters of national environmental significance.

The success or otherwise of the RFA process is an important example of what can happen if States are given increased control over approvals and regulation of matters of national environmental significance, without the ability for the Commonwealth Government to intervene in a timely and effective manner.

PART 2 ACCREDITED STATE REGIMES

As discussed above, the EPBC Act does not apply to forestry operations undertaken in accordance with an RFA. The Department of Agriculture, Fisheries and Forestry explained this, in response to questions on notice from the Senate Environment, Communications and Arts Committee, during the 2009 inquiry into the operation of the EPBC Act:

> *With the exception of the Tasmanian RFA, there are no obligations within the RFAs imposing a legally enforceable obligation upon the State to ensure the protection of species or ecological communities listed in the EPBC Act. However, in all the RFAs, the parties agree that specified State and Commonwealth legislation and other measures, such as the establishment of CAR reserves, will provide for the protection of rare or threatened flora and fauna species and ecological communities.*[24]

The Tasmanian RFA includes a provision regarding threatened species[25] within the legally enforceable part of the RFA, but this is limited to an agreement that the management prescriptions will provide for maintenance of relevant species. This enforceable obligation was weakened following the decision in the Wielangta case.[26] Prior to an amendment in February 2007,[27] clause 96 of the Tasmanian RFA required management prescriptions to be adequate to maintain priority threatened species. The amendment to require only that the RFA provide for, rather than achieve, maintenance of threatened species is symptomatic of compliance difficulties associated with the RFA regime.

Even where the Commonwealth Government was satisfied that management prescriptions under the Tasmanian forest practices regime were not providing sufficient protection, the only recourse for the Commonwealth Government is a power to institute dispute resolution proceedings.

It is also important to note that in NSW, Victoria and Tasmania, forestry operations on public land are exempt from planning law.

Since the EPBC Act and the Commonwealth have no active role to play in the protection of threatened species and the environment in RFA areas, and the planning regime that would normally require an assessment of the impacts of activities upon threatened species and biodiversity does not usually apply to the bulk of forestry undertaken in NSW, Victoria and Tasmania, the environment protection regulations and systems accredited by the RFAs have a critical role in the protection of threatened species, habitat and biodiversity.

Section 2.1 below describes forestry regulations and systems accredited through the RFAs and who is responsible for their implementation. Section 2.4 and 2.5 analyse whether the accredited State regimes in fact deliver the same level of protection as would be afforded under the EPBC Act. The focus is on flora and fauna, and particularly threatened species which are a matter of national environmental significance under the EPBC Act. The conservation of biological diversity (particularly endangered and vulnerable species and communities) is a fundamental objective of the *National Forest Policy Statement*.

2.1 ACCREDITED ENVIRONMENT PROTECTION REGULATIONS

2.1.1 New South Wales

The NSW RFAs each provide that the Commonwealth accredits NSW's forestry management "system", as providing for continuing improvement in Ecologically Sustainable Forest Management, including legislation, policies, Codes, plans and management practices. The "system" includes Forest Agreements (as distinct from RFAs), Integrated Forestry Operations Approvals, a process for forecasting sustainable yield, Codes of Practice and certain management systems.

Integrated Forestry Operations Approvals

Forestry operations in State forests are regulated primarily under Integrated Forestry Operations Approvals. Integrated Forestry Operations Approvals are granted jointly by the Minister for the Environment and the Minister for Primary Industries and apply to forests that are subject to an RFA. The Integrated Forestry Operations Approvals contain provisions governing how forestry activities are to be carried out in order to protect threatened species and endangered ecological communities, old growth forest and rainforests, hollow bearing and habitat trees, and heritage including Aboriginal heritage. The Integrated Forestry Operations Approvals require the Forestry Corporation

to give effect to the principle of Ecologically Sustainable Forestry Management, and to carry out forestry activities in a manner that gives effect to applicable principles of best practice.

The Integrated Forestry Operations Approvals operate as integrated approvals in that they contain the terms of licences required under other NSW environmental laws. Most Integrated Forestry Operations Approvals include licences under the *Threatened Species Conservation Act 1995* (NSW), *Fisheries Management Act 1994* (NSW) and the *Protection of the Environment Operations Act 1997* (NSW). These licences contain very detailed prescriptions for such matters as tree retention, stream exclusion zones, exclusion zones for threatened species and their habitats, operational requirements, and compartment mark-up surveys. The Forestry Corporation and any person carrying out forestry operations are required to comply with the licences.[28] It is noted that not all forestry operations require an environmental protection licence under the *Protection of the Environment Operations Act 1997*, which impacts the level of protection that streams are afforded.

Codes of Practice

There are four forestry codes of practice, which specify best management practice conditions for:

1. timber harvesting in plantations;
2. native forests;
3. plantation establishment; and
4. maintenance of forest roads and fire trails.[29]

Operators and contractors who carry out forestry activities are required, through licence conditions, to comply with Part 2 of the *Timber Harvesting in Native Forests Forest Practices Code 1998*.[30] The code sets out requirements for all aspects of timber harvesting in NSW State forests, including environmental protection measures for soil and water; protecting flora, fauna and cultural heritage; harvest plans; operations; tree selection; and felling and timber extraction.

2.1.2 Tasmania

Protection of threatened species

As part of the RFA negotiations, a "comprehensive, adequate and representative" reserve system was created, identifying public land that was, and was not, available for wood production throughout Tasmania. In 2005, as part of the Community Forests Agreement, an additional 170,000 hectares was reserved. With the additional reserves, it was estimated that approximately 980,000 hectares of old growth forest on public land was reserved, and funding was provided to secure protection of 45,000 hectares of old growth forest on private land. These designated reserve areas are intended to deliver biodiversity conservation outcomes for both vegetation communities and threatened fauna.

In most circumstances, forestry activities must be carried out in accordance with a Forest Practices Plan, which contains prescriptions in relation to species management, scheduling, marking out and retention of streamside reserves and wildlife corridors. Forestry activities carried out in accordance with a Forest Practices Plan are exempt from the requirement to obtain a permit under the *Threatened Species Protection Act 1995*.

Protection of threatened native vegetation communities

Clause 48 of the RFA required Tasmania to introduce statutory mechanisms to prevent clearing and conversion of rare, vulnerable and endangered non-forest native vegetation communities. The Tasmanian Government was also required to retain a minimum of 95 per cent of 1996-level native forest across the state.

The Tasmanian Government subsequently introduced a schedule of threatened native vegetation communities.[31] The government required any clearing or conversion of these listed vegetation communities to be carried out in accordance with a Forest Practices Plan and imposed restrictions on when a Forest Practices Plan would be granted in respect of listed communities. *A Policy for Maintaining a Permanent Native Forest Estate* was also adopted to assist in monitoring and regulating retention levels.

In 2009, amendments were made to the *Forest Practices Regulations 2007* to delegate responsibility for assessment of clearing associated with planning and building applications to local government, even where the clearing involved threatened native vegetation.

This approach has some advantages, in that such clearing is now subject to the planning system (which offers third party rights of appeal and enforcement) and would potentially not fall within the RFA exemption under the EPBC Act.[32] However, most planning authorities in Tasmania lack the regulatory power and the resources to effectively prevent clearing of threatened native vegetation. They also lack the capacity to adequately record vegetation losses at a regional scale (in contrast to the central monitoring of vegetation losses through Forest Practices Plans). This continues to compromise the government's ability to monitor retention of native forests.

2.1.3 Victoria

The Ecologically Sustainable Forest Management regime accredited under the Victorian RFAs contains three main elements that relate to environment and threatened species protection: Forest Management Plans, the Code of Practice for Timber Production (as discussed above), and the threatened species laws contained in the *Flora and Fauna Guarantee Act 1988.*[33]

The *Flora and Fauna Guarantee Act 1988* requires that Action Statements be prepared for each threatened species listed under the Act. The Action Statements are to provide a plan to conserve and manage the listed threatened species in the context of an overall objective that Victoria's flora and fauna can survive and flourish in the wild.

In addition, the Victorian Government agreed to undertake the creation of a comprehensive, adequate and representative reserve system. The creation of a comprehensive, adequate and representative reserve system is to be achieved through the creation of national parks and other reserved public land, and setting aside areas of State forest from logging, through the creation of zones in Forest Management Plans.

The Ecologically Sustainable Forest Management regime is mostly implemented through the Code of Practice for Timber Production, [34] which requires compliance with Forest Management Plans and any Action Statements prepared under the *Flora and Fauna Guarantee Act 1988* for species identified in the areas proposed to be cleared.

Standards contained within the accredited Ecologically Sustainable Forest Management regime include, amongst others:

1. the requirement to apply the precautionary principle to the conservation of biological diversity, at planning stages and throughout logging operations, including responding to new information, research and circumstances that may justify applying the precautionary principle;[35]
2. compliance with Action Statements prepared under the *Flora and Fauna Guarantee Act 1988,* which are supposed to set out actions to conserve and manage threatened species in Victoria; and
3. observance of the restrictions contained in Special Protection Zones and Special Management Zones contained in Forest Management Plans.

2.1.4 Western Australia

The South-West RFA accredited Western Australia's forest management system, but also required a series of improvements be made to the system in place at the time. The required improvements to the forest management system included: developing a system of pre-logging fauna assessment; that planning of forestry operations be guided by the precautionary principle; and that forest planning should be done to maintain forest values. Western Australia also agreed to implement a new or revised *Wildlife Conservation Act*, to address the lack of State regulation of activities that impact upon biodiversity and threatened species.[36]

Forest management plans developed under the Conservation and Land Management Act 1984 set out policies and guidelines for conservation, harvesting and other land use activities. The plans set out actions to be taken by the Conservation Commission, the Department of Environment and Conservation (**DEC**) and the Forest Products Commission to achieve objectives outlined in the plan.

Any production or plantation contract entered into under the *Forest Products Act 2000* must be consistent with the Forest Management Plan (or another management plan, if plantation activities are conducted outside State forests).

2.1.5 Findings

Federal and State laws regulating environmental impacts of forestry in areas covered by RFAs are different from the laws that regulate every other activity that impacts the environment. In addition, the means of regulating threatened species and biodiversity in forestry operations undertaken in accordance with an RFA are unique to those operations in each State. As a result, the regulation of forestry activities in areas covered by RFAs is complex and somewhat opaque.

Forestry operations in RFA areas are all exempt from State planning laws as well as the EPBC Act. As a result, there is no requirement for an environmental impact assessment process to be undertaken before new areas are made available for logging. As a result, the site-specific and unforeseen cumulative environmental impacts of logging within areas covered by RFAs are never assessed and managed. Exemption from the planning system and the EPBC Act also has significant implications in relation to the rights of third parties to enforce and participate in forestry processes. For example, third parties in some States have no right to

make submissions in response to government proposals to make specific areas available for forestry. Such rights would likely be available under States' planning regimes and the EPBC Act. In States where public comments are invited, there is no process to ensure that such comments are addressed or acted upon.

2.2 IMPLEMENTATION OF ACCREDITED CONSERVATION STANDARDS AND THREATENED SPECIES PROTECTION MEASURES

2.2.1 New South Wales

The Forestry Corporation is responsible for managing and administering forestry operations. In exercising its functions it is subject to the requirements of the *Forestry Act 2012* and the *Forestry Regulation 2012*, Forest Agreements, Integrated Forestry Operations Approvals and attached licences. A large number of contractors carry out the day-to-day forestry operations, including preparation for timber harvesting, the harvesting operations themselves, and road and snig track works. It is clear that logging contractors are required to comply with Integrated Forestry Operations Approvals and the attached licences, as forestry operations must be carried out in accordance with any applicable Integrated Forestry Operations Approval.[37]

The Forestry Corporation is required to conduct its operations in compliance with the principles of ecologically sustainable development contained in section 6 (2) of the *Protection of the Environment Administration Act 1991*.[38] The Integrated Forestry Operations Approvals require forestry operations to be carried out in a manner that gives effect to Ecologically Sustainable Forest Management and best practice, which requires that a forestry operation be managed to achieve the ongoing minimisation of any adverse impacts of the forestry operation on the environment.[39]

The Forestry Corporation is responsible for ensuring that contractors who carry out forestry operations do so lawfully. Before logging or other forestry activities commence, compartments are required to be surveyed for threatened species and the relevant exclusion zones and trees to be retained must be marked up. A Harvesting or Operational Plan, including a Harvesting Plan Operational Map, must be prepared, which shows forestry zones and landscape features; any exclusion, buffer and protection zones; threatened species and ecological communities; and rocky outcrops. The Forestry Corporation must notify regulatory authorities of the Harvesting or Operational Plan before commencing clearing, although these authorities do not assess or approve the plan. The Forestry Corporation is also required to keep a record of sites significant to Aboriginal people and to consult with the Aboriginal community.[40]

The Minister for the Environment and Minister for Primary Industries alone have the power to enforce a breach of an Integrated Forestry Operations Approval.[41] The Environment Protection Authority is the primary investigative agency. There are serious concerns that the oversight of forestry activities is not effective as there are historic and ongoing breaches of forestry regulations, as discussed below.

2.2.2 Tasmania

The Forest Practices Code requires that threatened species will be managed in accordance with Agreed Procedures between the Forest Practices Authority and the Department of Primary Industries, Parks, Water and Environment. Under the current Agreed Procedures, forest practices officers (usually employees of Forestry Tasmania or the logging contractor) consult the Forest Botany Manual and the Threatened Fauna Advisor and implement agreed management prescriptions. Forest Practices Officers are also required to seek further specialist advice as required.[42]

The Agreed Procedures require the Forest Practices Authority to monitor the efficacy of management prescriptions for the protection of threatened species. An independent expert panel has noted in relation to this requirement:

> *[I]t is unclear whether and how this process actually happens. What monitoring of efficacy of prescriptions for the protection of threatened species has been done? How adequate/defensible are the data to address the question of adequacy of prescriptions?*[43]

In response to this report, the Threatened Fauna Advisor is being updated and the Forest Practices Authority is currently undertaking research into implementation and effectiveness of its assessment procedures.[44] However, the updates are currently stalled and forest practices officers continue to refer to the 2002 Fauna Advisor in determining management prescriptions. The Threatened Fauna Advisor is not publicly available, and no public comments will be sought in relation to proposed amendments.

In the Wielangta case, Justice Marshall questioned the success of management prescriptions in protecting threatened species. In particular, referring to evidence that Forestry Tasmania had ignored recommendations from the Senior Zoologist in relation to Swift Parrot habitat, Justice Marshall concluded that, in practice, *"recommendations from*



TASMANIAN DEVIL, TASMANIA. PHOTO: MATTHEW NEWTON.

senior zoologists in accordance with the Adviser are negotiable, if Forestry Tasmania objects." (at [289]). He further noted (at [282]):

> *On the evidence before the Court, given Forestry Tasmania's satisfaction with current arrangements, I consider that protection by management prescriptions in the future is unlikely.*

In addition, due to most forestry land being declared a Private Timber Reserve, potential environmental impacts are rarely subject to scrutiny in the Resource Management and Planning Appeal Tribunal (**the Tribunal)**. However, two cases before the Tribunal have examined whether compliance with the Forest Practices Plan conditions was sufficient to satisfy the environment protection requirements of a planning scheme. The cases raise questions about the effectiveness of the threatened species measures contained in the Forest Practices Code.

In *Gunns Ltd v Kingborough Council*,[45] Kingborough Council refused an application for forestry operations on the basis that the should statements in the Forest Practices Plan did not demonstrate any commitment to implement the strategies identified to protect environmental values. The Tribunal considered that the Forest Practices Code provided a useful guide, if not necessarily an exhaustive test, and held that a planning scheme could adopt higher standards for forestry operations than those prescribed in the Forest Practices Code (at [20]) where necessary to protect threatened species.

In *Giles & Weston v Break O'Day Council*,[46] the forestry operator argued that compliance with Forest Practices Plan conditions was sufficient to satisfy the planning scheme requirements to protect threatened species habitat (in that case, habitat for the Giant Velvet Worm). However, the Tribunal considered that the Forest Practices Code provisions were not sufficiently specific to demonstrate compliance with several planning scheme provisions and concluded that, even with full compliance with the Forest Practices Code, there was an unacceptable risk that proposed logging would adversely impact on the Giant Velvet Worm (at [44] and [52]).

As outlined above in section 2.1.2, amendments to the *Forest Practices Regulations 2007* in 2009 effectively delegated responsibility for assessment of clearing associated with planning and building applications to local government. Given the limited resources and expertise available to councils, these amendments have significantly weakened the practical capacity of the Tasmanian Government to satisfy its obligations under the RFA to retain 95 per cent of pre-1996 native vegetation.

2.2.3 Victoria

For several years, the Department of Sustainability and Environment (***DSE***) and Department of Primary Industries (***DPI***) have been responsible for managing State-owned forests, both in terms of conservation and logging operations. At the time of writing these Departments were in the process of merging to form the Department of Environment and Primary Industries (***DEPI***). The Secretary of the DEPI is responsible for approval of timber release plans.[47] The DEPI is also responsible for implementing, monitoring and enforcing compliance with environment protection measures, including measures to protect threatened species and overseeing private forestry. The merger will be complete by 1 July 2013. There is no information as yet about how this will affect management of native forest logging and environmental protection.

VicForests, a State-owned business enterprise, carries out the bulk of native forest logging in Victoria and is responsible for carrying out on-the-ground conservation measures, such as pre-logging surveys. These surveys are critical, in that they determine whether or not a species is present on the site, and therefore what measures to protect species are required to be implemented. To be effective, they need to be carried out with adequate resources in the right season for target species; 'no detection' does not mean the species is not present.

VicForests also prepares the forest coupe plans that outline the detail of the forestry operations on a coupe, including details of how requirements, such as buffers to protect sensitive environments and threatened species protection measures, will be implemented on a particular coupe.[48] Forest coupe plans must be available on the site during operations, but do not require approval from the DEPI or any government authority and are not publicly available.

Action Statements, made under the *Flora and Fauna Guarantee Act 1988*, are supposed to set out actions to prevent the decline of listed threatened species, or means of managing threatening processes. Under the Code of Practice for Timber Production, forestry operations must comply with Action Statements.[49] As a consequence, Action Statements are the primary means of threatened species protection in the context of native forestry operations. If there is no Action Statement in place, there may be no other legal requirement to prevent harm to threatened species when undertaking forestry activities.

The DSE/DEPI has not prepared Action Statements for 55 per cent of species and threatening processes listed under the *Flora and Fauna Guarantee Act 1988*.[50] Some species that have been listed as threatened for more than 20 years still do not have Action Statements. Failure by the DSE to prepare Action Statements means that the majority of threatened species in Victoria are not protected at all under Victoria's forestry management regime. An example of this was exposed in *Environment East Gippsland v VicForests* (***EEG case***) where it was found that VicForests were not required to implement any measures to protect the Square-tailed Kite when logging, even though the Square-tailed Kite is listed as threatened under the *Flora and Fauna Guarantee Act 1988* and the forest coupe in question was likely Square-tailed Kite habitat.[51] This was because no Action Statement had been prepared for the Square-tailed Kite.

In addition, Action Statements vary in quality, detail, clarity and effectiveness in protecting species. In *MyEnvironment Inc v VicForests*[52] (***MyEnvironment***), the Supreme Court of Victoria accepted that the Action Statement prepared for the Leadbeater's Possum, the species at the centre of the case, was open to interpretation.[53] Nevertheless, the Court stated its job was to determine whether the standards in the Action Statement and Forest Management Plan had been complied with.[54] The Court found that the Action Statement did not impose obligations on VicForests independently of the Forest Management Plan.

The listing process that precedes the preparation of Action Statements has also been criticised on the basis that DSE (and now DEPI) have not allocated sufficient staff and resources to maintain the integrity of the list, so that the threatened species list is out of date and not underpinned by quality research and information.[55] Again, this could mean that species that warrant protection from logging activities are not protected.

There are also failings in the way VicForests approaches and implements conservation measures contained in Victoria's forestry regulations. These are discussed under the heading 'Compliance' in section 3.1.3 below.

2.2.4 Western Australia

Forest Management Plans developed under the *Conservation and Land Management Act 1984* set out policies and guidelines for conservation, harvesting and other land use activities. The plans set out actions to be taken by the Conservation Commission, DEC and the Forest Products Commission to achieve objectives outlined in the plan.

Any production or plantation contract entered into under the *Forest Products Act 2000* must be consistent with the Forest Management Plan (or another management plan, if plantation activities are conducted outside State forests).

The Forest Management Plan 2004-2013 identified a range of guidance documents for implementation of the plan and required the documents to be finalised within two years. In its mid-term audit report in relation to the plan, the Conservation Commission noted that many of the required guidance documents had yet to be finalised. The end-of-term report noted that seven documents had been completed, while eight others were still outstanding.[56] Lack of guidance documents compromises the Commission's capacity to accurately audit compliance with the plan.

Protection of fauna and flora

As stated above in section 2.1.4, the Western Australian Government agreed to implement a new or revised Wildlife Conservation Act as part of its RFA commitments. This has not yet occurred, and Western Australia remains without any comprehensive biodiversity or threatened species protection laws.[57]

In order to provide better species protection, the concept of fauna habitat zones was introduced in the Forest Management Plan 2004-2013 to provide a series of habitat areas, as a mechanism to facilitate recolonisation of disturbed areas. *The Forest Management Plan 2004–2013* identified 283 indicative zones located systematically across the Forest Management Plan area, each approximately 200 hectares in size and totalling approximately 52,700 hectares.

To date, only 102 of the 283 indicative fauna habitat zones have been finalised by the DEC, resulting in a deficit of approximately 31,000 hectares of fauna habitat. The proposed Forest Management Plan 2014-2023 (which has been endorsed by the Environment Protection Authority and is expected to take effect on 1 January 2014) will reduce the network of fauna habitat zones, consolidating areas and focussing reservation on habitat areas which are currently under-represented. The "refined network" covers a smaller area (48,400 ha) and exhibits a greater range of sizes - areas as small as 50 ha have been identified in areas affected by bauxite mining.[58]

One of the key performance indicators for the *Forest Management Plan 2004-2013* is that *"no species or ecological community will move to a higher category of threat as a result of management activities"*. The Conservation Commission's end-of-term audit report notes that 18 threatened species (12 flora, six fauna) have moved to a higher category of threat since 2004. While the report indicates that the changes are not necessarily attributed to management practices, the changes in status emphasise the need to ensure adequate knowledge, monitoring and adaptive management in relation to threatened species.[59]

2.2.5 Findings

The standards and systems accredited under the RFAs will only be successful in achieving Ecologically Sustainable Forest Management if they are fully implemented in a timely manner. The above analysis shows that the threatened species measures accredited under the RFAs are not properly being implemented.

State forestry agencies have a key role in implementing conservation standards. They are responsible for preparing and implementing the site-specific plans and actions that are intended to give effect to environment protection and threatened species regulations contained in the various forestry regulations and codes. This requires a site assessment and threatened species surveys. These assessments and surveys are typically undertaken by employees of the agencies, in some cases by employees who do not have appropriate training in conducting surveys or in threatened species identification.[60] Plans and actions are often prepared and implemented without prior independent approval. It must be emphasised that this is distinct from every other land use; other land uses require planning approval, which typically requires site-specific assessments and plans to be approved by a State or local government authority prior to work commencing.

There is an inherent conflict of interest in State forestry agencies having a significant role in implementing threatened species regulations at a site-specific, on-the-ground level, without the requirement for government approval. State forestry agencies, who all have commercial objectives, seek to maximise the resource they are able to exploit and thereby maximise their returns. This objective is in direct tension with environment and threatened species regulations, which limit the amount of forest that can be cleared. As a result, in a best-case scenario, State forestry agencies are likely to only implement environment protection and threatened species measures to the minimum extent necessary. In reality, as the cases, audits and reports on forestry operations demonstrate, threatened species measures and regulations are often not implemented in full or at all. This is discussed in more detail below.

Under a system in which those carrying out the forestry operations have a significant role in on-the-ground implementation of threatened species protection measures, adequate and effective monitoring, compliance and enforcement regimes are crucial to ensuring that threatened species protection measures are implemented. As detailed below, there are serious deficiencies in monitoring, compliance and enforcement of forestry agencies'

obligations and compliance with threatened species measures in RFA areas.

2.3 ADDRESSING NEW INFORMATION AND ISSUES

Difficulties arise when a strategic planning approach, such as the RFAs, seeking to balance economic and ecological outcomes, is set in stone for an extended period and cannot adapt to new circumstances. As McDonald has noted, where a one-off regional assessment forms the basis of a 20-year endeavour to achieve commercial viability and environmental sustainability, the precautionary approach becomes critically important. In particular, an application of the precautionary principle necessitates particular provisions for variation of the CAR reserve and the management prescriptions where new information becomes available.[61]

This is also recognised in Part 2 of all the RFAs, which outline that a key aspect of Ecologically Sustainable Forest Management is the capacity to adapt to new information.

This section examines the responsiveness of the RFA regime to a significant 'new' issue: climate change and associated extreme weather events. The capacity of the RFA regime to adequately respond to new information regarding biodiversity (such as newly identified habitat) is discussed in more detail in the following section.

2.3.1 Climate change

In 1992, governments acknowledged the need to manage forests so as to maintain or increase their 'carbon sink' capacity and minimise greenhouse gas emissions from forestry activities.[62] In 2007, the Council of Australian Governments recognised that climate change, resulting from higher atmospheric greenhouse gas levels, could have a range of significant impacts on Australia's forests, including through changes in water availability, higher temperatures, more frequent and severe bushfires, and greater pest and disease incursions.[63]

Forestry activities such as logging of native forests result in carbon pollution through decay, burning and soil disturbance; younger forests store less carbon than old forests and a major effect of logging is to reduce the age structure of native forests. Despite this, the RFAs themselves do not address climate change.

These issues have international implications as polluting activities impede Australia's international commitments to reduce its greenhouse gas emissions. From 2013, accounting for 'forest management' will become mandatory under the Kyoto Protocol, when ratified. Australia is a signatory to the Kyoto Protocol, an international agreement which commits its parties by setting internationally binding emission reduction targets. It was acknowledged in the *NSW Final Report on Progress with Implementation of NSW Regional Forest Agreements* that the forest global carbon pool has become a central issue since the establishment of the RFAs.[64]

It is vital that the climate impacts of forestry activities and the impacts of climate change on forests, forestry activities, as well as management regimes in RFA forests are properly assessed. However, there is a continued disregard of climate change issues within the RFA regulatory framework. State-commissioned reports assessing the progress of current RFAs aim only to report on existing RFA tasks and responsibilities, and neglect to engage in discussion of any climate change issues.[65]

Although the current RFAs were drafted prior to climate change re-emerging as a strong public concern and matter of government policy, codes of practice can be modified and carbon considerations should be built into future forest management models.[66] In the Independent Assessment of the *Report on Progress with Implementation of NSW Regional Forest Agreements* it is suggested that there may be some scope for climate change matters to be taken into account through adaptive management and continuous improvement in practice.[67] Whilst there may be some scope to address climate change under the RFA regime, it has not occurred in any of the States.

Climate change is but one example of forestry regimes accredited under RFAs failing to respond to new information.[68] This may constitute a failure by the States to comply with the requirement in the RFAs to act in accordance with the precautionary principle.

2.3.2 Declining rainfall

The end-of-term audit report on the *Western Australian Forest Management Plan 2004–2013* identified concerns that current adaptive management practices did not adequately account for climate change impacts such as higher temperatures, increased fire risk and declining rainfall. It was observed that annual streamflow had reduced by 12–50 per cent, largely attributable to declining rainfall, resulting in a failure to achieve targets in relation to maintenance of aquatic fauna. The report concluded that:

> *The potential impact of climate change on growth and sustained wood yield will need to be monitored and incorporated into the calculation of future sustained yields. Other supporting information and systems need to be updated to support calculation of sustained yield….*

Declining rainfall has significantly impacted water availability in the Forest Management Plan area and predicted future climate change is likely to lead to further impacts. Further declines in streamflow and impacts on aquatic environments are likely. The impact of climate change needs to be closely monitored with adaptive management strategies implemented that ameliorate the impacts of climate change.[69]

2.3.3 Bushfires

Since 2003, there has been close to 3 million hectares of public forests severely burnt in four major fire seasons in Victoria. The East Gippsland and Central Highlands RFAs make no mention of the likelihood of loss of resource as a result of bushfires and provide no guidance for how this occurrence should be addressed in terms of forestry management. It is therefore an example of RFAs providing no means for dealing with events that will have a significant impact on forests and biodiversity that were not contemplated when the RFAs were initially agreed to. The *MyEnvironment* case, which is discussed in more detail below at section 2.4.3, provides an illustration of this problem with the RFAs.

Despite the significant loss of forest caused by the bushfires, the Victorian Government continues to adhere to the commitments to supply unrealistic log volumes to its customers. This has recently seen areas previously protected as a result of the RFAs rezoned back to logging. This rezoning occurred without any detailed consideration of the impacts on biodiversity. The privileging of logging over the environment in these circumstances is within the discretion allowed to the States under the RFAs.

2.3.4 Findings

The above examples show that the RFAs do not provide compulsory mechanisms that require new information and changes in circumstances that have or will have significant environmental impacts to be taken into account in forestry activities. Mere reference to the precautionary principle has proved patently inadequate in ensuring that the forestry regimes within RFA areas are responsive to significant changes in the environment.

2.4 DO RFA-ACCREDITED STATE REGIMES OFFER THE SAME LEVEL OF ENVIRONMENT PROTECTION AS THE EPBC ACT?

As explained above, with the exception of forestry covered by an RFA, all actions that have a significant impact on a matter of national environmental significance must first be subject to environmental impact assessment and approved by the Federal Environment Minister before they can proceed under the EPBC Act. When deciding whether or not to approve an action that will impact threatened species, the Environment Minister is prohibited from acting inconsistently with Australia's international obligations relating to biodiversity as well as with recovery plans and threat abatement plans made under the Act.[70]

The RFA system has been said by the Courts to be an alternative to the EPBC Act.[71] This section discusses whether it can be said that the RFA system delivers an equivalent or better level of environment protection to forests than would be the case if forestry operations were subject to individual assessments under the EPBC Act.

2.4.1 New South Wales

It is clear that, in NSW, the State's regulatory regime for forestry activities in State forests is not as rigorous as the EPBC regime. That the operation of the EPBC Act has been switched off with respect to RFA forestry activities is of particular concern in the circumstances where Integrated Forestry Operations Approvals do not require the protection of matters of national environmental significance. The Integrated Forestry Operations Approvals and the attached licences are directed to impacts on the environment, including threatened species, populations and ecological communities that are protected under NSW legislation, rather than the matters protected under the EPBC Act. Therefore, if a species is protected under the EPBC Act but not NSW legislation, it will not be caught by the Integrated Forestry Operations Approval prescriptions.

Another key concern with the RFA process is the limited extent to which it allows for adaptive management as new environmental information comes to light. In NSW, Integrated Forestry Operations Approvals do provide for adaptive management to a limited extent, as the Integrated Forestry Operations Approvals and attached licences can be amended to provide for new prescriptions. For example, in November 2011 the *Integrated Forestry Operations Approval for the Upper North East and Lower North East Regions* was amended to include in the attached threatened species licence a number of requirements pertaining to the Hastings River



MOUNT JERSEY, EAST GIPPSLAND, VICTORIA. PHOTO: SARAH DAY.

Mouse. However, such amendments are relatively rare, and a cumbersome way of providing for adaptive management.

A more fundamental problem is that there is a presumption that forestry activities will go ahead, and the Integrated Forestry Operations Approval prescriptions only mandate that certain areas are to be excluded from logging based on pre-determined criteria. These criteria do not allow for assessment of cumulative impacts. The Integrated Forestry Operations Approval system is inferior, then, to environmental assessment on a case-by-case basis, which is required under the EPBC Act and was required for native forestry activities in NSW prior to the RFAs. Pre-1998, forestry activities were subject to assessment under Part 5 of the *Environmental Planning and Assessment Act 1979*, and this comprised a full assessment of whether logging should take place, taking into account likely environmental impacts.

A number of court cases were brought in relation to forestry activities pre-RFA, when third parties had a right to bring proceedings to remedy or restrain forestry activities undertaken in State forests. These cases confirm that the environmental assessment of forestry activities in NSW pre-RFAs was broad. The appropriate "environment" to be considered could include areas beyond the area in which the activity was proposed so as to include cumulative impacts, and the significance of the values of the environment to be impacted was a relevant matter.[72] In considering whether a forestry activity would have a significant environmental impact, such that the preparation of an environmental impact statement was required, consideration was required to be given to both immediate short-term and long-term impacts on the environment.[73] These pre-RFA requirements are akin to the environmental assessment requirements under the EPBC Act, which are more rigorous than the current arrangements for assessing forestry activities in NSW's State forests under the Integrated Forestry Operations Approvals and attached licences.

2.4.2 Tasmania

The Forest Practices Code is required to "prescribe the manner in which forest practices shall be conducted so as to provide reasonable protection to the environment".[74] This is a more qualified objective than the one set out in section 3 of the EPBC Act to provide for the "protection of the environment, especially those aspects of the environment that are matters of national environmental significance".

The Forest Practices Code has been criticised for its use of broad statements that are difficult to enforce. For example, the report of the Panel reviewing the biodiversity provisions of the Forest Practices Code recommended "the inclusion

of measurable objectives in the Forest Practices Code" in order to better achieve sustainable forest management.[75]

While Forest Practices Plans relate to a particular site, they are based on standard prescriptions (management plans) for affected threatened species developed by the Forest Practices Authority for the entire state, rather than comprehensively tailored to address specific conditions of the site. Provided it relates to land within an RFA category that is "available" for forestry activities, an application for a Forest Practices Plan would rarely be refused. It is likely that specific assessments under the EPBC Act and the imposition of site-specific conditions would provide more concrete and enforceable protections for biodiversity than the current system in forestry matters that have a significant impact on matters of national environmental significance.

The *Weilangta* case[76] provides useful analysis of the extent to which the Tasmanian RFA adequately protects threatened species. The Federal Court considered whether proposed forestry operations in the Wielangta State Forest would be carried out in accordance with the Tasmanian RFA, particularly the requirement in clause 68 to *"protect the Priority Species ... through the CAR Reserve System or by applying relevant management prescriptions."*

His Honour considered at length what was required to satisfy the requirement to "protect" these species, and concluded that they would not be protected under the nominated management prescriptions:

> *An agreement to 'protect' means exactly what it says. It is not an agreement to attempt to protect, or to consider the possibility of protecting, a threatened species. It is a word found in a document which provides an alternative method of delivering the objects of the EPBC Act in a forestry context…*
>
> *The method for achieving that protection is through the CAR Reserve System or by applying relevant management prescriptions. Does that mean the State's obligations are satisfied if, in fact, the CAR Reserve System or relevant management prescriptions do not protect the relevant species? I do not think so. If the CAR Reserve System does not deliver protection to the species, the agreement to protect is empty (in the absence of relevant management prescriptions performing that role). If relevant management prescriptions do not perform that role, the State should ensure that it does, otherwise it is not complying with its obligation to protect the species (at [240] – [241]).*

His Honour held that because the proposed forestry operation would not be 'in accordance with' the RFA, the forestry operations were not covered by section 38 of the EPBC Act, which states that the EPBC Act does not apply to forestry operations done in accordance with an RFA. He was satisfied that the proposed forestry operations would have a significant impact on three listed threatened species, the Broad-toothed Stag Beetle (*Lissotes latidens*), the Swift Parrot (*Lathamus discolor*) and the Tasmanian Wedge-tailed Eagle (*Aquila audax fleayi*), and that the EPBC Act would apply, requiring assessment of the impacts of the forestry operations on the threatened species.

Justice Marshall further held that because section 38 of the EPBC Act provided an alternative to assessment under the EPBC Act, the requirements under the RFA should be construed strictly.[77]

Forestry Tasmania appealed against the decision. Prior to the hearing of the appeal, the Tasmanian and Commonwealth governments amended clauses 68, 70 and 96 of the RFA. In particular, clause 68 was amended to read:

> *The Parties agree that the CAR Reserve System, established in accordance with this Agreement, and the application of management strategies and management prescriptions developed under Tasmania's Forest Management Systems, protect rare and threatened fauna and flora species and Forest Communities.*

The Full Court (Sundberg, Finkelstein and Dowsett JJ) concluded that the new clause 68 did <u>not</u> require the State to protect priority species, it required only that the State [participate] in the establishment and maintenance of CAR in the manner described in the RFA.[78] The Court also observed, based on the words of the Tasmanian RFA, that (at [63]):

> *The fact that the State's obligations under Part 2 of the RFA are expressed to be unenforceable points against the view that by cl 68 the State warrants that CAR will in fact protect the species.*

In other words, the Court found that the RFA itself did not require that the State protect threatened species.

Since the Court concluded that the RFA would not have been breached by the proposed forestry operation, the Court did not consider it necessary to reach any conclusion in relation to the issue of significant impact, under the EPBC Act. As such, Justice Marshall's criticisms of the Tasmanian forest practices system and his conclusions

regarding the impacts of harvesting in the Wielangta forest on the listed threatened species were not displaced.

The *Wielangta* case provides a clear statement that Tasmania's individual threatened species are not guaranteed protection under the RFA and would benefit from the more detailed assessments and customised, concrete and enforceable conditions that usually result from the EPBC Act process.

However, unlike the RFA, the EPBC Act does not explicitly provide for the preservation and reservation of land for general biodiversity or protection of non-threatened species or habitat. It is unlikely that Tasmania would be in a position to maintain 95 per cent of pre-1996 native forest extent without the protection offered by the RFA. Nevertheless, the Hawke review noted that reservation alone is not necessarily sufficient to deliver security for biodiversity, and "biodiversity outcomes of RFAs are also determined by the forest management practices applied to harvest strategies".[79] Current deficiencies in the forest practices system, including delegating assessment to internal forestry officers and under-resourced councils, outdated management prescriptions, and inadequate monitoring, continue to compromise the protection of biodiversity in Tasmania's forest estate.

2.4.3 Victoria

The conservation measures accredited under the RFAs do provide some advantages in terms of environment protection, when compared to individual assessments under the EPBC Act. These are discussed below. However, on balance, the accredited regime under the RFA does not appear to provide the same level of protection for biodiversity, particularly threatened species, as individual assessments under the EPBC Act, due to two main failings:

1. the failure of the DSE to properly implement the *Flora and Fauna Guarantee Act 1988*; and
2. the failure of the system accredited under the RFA to require any consideration of impacts of individual logging operations, even when the circumstances pertaining to a particular species or environment have undergone significant change since the RFAs were entered into.

As discussed above in section 2.3.3, DSE has not made Action Statements for over half of the species listed in Victoria as threatened. This generally means that these species are not required to be protected under the RFA-accredited regime.

Many species affected by logging in RFA areas that do not have Action Statements are listed as threatened under the EPBC Act. Examples include the Southern Brown Bandicoot and the Large Brown Tree Frog. If forestry operations in RFA areas were not exempted from the EPBC Act, logging that would affect these species would need to be referred to the Federal Environment Minister for a decision as to whether the impact on the species was likely to be significant, and if so, what environmental impact assessment would be required. The likely result would be more conditions on forestry operations designed to minimise the impacts on threatened species.

The second reason RFAs do not provide the same level of protection under the EPBC Act in Victoria is that, under the RFA regime, there is no flexibility to consider the actual conservation outcomes of the proposed action. Instead, there is a requirement to comply with the predetermined conservation measures developed in 1997, and no more. Even when there has been a substantive change in the state of an environment or a threatened species, there is no requirement for environmental impact assessment of individual logging activities.

This failing is exemplified by the decision in MyEnvironment, which centred on proposed logging of Leadbeater's Possum habitat. *MyEnvironment* was unsuccessful in arguing that logging habitat for the possum by VicForests breached any laws, despite clear evidence that the species was in serious risk of extinction following the 2009 bushfires.

The Court did not consider that VicForests was required to apply any higher standard than that accredited in the existing RFA, despite changed circumstances.[80]

If this matter had fallen under the scope of the EPBC Act, the result may have been different. Under the EPBC Act, the question of whether the logging would have a significant impact on the Leadbeater's Possum would have been considered as part of the assessment, having regard to current environmental conditions and circumstances relevant to the species' survival.

A further useful example highlighting the different treatment of biodiversity and threatened species in logging operations is the proposal by the NSW and Victorian governments to conduct an 'ecological thinning' trial on the Red Gums in the Barmah National Park. The proposed thinning was referred to the Environment Minister under the EPBC Act, who found that the action was a controlled action and would be assessed by way of a Public Environment Report. The requirement to prepare a Public Environment Report will result in a relatively comprehensive assessment of environmental impacts and opportunities for third

parties to comment on the proposal. In contrast, had the thinning been proposed to take place in an area covered by an RFA, it would have proceeded in accordance with the RFA-accredited procedures and regulations in NSW and Victoria, detailed above, without detailed assessment or any opportunity for members of the community to be involved in the process.

Another concerning aspect of Victoria's RFA regime is the relative ease with which accredited conservation standards can be removed. This is because many of the standards are contained in policies and legislative instruments that do not require parliamentary approval. For example, the Code of Practice for Timber Production can be amended by the Secretary of the DEPI, without parliamentary oversight.

Removal of some obligations in policies or legislative instruments, or discretionary application of conservation standards may not necessarily constitute a breach of the RFA. Even if it does, it remains to be seen if anyone other than the Federal Environment Minister can take action, following the *Wielangta* case. To date, the Federal Environment Minister has never publicly intervened or taken action to deal with Victoria's arguable non-compliance with its RFAs.

On the other hand, as in Tasmania, the RFAs have provided a strong incentive for the Victorian Government to reserve State-owned land for conservation, in order to meet the comprehensive and adequate reserve aspects of the RFA. It is unlikely that increased reserves would have been an outcome from forestry operations being individually assessed under the EPBC Act. In addition, the regime accredited by the RFAs avoids the uncertainty that arises from the test as to whether the EPBC Act applies, namely that an activity is "likely to have a significant impact" on a threatened species.

2.5 DISCUSSION AND FINDINGS

RFAs suffer a number of systemic failures. Foremost amongst these is their inflexibility, which means that they fail to have regard to changes in situation or information. Many of the plans which underpin the RFA regime in all RFA States are chronically out of date. Recovery plans and threatening process listings remain out of date, an issue consistently identified in independent reviews. Furthermore, the RFAs do not appear to effectively require State governments, or individual forestry operators, to act consistently with threatened species plans.

By failing to adequately adapt to new information or changing circumstances, RFAs essentially 'lock-in' the use of outdated practices and old information. This approach provides little security for threatened species whose survival is at risk.

RFAs also highlight the problems with only undertaking environmental impact assessment at a strategic level and using standardised prescriptions rather than site-specific assessments. This problem is best exemplified by the fate of the Leadbeater's Possum in the *MyEnvironment* case. This is compounded by a fragmented 'mechanistic' approach to decision-making which fails to take into account the national implications of impacts on species recognised as having national significance.

The decision in the *Wielangta* case confirmed that, under RFAs, State governments do not warrant that threatened species will actually be protected. Evidence in all four RFA States indicates that a number of forest-dependent species are in decline, despite apparent compliance with the RFA requirements to "provide for" their protection.

To the extent that the RFAs have potential to deliver reasonable environmental outcomes, this potential is compromised by poor implementation of the laws accredited by the RFAs on the ground.

PART 3 COMPLIANCE, MONITORING AND AUDITING



GIANT TREE, BROWN MOUNTAIN, EAST GIPPSLAND, VICTORIA.
PHOTO: JILL REDWOOD

This chapter focuses on how the environment protection measures discussed in Chapter 2 are actually put into place on the ground. The discussion looks at how various bodies ensure, or fail to ensure, that the conservation measures accredited under RFAs are complied with by those undertaking forestry activities and whether States or the Commonwealth keep track of whether the overall goals of the RFA regime are being achieved.

3.1 COMPLIANCE

3.1.1 New South Wales

In NSW, evidence suggests that the Forestry Corporation is systematically failing to comply with legal requirements for forestry activities. These compliance failures are discussed comprehensively in a recent EDO NSW report, *If A Tree Falls: Compliance Failures in the public forests of New South Wales*[81]. Regular audits undertaken by the State's investigative and enforcement agency, the Environment Protection Agency, and community organisations indicate that there have been hundreds of breaches of Integrated Forestry Operations Approvals and associated licences throughout NSW. Examples of common breaches includes the failure to mark up exclusion zone boundaries and habitat features, failure to complete koala surveying, failure to observe outcrop exclusion zones, failure to retain recruitment and habitat trees, logging within stream exclusion zones, the piling of debris around habitat trees and breaches of reporting requirements under the *Forestry and National Park Estate Act 1998* (NSW) (***FNPE Act***).[82]

The Land and Environment Court of NSW has recently expressed disdain at the Forestry Corporation's record of eight prior offences under environmental legislation, as follows:

> *the number of convictions suggests either a pattern of continuing disobedience in respect of environmental laws generally or, at the very least, a cavalier attitude to compliance with such laws. I would attribute more weight to these past convictions than that suggested by the Forestry Commission.*[83]
>
> *Given the number of offences the Forestry Commission has been convicted of and in light of the additional enforcement notices issued against it, I find that the Forestry Commission's conduct does manifest a reckless attitude towards compliance with its environmental obligations.*[84]

3.1.2 Tasmania

Forest Practices Officers (FPOs, usually employees of forest managers or private consultants) both prepare the Forest Practices Plans and submit the compliance reports regarding implementation of the Forest Practices Plan to the Forest Practices Authority. Compliance reports must be submitted within 30 days of completion of forestry operations (or, where the operations involve discrete phases, at the completion of each phase).[85] This process raises questions regarding the rigour and independence of compliance monitoring and reporting.

Compliance issues often arise as a result of Forest Practices Plans being implemented on-the-ground by contractors without specific expertise, and often without detailed maps. Evidence was presented in the *Wielangta* case demonstrating that areas reserved for Swift Parrots within the coupes were being logged or were subjected to roadworks "by mistake". Justice Marshall stated that these incidences "illustrate the difficulty not only in having adequate management prescriptions to protect threatened species, and promote their recovery, but also the difficulty of actually implementing management prescriptions" (at [289]–[292]).

The Forest Practices Authority is required to "assess the implementation and effectiveness of a sample of Forest Practices Plans" and, in practice, conducts random audits of approximately 10 per cent of Forest Practices Plans each year.[86]

In its 2010-2011 Annual Report, the Forest Practices Authority reported that, even on the small number reviewed, over 17 per cent of audited Forest Practices Plans from small, independent operators were assessed as being below sound or unacceptable. For Forest Practices Plans audited for operations by Forestry Tasmania or larger operators, approximately 7 per cent were assessed as being below sound or unacceptable. Very little detail is provided in relation to the cause of poor ratings, though the report observes that compliance remains lowest amongst small, independent forest operators, due to the lack of ongoing supervision.[87]

As outlined in the discussion on enforcement in section 4.1.2 below, despite the number of low ratings, very few operators are penalised by fines or remediation notices.

3.1.3 Victoria

There have been many instances of forestry operators, particularly VicForests, not fully complying with

environmental prescriptions contained in the Code of Practice for Timber Production and Forest Management Plans.

A regular example of non-compliance is the manner in which pre-logging surveys are carried out. Pre-logging surveys are an essential step in ensuring effective species protection, determining what species are present in a coupe and therefore what protection measures are to be applied. It has been publicly acknowledged by the relevant Minister and the Department that pre-logging surveys are not adequately carried out and need to be improved.[88]

This is also acknowledged as a problem by DSE. An internal DSE report tendered during the course of the hearing of EEG case said:

> *The absence of a pre-harvest survey process exposes DSE and VicForests to the prospect of inadvertent damage or destruction of significant species sites (or advertent damage if a report of a species presence has been made), negative publicity and accusations of breaches of our own guidelines and possible legal challenges to timber harvesting.*[89]

Even if surveys are done, evidence given in the EEG case raises concerns regarding their adequacy. The evidence showed that field assessments (such as flora and fauna surveys) designed to determine the net harvestable area within a logging coupe and refine the timber release plan, were undertaken by foresters, "with no special expertise in respect of biology or conservation of endangered species".[90]

The Court in the EEG case also considered whether VicForests had breached conservation obligations triggered by the detection of threatened species in logging coupes. It was VicForests' view that these standards were only required to be applied in the planning stage and could not be relevant at later stages. The implications of adopting this view is that initial surveys cannot be called into question to alter management prescriptions, even in the face of later, contradictory evidence of species presence – this approach would severely limit the efficacy of threatened species protections. The Court ultimately found this approach to be incorrect and held that VicForests had failed in management responsibilities. In particular, the Court found that VicForests had failed to respond to triggers requiring set responses, and failed to apply the precautionary principle.

DEPI (formerly DSE) is primarily responsible for managing compliance in relation to forestry activities, as well as compliance with biodiversity laws more generally. DEPI has a range of tools designed to actively encourage compliance and deter noncompliance.

Despite these tools, in a recent review of the effectiveness of DSE's compliance activities the Victorian Auditor-General found that DSE was not fulfilling its responsibilities in relation to forestry laws consistently or effectively.[91]

The Auditor-General acknowledged examples where DSE's efforts have increased compliance levels and contributed to achieving compliance objectives.[92] However, enforcement mechanisms have been rendered less than effective as a result of the failure of DSE to carry out sufficiently detailed, consistent or transparent compliance prioritisation, planning, monitoring, reporting or review.[93]

The report further stated that DSE cannot even be sure that their compliance activities will protect natural resources, primary industries or the environment,[94] due to minimal active oversight of how the compliance functions are delivered.[95]

Recent cases provide further insight on the attitude of DSE towards implementing and complying with the forestry management system. In the EEG case, a witness for DSE "expressed the view that there is always a discretion as to whether the requirements of the Forest Management Plan are implemented. With regard to DSE implementation of Forest Management Plan guidelines, he stated 'there is a choice in everything we do'".[96]

DSE has shown a lack of will to take actions to require compliance, even in the face of evidence of flagrant breaches of environmental protection obligations. For example, in the EEG case, DSE took no compliance action despite evidence of the presence of a threatened species which had a trigger effect under the *Flora and Fauna Guarantee Act 1988* being explicitly brought to its attention. DSE was also aware of the inadequacy of its own surveys carried out in response to breaches identified by Environment East Gippsland, but took no further action until further evidence was brought forward by Environment East Gippsland.[97]

3.1.4 Western Australia

In *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management* (1997) 94 LGERA 380, the Supreme Court held that Department of Conservation and Land

Management (the predecessor of DEC) was not bound to protect fauna under the *Wildlife Conservation Act 1950*, or to act strictly in accordance with the detail of a forest management plan. Leave to appeal to the High Court was refused but, in dissent, Justice Kirby noted:

> *unless corrected, [the decision] will stand as a serious obstacle to the enforcement of such management plans in [Western Australia]… It will encourage the notion that such management plans in environmental matters are mere exhortations and… ultimately unenforceable.*

Amendments to the legislation were made following the introduction of the South West Forests RFA, requiring government agencies to act in accordance with the forest management plan when making a range of decisions. For example, the Commission is required to ensure that production contracts are in accordance with any relevant management plan in terms of harvesting locations and the quantities and kinds of forest products to be harvested, and any provisions in a production contract for departmental land that are inconsistent with the management plan have no effect.[98]

The Conservation Commission is responsible for assessing the performance of the DEC and the Forest Products Commission against the objectives of a forest management plan at the mid-term and expiration stages of the plan. The Conservation Commission is required to develop guidelines for monitoring and to set performance criteria for evaluating the performance of the relevant agencies.[99]

Although the legislation requires actions to be taken in accordance with a forest management plan, the Conservation Commission still has very limited capacity to deal with any identified breaches. The only avenues available to the Conservation Commission to address compliance issues are through public reporting and providing advice to the Minister.

In June 2013, the Auditor-General released a report entitled *"Supply and Sale of Western Australia's Native Forest Products"*. A key conclusion of the report notes:

> *Our audit found that the planning processes align with key sustainability assumptions of the Forest Management Plan. However there is a general lack of transparency and accountability when these plans are implemented in practice through harvesting and the subsequent sale and supply of timber. During the course of the audit we saw instances of waste and breaches of environmental standards in the forests that are not adequately followed up. We also found a large proportion of the Commission's sales lack transparency.*
>
> *We acknowledge that the Commission faces a complex task in managing the sale and supply of timber from our native forests. However, it has more to do to earn public and industry confidence that its processes are achieving the outcomes our community expects.*[100]

3.1.5 Findings

There is considerable evidence in both NSW and Victoria of systemic failures to comply with prescriptions designed to protect threatened species. This is evident in both coupe planning and design, and in on-ground implementation. The attitude of responsible government agencies in response to discovery of new information (such as newly identified habitat for threatened species) is also concerning. Without ongoing pressure from conservation groups, many breaches would not be investigated or would not trigger management actions to secure the protection of threatened species.

Less compliance data is available for Western Australia and Tasmania. The Western Australian Conservation Commission has consistently advocated for an increase in public reporting of compliance monitoring, incident management and enforcement responses.

In Tasmania, the fact that most regulation is undertaken by forest practices officers engaged by forestry operators means that there is limited independent information regarding compliance. Most compliance monitoring undertaken by the forest practices officers who are also responsible for preparation and implementation of forest practices plans. However, material breaches have been recorded in approximately 25 per cent of the forestry operations subject to random annual audits. The relatively poor performance achieved by independent forest contractors is also indicative that lack of oversight continues to facilitate non-compliance.

3.2 MONITORING AND AUDITING

The Hawke review succinctly described the inadequate reporting, auditing and monitoring of environmental outcomes under the RFAs:

> *Reporting on the biodiversity outcomes of RFAs, particularly the on-ground*

performance of RFAs and adaptive management capacity of forest management practices, has been patchy and has not been delivered according to agreed RFA timeframes. Failure to complete timely reviews and inadequate processes for public complaints has fuelled public mistrust in the management of RFA forests and does not engender the level of confidence needed to continue the current treatment of RFA forestry operations under the [EPBC] Act.[101]

3.2.1 New South Wales

Monitoring and auditing of compliance in NSW is undertaken by the Environment Protection Authority (EPA), but has proved insufficient to identify all of the continuing breaches of forestry regulations. The EPA has limited resources and the number of audits it conducts annually covers only a very small percentage of the total logging operations undertaken.

As a result of community concern regarding the adequacy of the EPA audit program in identifying environmental impacts of unlawful forestry activities, community groups also undertake pre- and post-logging auditing and can report incidents to the EPA. The results of community audits are reported to the EPA, who then investigate the breaches reported by the community. Often, the EPA confirms the breaches identified by the community.

For example, in the 20112012 financial year, the EPA conducted 39 audits, 11 in response to community concerns and 28 proactive audits. The EPA identified a total of 634 non-compliances with relevant regulatory requirements at the 39 audit sites.[102]

3.2.2 Tasmania

The Agreed Procedures require the Forest Practices Authority to monitor the efficacy of management prescriptions for the protection of threatened species. As discussed above, in response to an independent review questioning the adequacy of the prescriptions and their implementation,[103] the Threatened Fauna Advisor is currently subject to review.

Evidence brought forward in the Wielangta case further highlights monitoring and compliance issues in relation to adaptive management and the implementation of prescriptions designed to protect threatened species. Justice Marshall was highly critical of an expert called on behalf of Forestry Tasmania who had altered his affidavit to modify his critique of forestry practices. In the original affidavit detailing his work in relation to the threatened Broad-toothed Stag Beetle, the expert noted the "inadequacy of existing monitoring programs and the 'somewhat patchy' implementation of 'adaptive management strategy' for conservation of the beetle".[104]

Individual forest practices officers sign compliance certificates, however the Forest Practices Authority conducts random audits of approximately 10 per cent of Forest Practices Plans each year.[105] The Forest Practices Authority investigates incidents arising from these audits, along with incidents reported by forest practices officers or members of the public. In 2011-2012, the Forest Practices Authority completed 92 investigations and identified breaches (of varying degrees) at 67 of the operations investigated. [106]

In terms of statewide compliance auditing, the second five-year review of the Tasmanian RFA, completed in 2008, stated:

> *While [this] Review was able to undertake a general overall assessment of progress in achieving the RFA milestones and commitments, there has not been a comprehensive financial and performance audit of whether or not the objectives of the RFA and the subsequent commitments have been achieved.*
>
> *In light of the fact that the next Review must consider the question of whether the RFA should be extended, it is appropriate that the Parties establish and progressively implement an audit program so that an assessment can be made of the measure of success achieved in meeting the overall objectives.*

The third five year review was due to commence in 2012. The Department of Agriculture, Fisheries and Forestry Annual Report 2011-2012 indicates that "in Tasmania, discussions on the third five-year RFA review have been initiated",[107] however no timeframe is provided. To date, no further details in relation to this review have been released.

3.2.3 Victoria

No independent auditing of compliance with the Codes of Practice took place in Victoria until 2003. Audits of RFA compliance were conducted by the Environment Protection Authority between 2003 and 2007. These audits showed numerous compliance failures, many of which were ongoing and remained unaddressed for years. The audits themselves were problematic, changing from year to year such that audits could not be compared, and did not audit a sufficient number of forestry operations, such that they could have a significant compliance impact.[108] They also failed to show

proper audit methodology, calling into question whether non-compliance would have been found to be even higher had the audits been properly conducted. [109]

The lack of compliance monitoring in relation to forest activities was one of the failures of DSE in fulfilling its role identified in the Auditor-General's Report.

The second five-year review of Victorian RFAs, covering the period to June 2009, was completed in May 2010. It called, among other things, for the delay in undertaking the review to be explained, for additional information on internal compliance audits with the Code of Forest Practices, and for sustainability indicators to be monitored as a matter of priority.

The DSE website states that "the governments are currently preparing a joint response to the recommendations" [in the review]. As of 30 June 2013, no response has been forthcoming.[110]

3.2.4 Western Australia

The Conservation Commission monitors compliance by relevant government agencies with the forest management plan as part of its mid-term and end-of-term audit reviews. As mentioned above in section 3.1.4, the Commission lacks any practical capacity to monitor individual contractor performance or to take enforcement action in response to systemic non-compliance.

Since 2002, DEC has undertaken an integrated monitoring project (FORESTCheck) to provide data on biodiversity changes associated with forest activities. FORESTCheck samples multiple sites across jarrah forests throughout the State, monitoring fungi, lichens, flora and fauna, leaf and soil nutrients and the degree of soil disturbance due to forestry practices.[111]

FORESTCheck is not currently used to monitor site-by-site compliance. The Conservation Commission has recommended that FORESTCheck be reviewed to provide more practical monitoring of forest practices and a more targeted source of information to assess compliance with the forest management plan.

3.3 DISCUSSION AND FINDINGS

Non-compliance with environmental laws and regulations within the various States' forestry regimes obviously limits the efficacy of environment protection measures. In some instances the non-compliances are significant enough to compromise achievement of the environmental objectives of the RFA.

Lack of environmental integrity in forest management practices is compounded by lack of regular, independent monitoring, auditing and use of compliance measures by the State agencies responsible for ensuring the environment protections are implemented. Inadequate monitoring regimes means non-compliances often go unreported and are not penalised or rectified. This places an inappropriate burden on community groups to report breaches.

Several of the reported cases discuss deficiencies in monitoring programmes, however none directly rule on the issue. Despite this, it remains a concern that a lack of monitoring and compliance activity by the State agencies encourages a culture of non-compliance within the forestry operators.

Lack of adequate reviews measuring the performance of RFA forestry activities against environmental protection standards also remains a problem.

As the Hawke Review noted:

> *In order to demonstrate that environmental protection outcomes are being achieved in RFA forests, the RFA reviews need to focus on the performance of the RFAs in achieving their objectives, including protecting biodiversity, and not just report on processes under the agreements.*

The Hawke Review recommended that regular reports assess the capacity of forest management practices to adapt to new information and report on verifiable criteria relating to matters of national environmental significance. Significantly, the review also recommended that the EPBC Act be amended to provide that forestry operations in any State will only enjoy the benefit of section 38 if the Commonwealth is satisfied that conduct and reporting requirements have been met.[112]

Without such an approach, there is no basis for confidence that the RFA regime is meeting the objectives of the EPBC Act.

PART 4 ENFORCEMENT



MARYSVILLE, VICTORIA. PHOTO: TRENT PATTEN.

As outlined above, compliance and monitoring work done to ensure environmental requirements in forestry regulations are enforced is inadequate to non-existent. Lack of opportunities to challenge harvesting quotas or to assess the adequacy of compliance with quotas and management prescriptions contributes to the failure of RFA-accredited regimes to achieve 'ecologically sustainable forest management'.

This section considers enforcement undertaken by State agencies in response to non-compliance with environmental and threatened species regulations. It also considers efforts by third parties, in particular community members concerned about forest protection, to enforce the regulations.

4.1 ENFORCEMENT BY STATE AGENCIES

4.1.1 New South Wales

"Soft tools" ineffective to curb breaches

The EPA is currently responsible for the regulation of forestry activities.

The Office of Environment and Heritage and the former Department of Climate Change and Water (and now the Environment Protection Authority) have tended to use so-called "soft tools" to regulate the industry. The soft tools, used in response to breaches of forestry laws, include warning letters and infringement notices and the imposition of requirements that the Forestry Corporation train its staff to prevent further breaches (the latter is often used in relation to breaches of Aboriginal heritage requirements). For example, a total of 634 non-compliances were identified in the 2011-2012 financial year, however, there were no prosecutions commenced in that year. The EPA relied upon soft tools, is suing 25 letters and 10 penalty notices, and requiring works to be done on 10 occasions.[113]

Anecdotal evidence indicates the Forestry Corporation takes little notice of warning letters. The Department of Climate Change and Water issued the Forestry Corporation with a warning letter on 15 January 2009 in relation to the failure to comply with threatened species licence requirements for Smoky Mouse exclusion zones. The Department reminded the Corporation of its obligation to comply with the relevant requirements and requested it to educate staff and contractors as well.[114] Nonetheless, between 29 April 2009 and 21 May 2009 the Forestry Corporation carried out bushfire hazard reduction burning in a Smoky Mouse exclusion zone, for which it was prosecuted and fined by the Land and Environment Court.

It is clear that soft tools are not effective because there is no indication of any behavioural change flowing from their use.

Few prosecutions and no third party standing

It is concerning that so few prosecutions are being commenced given the large numbers of breaches by the Forestry Corporation. Only nine prosecutions have been brought since 1992, and only two since the RFA agreements were signed over a decade ago, in 2004[115] and 2011.[116]

The Land and Environment Court of NSW recently noted that the penalty of $22,000 for the offence of breaching the *National Parks and Wildlife Act 1974*, in that case by contravening a threatened species licence attached to an Integrated Forestry Operations Approval, "is exceedingly low compared to penalties for other environmental offences, particularly given the seriousness with which the community has come to view environmental offences".[117]

The EDONSW has recommended that the maximum penalties and enforcement mechanisms available under relevant legislation be reviewed and strengthened, and that penalties of up to $1.1 million and terms of imprisonment would be appropriate and in line with penalties for breaches of other environmental laws.[118]

Pressure on community to conduct audits and reporting of breaches

The failure by the regulator to adequately audit and oversee forestry activities places pressure on community groups who themselves undertake audits of logged forests and report breaches to the regulator, as discussed above in section 3.2.1.

4.1.2 Tasmania

The Forest Practices Code, which sets out the standards that must be met by the Forest Practices Plans, has been criticised for its use of broad statements that are difficult to enforce. For example, the report of the Panel reviewing the biodiversity provisions of the Forest Practices Code recommended "the inclusion of measurable objectives in the Forest Practices Code" in order to better achieve sustainable forest management.[119]

Enforcement activities

Forest Practices Officers have a range of enforcement options, including warnings, rectification notices, fines and prosecutions.[120]

Under section 47B, the Forest Practices Authority may also elect to impose a fine as an alternative to prosecution. Fines imposed under that provision are to be:

- equal to twice the amount required to make good the damage; or
- if the offence is "particularly serious" or it is not possible to make good the damage, an amount that the Forest Practices Authority considers will "constitute an appropriate sanction and deterrent".

If an offender agrees to pay the fine, the Forest Practices Authority will waive any proceedings and allow the offender to retain the timber obtained through the unlawful harvesting or clearing and conversion.

In 2011-2012, the Forest Practices Authority completed 92 investigations[121], with the following outcomes:

- **No breach:** 25
- **Minor breach (no serious environmental harm):** 13
- **Notice requiring corrective action / formal warning:** 39
- **Penalty imposed:** 6
- **Referred to courts:** 2
- **Apparent breach but insufficient evidence or out of time to proceed with legal action:** 7

Maximum penalties for forestry offences are currently $130,000, considerably lower than fines available under the EPBC Act. More significantly, the fines imposed are generally much less than the maximum. For example, in 2011-2012 the total sum of the six fines imposed was $17,000.[122]

This included a fine of $6,000 for unlawful clearing in relation to a wildlife habitat clump and a known Grey Goshawk nest, and a further fine of $4,000 for clearing in a streamside reserve without a forest practices plan. Considering that the offenders are able to retain the wood harvested in breach of the relevant provisions, it is questionable whether fines of such low magnitude have any deterrent effect.

Very few matters are referred for prosecution, and those that have been referred may not be pursued or may fail due to insufficient evidence. A complaint in relation to unlawful clearing of 31 hectares of land was resolved two years later when the offender pleaded guilty and was fined $4,000. A further complaint relating to the clearance of 43 hectares of threatened species habitat near St Helens was referred for prosecution in 2009, but has yet to be resolved.[123]

4.1.3 Victoria

DEPI is now the government agency responsible for regulating forestry activities, including enforcement with respect to breaches of forestry regulations.

DSE, the agency formerly responsible, did not have a compliance and enforcement policy.[124]

The lack of a strategic approach to monitoring and compliance means that DSE's enforcement actions have not been effective. DSE also provided limited public data about its enforcement activities.[125]

These facts suggest that DSE did not have an enforcement culture.

The only real source of publicly available data on DSE's regulatory and enforcement activity is from the Victorian Competition and Efficiency Commission (VCEC) annual 'Victorian Regulatory System' reports. These reports contain high-level data on DSE's regulatory activity; however, this data is the combined data for all regulatory activity of the DSE, under the eight different Acts and eighteen regulations it administers. It is therefore impossible to see what proportion of regulatory activity and enforcement work relates to forestry activities and the actions of VicForests.

However, there is clear evidence to suggest that the DSE approach to enforcement, in relation to breaches of biodiversity and threatened species protection measures, has been grossly inadequate. There is no reason to believe that this culture will be improved in relation to forestry under the newly formed DEPI.

The EEG case indicates fundamental failings in DSE's approach to enforcement. The information that ultimately lead to the Court finding that VicForests had breached the Code of Practice for Timber Production and the Forest Management Plan in relation to several species was made available to DSE prior to the commencement of proceedings. DSE did not take any enforcement action upon receiving the information.

The maximum penalty for not complying with a Timber Release Plan and its conditions is, in the case of a corporation, $33,801.60.[126] For logging not done in accordance with a Timber Release Plan, the offences of harming native flora without a licence which has a maximum penalty of $7,042,[127] or destroying native vegetation without a permit, may also be available.

4.1.4 Western Australia

Conservation groups in WA remain critical of the lack of enforcement action taken in response to breaches of logging guidelines by logging contractors and the Forest Products Commission.[128]

The Conservation Commission lacks enforcement powers in relation to forestry activities, and DEC have not taken strong action against contractors for breaches of environmental legislation.[129]

The EPA has recommended amendments to empower the Commission and DEC to take appropriate enforcement action. No amendments have been made to date, however the Conservation Commission has proposed amendments to the *Conservation and Land Management Act 1984* to require advice to the Minister of Environment to be tabled in Parliament where substantial non-compliance with the Forest Management Plan is likely to lead to serious environmental consequences.[130]

4.1.5 Findings

The enforcement culture of the regulatory agencies examined is inadequate to achieve compliance in the forestry sector. Of particular concern is a lack of willingness to undertake prosecutions in response to more serious offences, or to impose fines at the higher end of the range. As a result, there is no serious disincentive to non-compliance with forestry and environmental regulations, including those intended to protect the environment and biodiversity.

Also concerning is the lack of information about enforcement activities, particularly in Victoria. Publishing information about enforcement actions is an important deterrent. It is also a means of assuring the public that regulations designed to protect the environment are being taken seriously and that the money paid to regulators is well spent.

4.2 ENFORCEMENT BY THE COMMONWEALTH

The Federal Department of Sustainability, Environment, Water, Populations and Communities has an enforcement policy, and in recent times has taken several enforcement actions relating to the clearing of native vegetation. Penalties for breaches of the EPBC Act are generally more significant than penalties able to be imposed for breaches of State legislation.

It should be noted that none of the recent enforcement actions relate to forestry. It should also be noted that the Federal Government has done very little in relation to compliance and enforcement in the forestry sector since the signing of the RFAs, at least in the public sphere. It is possible the Federal Government has discussed issues around RFAs with State governments 'behind closed doors', although if this has occurred, it has not resulted in any behavioural change. Although the Federal Government is a party to the RFAs it seems that the Federal Government chooses to leave RFA-related matters to the States.

This is not acceptable. The Federal Government should take some responsibility for problems with the RFAs. As discussed above, there are some actions available under the RFAs that the Federal Government can trigger in the event of a breach of the RFAs. The continued failure of the Federal Government to take action in response to ongoing breaches of the RFAs makes it complicit in the failure of the RFAs to protect matters of national environmental significance.

4.3 THIRD PARTY ENFORCEMENT

Third party enforcement refers to members of the community bringing Court proceedings in response to breaches of forestry and environment protection laws. This section discusses opportunities for, and obstacles to, bringing third party enforcement proceedings, as well as some of the cases.

4.3.1 New South Wales

Up until the mid-1980s the Forestry Corporation was in effect self-regulating. However by 1997 the Corporation was required to comply with environmental impact assessment laws, and seek legal approvals. This was due to third party public interest litigation, public prsessure and the enactment of legislation. In 1998 the legal regime that governs forestry in NSW was radically altered with the enactment of the *Forestry and National Park Estate Act* as a precursor to the RFAs.

The *Forestry and National Park Estate Act* revoked open standing provisions that had applied prior to 1998. Under section 40 of that Act, which is now section 69ZA of the *Forestry Act 2012*, members of the public are effectively barred from bringing proceedings alleging breaches of:

- an RFA or Forest Agreement;
- the Forestry Act;
- an Integrated Forestry Operations Approval; or
- the conditions of a licence issued under such an approval, such as a threatened species licence or an environment protection licence.

Nevertheless, this may not restrict common law actions such as nuisance, nor does it appear to restrict the inherent jurisdiction of the courts to examine questions of compliance with the law. However, third parties would need to have standing to bring proceedings, requiring the satisfaction of the test that they have an "interest" in the proceedings that is not merely emotional or intellectual, rather than relying upon the statutory provisions that give access to the courts.[131]

These restrictions on third party enforcement reduce the transparency of government decision-making. They also reduce accountability by giving rise to the possibility that the timber industry may breach environmental laws without fear of third party enforcement actions. Often in the past, it has been public interest litigation that has revealed and proven non-compliance with environmental laws in public forests, rather than the efforts of regulatory agencies.

4.3.2 Tasmania

The vast majority of forestry activities are not subject to the planning system because they take place on public land or in Private Timber Reserves where the planning system does not apply. In matters not subject to the planning system there are no automatic third party rights to standing. As a result, there are very limited opportunities for civil enforcement actions by third parties, in contrast to the opportunities available to commence enforcement proceedings for breaches of a planning permit or environment protection notice.

The only basis on which adjoining owners can object to land being declared a Private Timber Reserve (and becoming exempt from the planning scheme) is if they will suffer a direct and material disadvantage as a result of the declaration. The loss of an opportunity to influence the planning decision or take civil enforcement action is not considered a material disadvantage for that purpose.[132]

In *Gunns Ltd v Kingborough Council*,[133] the local council raised concerns that the fact that only 10 per cent of Forest Practices Plans are audited made the system "wide open for non-observance" and unable to guarantee that natural values would be protected. The Tribunal acknowledged the concern (at [81]) but held that, because this was a rare situation in which a planning permit would be issued for the forestry operations, the powers held by the council to enforce its permit conditions was sufficient. Recognising the council's lack of expertise to assess compliance with issues such as visual amenity and erosion, the Tribunal included a further condition requiring the forestry operator to provide sufficient information to allow council to determine whether appropriate controls had been implemented.

In the absence of civil enforcement options under the Tasmanian forest practices system, Senator Brown attempted, in the *Wielangta* case, to seek an injunction under the EPBC Act. As outlined above, Senator Brown alleged that forestry activities did not enjoy the protection of section 38, and therefore required approval under the EPBC Act. Interceding amendments to the RFA meant that any operations carried out under the Tasmanian forest practices system were deemed to be "in accordance with" the RFA and exempt from the operation of the EPBC Act. As a result, it is now almost impossible for third parties to seek injunctive relief (ie an order from the Court that the forestry operations cease) if they consider that forestry operations would have a significant impact on a listed threatened species or community.

4.3.3 Victoria

Forestry undertaken on public land and in accordance with the Code of Practice for Timber Production does not require a planning permit.[134] If the planning laws do not apply, there are no statutory rights for third parties to enforce breaches of the forestry laws and regulations or biodiversity protection laws and regulations. As a consequence, the most significant cases enforcing breaches of forestry laws have been brought in the equity division of the Supreme Court.[135]

An important hurdle to bringing such proceedings is the requirement to establish standing. Third parties must meet the common law test for standing which is that they have more than a "mere emotional or intellectual concern". In the EEG case about Brown Mountain, Environment East Gippsland's standing to bring the proceedings was challenged by VicForests. Environment East Gippsland's long concern for, and involvement in, the protection of Brown Mountain meant that the group was found to have standing. However, the test third parties must meet to be able to bring proceedings is a demanding one, and therefore a significant barrier.

In spite of this barrier, as well as the costs barriers discussed below in section 4.4, frustration by members of the community at the lack of enforcement action by the DSE has led to several third party enforcement cases being brought in Victoria. Some have highlighted a series of problems in the way biodiversity protection laws are interpreted and acted upon by DSE and VicForests.

The EEG case was brought by a community group and created important precedents in relation to the standing of third parties, the application of the precautionary principle in relation to threatened species, and the enforceability of the Code of Practice for Timber Production. It basically established that VicForests practice in approach to threatened species protection requirements has been contrary to the *Flora and Fauna Guarantee Act 1988*. The case brought by MyEnvironment, although unsuccessful, drew attention to the fact that the forestry laws in place are inadequate to protect the Leadbeater's Possum, one of Victoria's most endangered species. These cases have resulted in a change in approach by VicForests, such that compliance and documentation are given more emphasis than previously.[136] Whether this also translates into behavioural change is yet to be seen.

Two years prior to the MyEnvironment case, a community group, the Flora and Fauna Research Collective, also attempted a private prosecution in the Magistrates Court in relation to logging of old trees which were Leadbeater's Possum habitat. This case was brought by the Collective because the DSE had chosen not to prosecute, despite being made aware of the issue.[137]

There have also been two cases in which protesters, who were charged with trespass, defended their charges by arguing that the logging being undertaken was unlawful.[138] In both cases, the protesters' charges were ultimately dropped, following findings by the Court that the logging was being undertaken unlawfully. Whilst these cases are not third party enforcement proceedings, they demonstrate the important role the community has had in calling forestry operators to account, when breaching environmental regulations during forestry activities.

4.3.4 Western Australia

In the limited number of enforcement cases brought by third parties in relation to forest practices, arguments relating to standing have been raised. In *Bridgetown-Greenbushes*, the Court held that the community group had standing to seek relief, but ultimately dismissed the cause of action.[139]

As with all States, community groups lack financial and human resources, making it difficult to compete with the professional resources generally available to government agencies or forestry companies. For example, in the Southwest Forest Defence Foundation case, pleadings were struck out for failing to disclose a cause of action due largely to inadequacies in the preparation of the pleadings.[140]

4.4 COSTS

Most cases to enforce forestry laws in NSW, Victoria and Western Australia are commenced in the Supreme Court. The usual rule in the Supreme Court is that the unsuccessful party pays the costs of the successful party.

However, the Court does have an overall discretion about what orders it makes about costs. This means that the Court may decide that, with respect to a case brought in the public interest, it is appropriate that there be no order for costs. Community members considering taking proceedings to uphold forestry laws have no way of knowing in advance whether such an order will be made.

An order of this nature was sought in *MyEnvironment Inc v VicForests*.[141] The Court was satisfied that the case was brought in the public interest, related to the interpretation of legislation, and that the bringing of the action prompted the defendant to amend its logging proposals to restrict the area to be logged and abandon clearfelling plans. Nevertheless, costs were awarded to the defendant, VicForests, on the basis of the usual rule for costs. This case is an example of a public interest community group bearing the burden of enforcement. If this action had not been brought, the defendant would not have conceded the changes to its plan.

Costs have also generally been awarded against third parties where they pursue actions in the Federal Court in relation to compliance with RFA provisions. Costs were awarded against Senator Brown in full in the *Wielangta* case.

In the 2007 Tasmanian Pulp Mill case, the Court reduced the percentage of costs for which The Wilderness Society was responsible on the basis of the public interest nature of the proceedings.[142]

Marshall J held that the broader test of standing under the EPBC Act did not alter the discretion to award costs, but agreed that "public interest" factors were relevant to how that discretion was exercised. He was satisfied that The Wilderness Society was acting in the public interest, but the case was not a test case and did not raise issues of particular legal significance. Overall, he considered that it was appropriate to reduce the amount The Wilderness Society paid to 70 per cent of the Minister's costs.

4.5 FINDINGS

Enforcement should primarily be the responsibility of the relevant government agencies. However, the evidence above indicates that State agencies do not take their enforcement roles seriously and enforcement by the States is deficient.



NUMBAT, WARRUP FOREST, WESTERN AUSTRALIA.
PHOTO: PANDA BROAD.

Significant procedural barriers and costs risks mean third party enforcement can only occur in limited circumstances, and be undertaken by groups with significant involvement and commitment to an issue, as well as access to significant resources. This means in circumstances where government is failing to enforce compliance with forestry laws, it is difficult for the community to pick up the slack. Nevertheless, there have been several instances when communities have taken enforcement proceedings and in doing so, have played an essential role in drawing attention to the failures of forestry agencies to comply with environment protection laws.

PART 5 CONFLICT

One of the main objectives of the RFA process was to reduce conflict between the forestry industry and conservationists and environmentalists, concerned about the impacts of forestry on the environment. This part of the report looks at whether this objective has been achieved.

5.1 New South Wales

In NSW there has been significant conflict as a result of community frustration with ongoing breaches of forestry laws, particularly in response to the logging of forests that are of environmental significance or contain Aboriginal heritage of special importance to the community. Numerous protests across the state in recent years have resulted in a large number of criminal cases brought against forestry protesters. The cost to the police, the Crown and the Corporation in bringing these proceedings has been significant. However, in many cases the Court has found that the protester is not guilty or dismissed the charges.

In *FNSW v Hughes & Ors*,[143] a matter in which there were 11 defendants facing 36 charges, Magistrate Pearce stated that:

> *(t)here is something repugnant about this case. Forests NSW were quite clearly logging an Aboriginal Place, and then to continue to log and then people being pursued because they protested the illegal logging, there is some irony.*

In Police v Castle[144] the Court stated that:

> *(t)he logging operation which is the subject of the current case had been approved and undertaken on a flawed basis as the National Parks and Wildlife Act imposes certain restrictions upon activities which may be undertaken in Aboriginal places. There was evidence that the proper authorities had been alerted to the questionable legality of the logging operation but the operation was continuing. The move-on direction by the police was unlawful under s 200 of the Law Enforcement Powers and Responsibilities Act. The 6 charges were dismissed.*

In *Police v Flint, Daines and McLean*[145] three protesters were charged under the Forestry Regulation 2009 (NSW).[146] Counsel for the defence argued that for forestry regulations to apply, there had to be a lawful logging operation. The Court found that the logging was unlawful in that the operation required approval under planning legislation because the area was not covered by an Integrated Forestry Operations Approval, and such approval had not been obtained and was required due to the significant environmental impacts.[147]

In *Police v Bertram, Daines, Stone and Whan*[148] proceedings were brought against four people for protests against forestry activities in the Bermagui State Forest. The protests were motivated by a large number of breaches of forestry laws in an adjacent forest that had been reported by the accused and confirmed by the EPA. In police evidence it was submitted that police had advised the Forestry Corporation to declare a prohibited area zone "to make it easier to arrest protesters". In their evidence the Forestry Corporation stated they wanted the defendants "to be prevented from re-entering the compartment". It was proven, by reference to the relevant legislation, that this was contrary to the *Forestry Act 1916* (NSW) which provides that a prohibited area is for the safety of persons.

It became obvious through the Prosecution's witnesses statements that the object of the arrests was to impose bail conditions so that the accused would not return to the compartment. Bail conditions specified that defendants could not enter any State forest, broadcast the conditions of bail by speaking to the media, nor associate with each other. The Court, in delivering judgment, stated there was "something persecutory in the (former) Forests NSW and police conduct".[149] All charges were dismissed.

Applications for compensation are also often made by the Forestry Corporation against protesters that are charged, but these applications have largely been unsuccessful.

5.2 Tasmania

In Tasmania, actions in Court indicate that a high level of conflict remains. Criminal and civil actions continue to be taken against forest protesters for trespass, nuisance and property damage.

The civil action commenced by Gunns Limited against twenty individuals and organisations in 2004 (**the Gunns 20 case**) exemplifies the ongoing conflict in relation to the use and protection of Tasmania's forests. In that case, Gunns

Limited sought nearly $7 million in relation to protest actions, campaigns and allegations regarding health issues, which the company claimed had damaged its business and reputation.[150]

When sentencing in criminal matters, magistrates regularly comment that protesters have caused inconvenience, disrupted commercial operations and "put others at risk".[151]

While most charges attract no conviction, or a small fine, a protester was gaoled for three months in February 2012 after breaching his bail conditions by participating in further protest action. The defendant was also given a three-month suspended sentence for trespass and nuisance associated with the protest action.[152]

In 2010, two forestry workers were convicted of assault charges after smashing the windows of a car in which two protesters were sheltering, and proceeding to kick one of the protesters. The workers argued that the protesters had consented to the assault by participating in protest action with the knowledge that violence could ensue. The Magistrate rejected that defence and fined both workers.[153]

Applications are increasingly being made seeking compensation for costs and economic losses associated with protest actions. In 2007, Forestry Tasmania and the police commenced proceedings seeking to recover $10,000 from a protester who had been arrested for sitting on a tall tripod blocking road access to the Weld Valley.[154] The police subsequently withdrew their application and Forestry Tasmania's application was dismissed.

In 2009, Gunns Ltd sought aggravated and exemplary damages from 13 protesters who had locked on to equipment at a woodchip facility (the "Triabunna 13"). The damages were claimed on the basis that the protesters had disrupted business, publicised political beliefs and put police officers to trouble and expense in removing them. The defendants sought to rely on "penalty privilege" to refuse to answer interrogatories on the basis that their answers may incriminate them. The court held that the aggravated damages claimed were incidental to compensatory damages so were not a "penalty" that would attract the protection against self-incrimination.[155] The matter was settled out of court before any determination in relation to damages was made.

The Magistrates Court has expressed some sympathy towards awarding compensation against protesters, but is yet to do so. In *Lusted v Doornbusch*, the Magistrate stated that she would "readily accept the principle that Ms Doornbusch should compensate the truck operator for loss arising from this offence. As I have already pointed out one of her aims was to disrupt the truck operations." However, she was not satisfied that the limited compensation categories allowed for would extend to the economic losses being sought. [156]

A discussion paper was released by the Minister for Police and Emergency Management in late 2011 proposing changes to the *Police Offences Act 1935* to allow "unusual" costs associated with protest actions, such as the cost of removing "lock-ons" or dismantling tree sits, to be recovered from protesters.[157] No action has been taken by the government in response to the discussion paper to date.

5.3 Victoria

In *Hastings v Brennan*, logging protesters appealed against their conviction to the Victorian Supreme Court. While the court in that case held in favour of the protesters, the appeal highlights institutional bias against logging protesters where the first appeal judge failed to consider that the protesters did not act unlawfully if the logging against which they protested was itself unlawful. In that case, in addition to failing to consider evidence that the relevant logging was itself unlawful, the first appeal judge also made statements indicating that the guilt of the appellants had been predetermined.[158]

Some of the 'behind the scenes' incidents relating to the *MyEnvironment* case are also quite instructive as to the nature of the relationship between members of the community concerned about the impact of the environment, and the government and forestry agencies involved in logging. For example, at the end of the MyEnvironment case, the Minister said that the case was brought in bad faith, contrary to findings by the judge that the case was brought in good faith and in the public interest. The Minister later publicly apologised for these comments.[159] In addition, when (peacefully) protesting the logging of coupes in Toolangi, several protesters were violently assaulted by foresters. These assaults were captured on film. When shown to the relevant Minister, he described the protesters, in a public interview, as "environmental terrorists of the worst kind".

Correspondence received from VicForests indicates that the VicForests has expended in excess of $3 million on court cases brought by members of the community in relation to alleged unlawful logging activity, in the last couple of years.

5.4 Western Australia

Protests against logging continue throughout the south west of Western Australia, with many protesters charged with trespass offences. Small fines are generally imposed, however in some instances suspended sentences or community service has been ordered.[160]

5.5 Findings

As stated above, one of the objectives of the RFA process was to reduce conflict in the communities as to whether logging should go ahead. The above instances show that this objective has not been achieved.

The environment protection measures and processes established and recognised by the RFAs have not addressed many of the concerns of community members regarding the impacts of logging on biodiversity and threatened species. Ongoing conflict, often culminating in protest action, should be viewed in the context of lack of enforcement action by State agencies, the inability of the Commonwealth Government to intervene in relation to RFA forest activities, and the complexity, uncertainty and expense facing third parties undertaking enforcement action.



ANNEXURE 1. OVERVIEW OF STATE LEGAL REGIMES

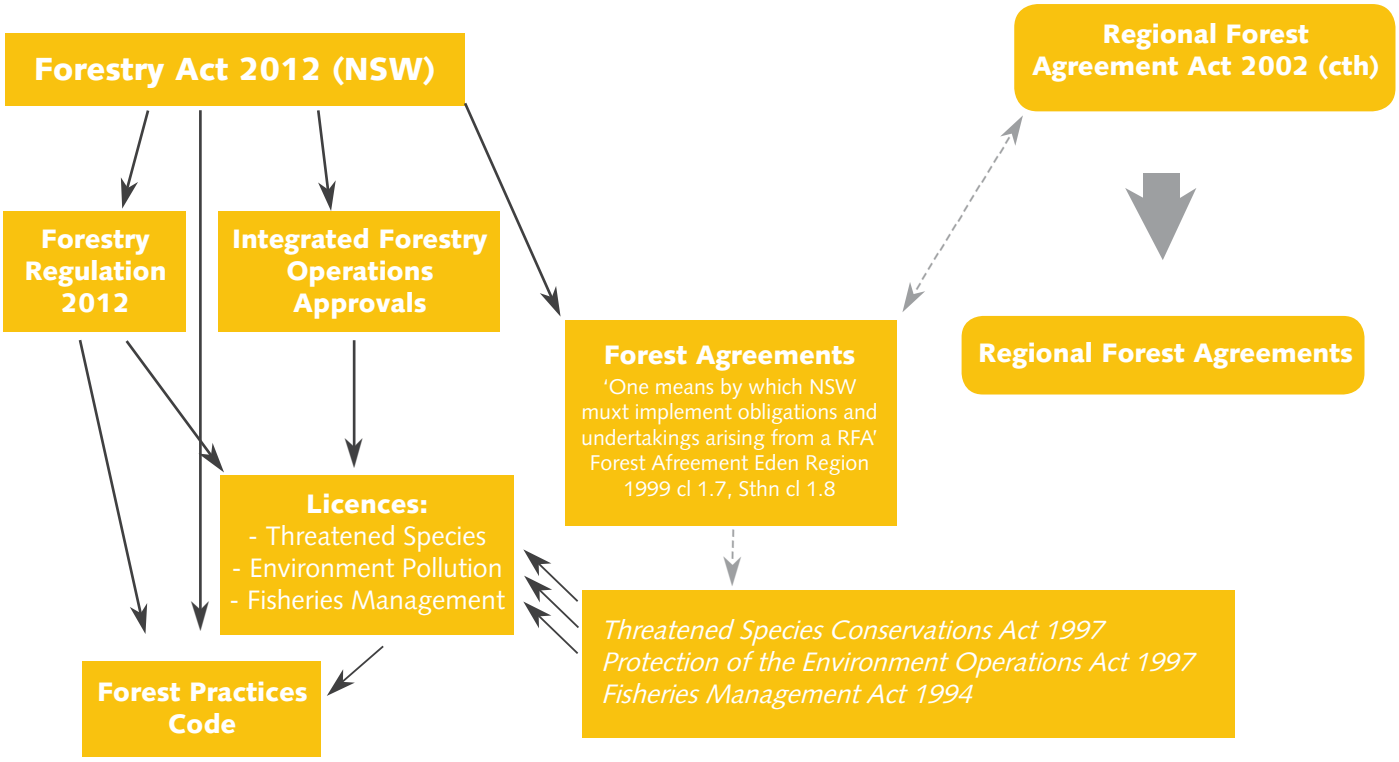


Figure 1: Regulation of forestry operations in NSW

The laws governing native forestry activities and the implementation of obligations under the RFAs vary considerably between the States. It is therefore convenient to set out how the various legal regimes work.

NEW SOUTH WALES

Three RFAs operate in NSW:

- the *Regional Forest Agreement for the Eden Region of New South Wales* (Eden RFA) – signed in August 1999;
- the *Regional Forest Agreement for North East New South Wales* (North East RFA) – signed in March 2000; and
- the *Regional Forest Agreement for Southern New South Wales* (Southern RFA) – signed in April 2001.

Legislation was enacted specifically to implement the NSW RFAs. The *Forestry and National Park Estate Act 1998* (NSW) established a regime comprising Forest Agreements (as distinct from RFAs), which are prepared for each of the RFA regions in NSW, and Integrated Forestry Operations Approvals (**IFOAs**). The 1998 Act and the *Forestry Act 1919* have recently been replaced by the *Forestry Act 2012*. The purpose of the *Forestry Act 2012* is to provide for the dedication, management and use of State forests and other Crown-timber land, and to constitute the Forestry Corporation of New South Wales as a statutory State-owned corporation. Those parts of the 1998 Act that relate to forestry agreements and Integrated Forestry Operations Approvals have been transferred to the *Forestry Act 2012* as Parts 5A and 5B respectively. However, the transfer is not intended to change the existing ministerial arrangements in relation to those provisions, nor the current integrated approval system.

Forest Agreements set out the principles and strategic framework for the cooperative management of NSW's State forests by the Office of Environment and Heritage, the Department of Primary Industries and the Forestry Corporation. They mirror the terms of the RFAs in many respects. Integrated Forestry Operations Approvals describe the types of activities and operations permitted on the land to which they apply. Their main purpose is

to provide more detailed requirements and to integrate the regulatory regimes for environmental assessment, protection of the environment and threatened species conservation under other legislation.

Integrated Forestry Operations Approvals contain detailed management prescriptions and include the terms of licences under the *Protection of the Environment Operations Act 1997, Threatened Species Conservation Act 1995, and Fisheries Management Act 1994*.[161] Terms of licences cannot be varied or revoked under the relevant Act.[162] While the terms of the licences are to be enforced in the same way as any other licence under the relevant Act,[163] third party rights to remedy or restrain a breach of the Forestry Act 2012, including the breach of an Integrated Forestry Operations Approval or the licences attached to it, are specifically excluded.[164]

Environmental assessment and approval under Parts 4 and 5 of the *Environmental Planning and Assessment Act 1979* is not required for forestry operations undertaken under an Integrated Forestry Operations Approval.[165] Stop work orders and interim protection orders under the *National Parks and Wildlife Act 1974* and the *Threatened Species Conservation Act 1995* do not apply to forestry operations carried out under an Integrated Forestry Operations Approval, with the exception of an order for the protection of an Aboriginal object or place.[166]

Many State forests in NSW contain flora reserves and forest management zones. These areas often contain rare ecosystem areas; old growth forests; rainforests; and threatened species, populations and ecological communities. Forest management zones are divided into categories,[167] and logging operations are variously restricted or excluded from these areas under the Integrated Forestry Operations Approvals.[168]

Table 1: Forestry legislation, NSW

LEGISLATION	ACTIONS COVERED	COMMENTS
Forestry Act 2012	• Establishment of Forestry Corporation of NSW • Declaration of State forests, flora reserves and special management zones • Licensing to take timber and forest products • Making of *Forest Agreements* (Part 5A) • Making of *Integrated Forestry Operations Approvals* (IFOAs) (Part 5B) • Investigations and enforcement powers	*Forest Agreements* mirror the terms of the NSW RFAs Integrated Forestry Operations Approvals contain detailed management prescriptions and include terms of licences under *Protection of the Environment Operations Act 1997, Threatened Species Conservation Act 1995, Fisheries Management Act 1994.* No third party rights to remedy or restrain a breach of the *Forestry Act 2012*
Threatened Species Conservation Act 1995	• Listing of threatened species, populations and ecological communities, and key threatening processes • Declaration of critical habitat for species • Development of recovery plans and threat abatement plans. • Licensing to harm or pick threatened species or damage habitat • Stop work orders • Biodiversity certification and biobanking	Threatened species licence incorporated into IFOA Offences set out in National Parks and Wildlife Act 1974 Stop work orders do not apply to forestry operations carried out under an IFOA

LEGISLATION	ACTIONS COVERED	COMMENTS
Protection of the Environment Operations Act 1997	• Creates offences for pollution of the environment without a licence • Provides for regulatory authorities for pollution, including the Environmental Protection Authority	FOAs include terms of licence under *Protection of the Environment Operations Act 1997*
Fisheries Management Act 1994	• Creates offences for possession, take or sale of prohibited size, quantity or species of fish • Protection of aquatic habitats • Listing of threatened species, populations and ecological communities and key threatening processes • Declaration of critical habitat for species • Development of recovery plans, threat abatement plans • Creates offences of harming threatened species, populations or ecological communities without a licence	IFOAs include terms of licence under *Fisheries Management Act 1994*
National Parks and Wildlife Act 1974	• Provides for the protection and management of national parks, historic sites, conservation areas, nature reserves and Aboriginal areas • Creates offences for harm or damage to threatened species, populations or ecological communities, or to Aboriginal objects or places, without a licence or permit • Provides for stop work orders, interim protection orders and remediation directions	Stop work orders and interim protection orders do not apply to forestry operations carried out under an IFOA, except for the protection of an Aboriginal object or place
Environmental Planning and Assessment Act 1979	• Provides for the making of environmental planning instruments • Provides mechanisms for environmental assessment of developments (Part 4) and activities (Part 5)	Environmental planning instruments cannot prohibit, require development consent, or otherwise restrict forestry operations carried out under an IFOA Parts 4 and 5 do not apply to forestry operations carried out under an IFOA

TASMANIA

In Tasmania, forestry operations (including harvesting, clearing and conversion of threatened native vegetation, reafforestation and associated roadworks and quarrying activities) are subject to the *Forest Practices Act 1985*. Forestry activities must be conducted in accordance with the conditions of a certified Forest Practices Plan (**FPP**)[169] which must meet the standards set out in the Forest Practices Code 2000.

Forestry Tasmania is the government-owned company responsible for managing State forests. Forestry operations in State forests are not subject to the *Land Use Planning and Approvals Act 1993* (**LUPAA**), and do not require a planning permit to proceed. Forestry operations on private land will be subject to LUPAA, unless the land has been declared a Private Timber Reserve (**PTR**). For the majority of plantation and harvesting activities, the landowner applies for (and is granted) declaration of the land as a PTR in order to avoid the need to obtain a planning permit. As a consequence, the Forest Practices Code and FPP provisions are generally the only standards applied in respect of forestry operations, and there are

Table 2: Forestry legislation, Tasmania

LEGISLATION	ACTIONS COVERED	COMMENTS
Forest Practices Act 1985 • Forest Practices Code 2000	• Development of Forest Practices Code • Declaration of Private Timber Reserves • Certification of Forest Practices Plans • Development of wood production • Appointment of Forest Practices Officers to develop and monitor implementation of FPPs • Establishes Forest Practices Authority	Forest practices plans no longer required for clearing associated with building and development
Forestry Act 1920 • Sustainability Charter (which replaced the regional forest management plans)	• Development of Forest Management Plans • Declaration of forest reserves • Entering wood supply agreements • Closing forest roads	
Threatened Species Protection Act 1995	• Listing of species • Development of listing statements, threat abatement plans and recovery plans • Permits to take threatened species	No permit to take is required if the "taking" is done under a forest practices plan
Nature Conservation Act 2002	• Listing of threatened native vegetation communities	A forest practices plan is required for any clearing and conversion of listed communities, and will not be issued unless the clearance is justified by "exceptional circumstances", will result in an "overall environmental benefit" or will not detract from the conservation of the community.

LEGISLATION	ACTIONS COVERED	COMMENTS
Public Land (Forests and Administration) Act 1991	• Commission to conduct inquiries into use of public land	The Commission recommended declaration of the original RFA reserves.
Land Use Planning and Approvals Act 1993	• Permits for forest activities other than on State forest or a private timber reserve	

VICTORIA[170]

The rules for logging in Victoria, on both public and private land, are set out in the *Code of Forest Practices for Timber Production (2007)* (**the Code**).[171] *The Sustainable Forests (Timber) Act 2004* (**SFT Act**) requires anyone carrying out logging on State Forests in Victoria to comply with the Code.[172] Logging done on private land must comply with the applicable planning scheme, all of which require that logging be conducted in accordance with the Code.

Logging regimes in Victoria vary between East and West Victoria. In Western Victoria, logging is managed by the Department of Sustainability and Environment (**DSE**) (to be merged with the Department of Primary Industries with the formation of the new Department of Environment and Primary Industries (**DEPI**)), and carried out by private forest operators. Such operators must obtain a Forest Produce Licence, which is subject to conditions.

The bulk of logging in Victoria occurs in Eastern Victoria and is carried out by VicForests, which is a State-owned business enterprise established in 2004 to undertake forestry operations on public land. When VicForests began operating, the State Government guaranteed fifteen years' access to State Forests for harvesting through an Allocation Order.[173] The order, approved by the Minister for Agriculture and Food Security, has been amended several times (2007, 2009, 2010 – twice, 2012), increasing both available and allocated areas, and at the end of the first five-year period was extended for a further five years, to 2024.

The Code requires that all commercial logging in State Forests be carried out in accordance with a series of plans, outlined below, which set out in increasing detail the areas that are to be protected, the areas that are to be logged, and the site-specific conditions that apply to logging in these areas. These plans must be approved by a State Government authority, which is currently the Secretary of the Department of Environment and Primary Industries (**DEPI**).

The first of these plans are Forest Management Plans. There is a Forest Management Plan for each Forest Management Area in Victoria. Each Forest Management Plan sets out the framework and objectives for the management of the areas of State Forest within its boundaries, including which areas are to be conserved and which are to be used for logging. It does so by dividing the Forest Management Areas into three different zones:

General Management Zone – Areas of State Forest which can be used for a range of activities, including logging.

Special Management Zone – Areas which can only be used for a range of activities, such as logging, provided certain conditions are met.

Special Protection Zones – Areas which are set aside for protection. Logging is not permitted in Special Protection Zones.

Forest Management Plans also have specific prescriptions for particular species and ecological communities.

The second set of plans that must be prepared before logging can commence are Wood Utilisation Plans or Timber Release Plans, which identify areas to be logged and the location of associated access roads, and set out the approximate timing of the logging. For DSE/DEPI-managed operations (mostly in western Victoria) a

Wood Utilisation Plan (**WUP**) must be prepared. Wood Utilisation Plans are approved by DSE/DEPI and are prepared annually. For VicForests managed operations (in eastern Victoria), VicForests must prepare a Timber Release Plan (T**RP**) before being allowed to log native forest allocated through an allocation order. TRPs apply for five years, and must be approved by the Secretary of the DPI.[174] In addition, at least one TRP amendment is typically applied for and approved each year.

Logging cannot begin until the relevant TRP or the WUP is approved.

Finally, prior to the commencement of logging, a Forest Coupe Plan must be prepared for each logging operation, which sets out the precise areas to be logged and the period during which operations are to occur. These plans also contain site specific environment protection measures, including buffers from waterways and rainforest and threatened species protection measures. Timber can only be felled within the designated boundaries set out in the Forest Coupe Plan.

It should be noted that forestry operations authorised on public land and done in accordance with the Code are exempt from the need to obtain planning permission.

Table 3: Forestry legislation, Victoria

LEGISLATION	ACTIONS COVERED	COMMENTS
Forests Act 1958	• Development of forest management plans • Issuing of Forest Produce licences	Applies to logging done in Western Victoria
Sustainable Forests (Timber) Act 2004	• Allocates timber in State Forests to VicForests, via allocation orders and timber release plans • Compliance with the Code of Practice for Timber Production compulsory for all logging on public land	Allocation regime applies to logging done in Eastern Victoria
Planning and Environment Act	• Provides for preparation of and compliance with planning schemes • Planning schemes require logging done on private land comply with the Code	Planning permission not required for logging done on public land
Conservation, Forests and Lands Act 1987	• Provides for preparation of the Code of Practice for Timber Production • Requires preparation of Wood Utilisation Plans	Wood Utilisation Plans required for logging of timber not allocated to VicForests, on public land (mostly in Western Victoria)
Flora and Fauna Guarantee Act 1988	• Requires preparation of 'Action Statements' for threatened species	Code requires compliance with Action Statements[175]

WESTERN AUSTRALIA

The *South-West Forests Regional Forest Agreement* (**South West Forests RFA**) was entered into in 1999, covering all State forests and timber reserves in the south west of Western Australia. In 2001, honouring an election promise, the Western Australian Government announced a statewide ban on logging in old growth forests and converted a number of forest reserves to national parks. However, full implementation of the ban was postponed until 2004 to protect industry contracts.[176]

State forests and most timber reserves in Western Australia are declared under the *Conservation and Land Management Act 1984*[177]. Once declared, State forests and timber reserves are vested in the Conservation Commission and managed by the Department of Environment and Conservation (**DEC**).

Following the commencement of the South West Forests RFA, legislation was enacted to require the Conservation Commission to implement, monitor and assess compliance with forest management plans[178], and to create the Forest Products Commission to manage forest harvesting contracts for State forests and timber reserves.[179] Any production contract entered into under the *Forest Products Act 2000* must be consistent with the applicable forest management plan.

Forest management plans set out policies and guidelines for conservation, harvesting and other land use activities, including actions to be taken by the Conservation Commission, DEC and the Forest Products Commission to achieve those objectives. Draft management plans are assessed under the *Environment Protection Act 1986* and are available for public comment prior to the Conservation Commission finalising the draft and submitting it to the Environmental Protection Authority (**EPA**) for assessment. There is a further opportunity for third parties to appeal against the EPA's assessment report, before the plan is amended in accordance with any conditions imposed by the Minister for Environment and declared by the Governor.

The *Forest Management Plan 2004–2013*, which currently covers State forests and timber reserves in the south west, is due to expire on 31 December 2013. The public comment period for the proposed replacement plan, *Draft Forest Management Plan 2014–2023*, closed in November 2012.[180] The Conservation Commission's report in relation to the proposed *Forest Management Plan 2014-2023* was released on 1 July 2013.

Table 4: Forestry legislation, Western Australia

LEGISLATION	ACTIONS COVERED	COMMENTS
Conservation and Land Management Act 1984	• Development of forest management plans • Contracts for forest produce • Assessment of compliance with forest management plan	On State forest and forest reserves, contracts for "Forest produce" including timber, sawdust and woodchips are not required where the products are covered by the Forest Products Act 2000. Outside State forests and reserves, contracts will be required for these products.
Forest Products Act 2000	• Establishes Forest Products Commission • Production and plantation contracts	Production contracts can make provision for infrastructure (including roads), silvicultural operations and regeneration.
Environment Protection Act 1986	• Assessment process for draft forest management plan • Offences for clearing native vegetation	
Wildlife Conservation Act 1950	• Permits to take flora / fauna under a forest products contract	Not required for State forests and timber reserves if activities are carried out in accordance with the forest management plan.

ANNEXURE 2. FORESTRY CASE SUMMARIES

FEDERAL CASES

Wilderness Society v Minister for Environment [2007] FCAFC 175

Facts:

The Wilderness Society (**TWS**) challenged the decision of the Environment Minister in relation to the determination of controlling provisions for the Bell Bay pulp mill, arguing that he had failed to take into account the impact of forestry operations required to supply the mill on matters of national environmental significance.[181]

The Minister argued that s.75(2B) prevented him from considering any adverse impacts arising from RFA forestry operations (which in this case included all forestry operations in Tasmania for the duration of the Tasmanian RFA).

TWS argued that s.75(2B) only applies where the action being assessed is itself a forestry operation. TWS also pointed to s.42(c), which provided that the RFA exemption did not apply to "forestry operations that are… incidental to another action whose primary purpose does not relate to forestry."

Legal issues:

Does s.75(2B) of the EPBC Act prevent any consideration of the impact of related forestry operations on matters of national environmental significance?

Does s.42 allow incidental forestry operations to be considered?

Summary:

In the first instance, Justice Marshall observed that, pursuant to s.38, RFA forestry operations did not require assessment under the EPBC Act. His Honour held that s.75(2B) could not be confined to applications for forestry operations, as such applications would not be subject to assessment under Part 4. He concluded that the provision of s.42 were restricted to applications for forestry operations that were incidental to another non-forestry use. In this case, the application was for a pulp mill, not a forestry operation, so s.42 did not apply (see *Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178).

On appeal to the Full Court, the majority held that forestry operations would be incidental to another activity if the operations have a "fortuitous or subordinate connection" to the activity, rather than an essential connection. Branson and Finn JJ considered that the pulp mill had an essential connection to the forestry operations required to supply the mill with woodchips, therefore the forestry operations were not "incidental" to the primary purpose.

Branson and Finn JJ considered that, if the scope of s.42(c) was as broad as contended by TWS, any forestry operations that supplied a subsequent industrial use (such as a sawmill) would not be subject to the RFA exemption. As most large scale harvesting ultimately supplies a non-forestry use, their Honours held that this broad interpretation would rob the RFA exemption of any meaning and be inconsistent with the clear legislative intent to exclude forestry operations from assessment under the EPBC Act.

Tamberlin J (dissenting) considered that the purpose of s.42, to ensure that forestry operations with the potential for significant impacts (such as on World Heritage places) were adequately assessed, was not served by a narrow interpretation of what was "incidental" to a forestry operation. His Honour preferred the view that forestry operations would be incidental to a proposed action if there was a sufficient degree of dependence and closeness of association. Tamberlin J was satisfied that the RFA forestry operations were incidental to the construction and operation of the mill, therefore the Minister had erred in not considering the impact of the forestry operations on matters of national environmental significance.

The Full Court ultimately dismissed the appeal and upheld the Minister's decision that he was not entitled to consider the impact of harvesting to supply the pulp mill in assessing whether the proposal was a controlled action under the EPBC Act.

Response:

The Minister and Gunns submitted that TWS should pay their costs of the appeal. The Court held that it was appropriate that costs be awarded against TWS to compensate the respondents. However, having regard to the public interest nature of the proceedings, and the fact that TWS did not stand to gain anything from its appeal, the Court held that TWS was only required to pay 70% of the Minister's costs.

The Court also considered that Gunns had played a larger role in the appeal than necessary, as its own conduct was not being challenged and the Minster was actively defending

the appeal. The Court ordered that TWS pay only 40% of Gunns' costs.

Relevant quotes:

[It] is clear from the terms of the Act and of the RFA that the RFA Act regime is concerned not only with forests and forest operations but also with those industries "associated with forests and timber products" (per Branson and Finn JJ at [34]).

Whether a particular forestry operation is in fact "incidental" to a particular action will require consideration of the proposed action and its degree of dependence and closeness of association with the relevant forestry operations. In my view, the RFA forestry operations relevant to this case may be characterised as incidental to another action, namely the construction and operation of the mill.

The interpretation of "incidental to" favoured by the majority in this case could produce the odd result whereby fortuitous or subordinate logging on a relatively small scale, such as a one-off activity to clear part of a forest to make space for the construction of a road or school or playing field, would be covered by s 42(c) as incidental, yet other essential forestry operations on a very large scale and having much greater adverse impacts over several decades in relation to many millions of tonnes of harvested timber would be regarded as not incidental. In my view, this anomalous consequence points strongly against the interpretation favoured by the majority (per Tamberlin J at [112] – [113]).

Brown v Forestry of Tasmania (No 4) [2006] FCA 1729

Facts:

Senator Brown sought an injunction to prevent forestry activities in the Wielangta forest, alleging that the operations were a controlled action by virtue of s.18(3) of the EPBC Act and therefore required approval from the Federal Minister. He argued that Forestry Tasmania could not rely on the RFA exemption in s.38, as the absence of adequate processes in the forest practices system to assess the impact on, or to protect, endangered species meant that the forestry operations had not been, and would not be, carried out in accordance with the Tasmanian Regional Forest Agreement (the **RFA**).

Senator Brown's case focussed on the likely significant impact of the proposed forestry activities on the broad-toothed stag beetle (*Lissotes latidens*), the swift parrot (*Lathamus discolor*) and the Tasmanian wedge-tailed eagle (*Aquila audax fleayi*) – all of which were threatened by disturbance of habitat. Senator Brown argued that failure to prevent impacts on these species meant that the forestry activities did not satisfy clause 68 of the RFA:

> *'The State agrees to protect the Priority Species... through the CAR Reserve System or by applying relevant management prescriptions.'*

Significant legal issues:

- Were the proposed forestry operations, and the longer term planned activities, "actions" within the meaning of s.523 of the EPBC Act?
- Was the Tasmanian RFA an RFA within the meaning of the *Regional Forest Agreements Act 2002*?
- When will activities be carried out "in accordance with" the RFA?
- What is required to satisfy the requirement in clause 68 of the RFA to protect priority species?

Summary of decision:

The Federal Court held that, because Forestry Tasmania had exclusive control over state forest resources, Forestry Tasmania's actions in authorising forest practices plans was an "action" under the EPBC Act, even where the forestry activities themselves would be conducted by another operator or contractor. The Court was satisfied that proposed operations on two coupes for which plans had been certified were clearly "actions".

The Federal Court was also satisfied that forestry activities in the area were planned until 2013, even though specific certified forest practices plans had yet to be issued which extended beyond 2008. The Court held that planning for future coupes under the broader harvesting plan constituted an "action", and could be subject to the EPBC Act.

Justice Marshall held that proposed forestry operations in the Wielangta area were likely to have a significant impact on all three species of concern, having regard to their endangered status and all other threats to them.

Senator Brown argued that the Tasmanian RFA was not an RFA because it failed to meet the requisite conditions of providing for a CAR reserve system and ecologically sustainable management and use of forested areas. He argued that legally binding prescriptions in the RFA were required to achieve those objectives. Justice Marshall was satisfied that the Tasmanian Regional Forest Agreement was

an 'RFA' within the terms of the RFA Act. His Honour distinguished a requirement to "provide for" something from a requirement to "provide" something, and was satisfied that the RFA provided for the establishment of a CAR system and ESFM. As such, Forestry Tasmania could rely on the s.38 exemption in relation to forestry activities that would otherwise have required assessment under s.18(3), provided the activities were undertaken in accordance with the RFA.

Justice Marshall held that s.38 provided an alternative to assessment under the EPBC Act, therefore should be construed strictly and would apply only where the terms of an RFA were being met. His Honour considered that forestry operations would be "in accordance" with an RFA only where they were conducted in accordance with the requirements set out in the RFA. He held that the requirement to protect priority species required actual protection of the species – provision of the CAR reserve system would not, in and of itself, demonstrate that such protection was being delivered.

Given the significant impacts on all three species as a result of forestry operations, the Federal Court was satisfied that neither the CAR reserve system nor any management prescriptions imposed on the operations protected the species. Justice Marshall concluded that the forestry operations at Wielangta would be, and had been, carried out otherwise than in accordance with the RFA, therefore the s.38 exemption could not be applied.

Response:

Forestry Tasmania appealed against the decision (*Forestry Tasmania v Brown* [2007] FCAFC 186). Prior to the hearing of the appeal, the Tasmanian and Commonwealth governments amended clauses 68, 70 and 96 of the RFA. In particular, clause 68 was amended to read:

> *'The Parties agree that the CAR Reserve System, established in accordance with this Agreement, and the application of management strategies and management prescriptions developed under Tasmania's Forest Management Systems, protect rare and threatened fauna and flora species and Forest Communities.'*

The Full Court (Sundberg, Finkelstein and Dowsett JJ) considered that the RFA was "redolent of compromise between various competing interests" and noted that clause 68 was not legally binding and could not be enforced by the Commonwealth, other than by bringing the RFA to an end (at [44]). Having regard to the nature of the RFA, the Court concluded that clause 68 did not require the State to protect priority species, it required only that the State "[participate] in the establishment and maintenance of CAR in the manner described in the RFA" (at [60]). The Court also observed (at [63]):

> *The fact that the State's obligations under Part 2 of the RFA are expressed to be unenforceable points against the view that by cl 68 the State warrants that CAR will in fact protect the species.*

The Court noted the amendments that had been made to the RFA, but stated at [69] that:

> *Cl 68 has been amended so that it more clearly says what we think it means in its original form.*

The Court held (at [62]) that the structure of s.38 of the EPBC Act and s6(4) of the RFA Act meant that the EPBC Act *"does not apply to forestry operations in RFA regions, and that the regime applicable in those regions is found in the RFAs themselves."*

Given its conclusion on the application of the RFA, the Court did not consider it necessary to reach any conclusion in relation to the issue of significant impact. As such, Justice Marshall's conclusion regarding the impacts of the proposed forestry operations on the threatened has not been displaced.

Senator Brown sought leave to appeal to the High Court however, in May 2008, his application was refused by a majority 2:1 decision.

Following swift parrot breeding surveys undertaken in 2007/2008, the Tasmanian Minister announced a moratorium on harvesting in swift parrot habitat, including Wielangta. Wielangta is one of the areas identified in the current Intergovernmental Agreement negotiations for declaration as a reserve.

Relevant quotes:

Significant impacts

- Even though forestry operations in Wielangta (in coupes 17E and 19D) and the proposed forestry operations in coupes other than 17E and 19D will cause a loss of breeding and foraging habitat for the eagle which is relatively insignificant in the context of other factors causing loss to such habitat, that loss can still be considered 'significant' in the context of legislation which is designed 'to protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species)...'. Loss of habitat caused by forestry operations, while

- small when compared to other causes, has a significant impact on a threatened species where 'to protect' is seen as a duty not just to maintain population levels of threatened species but to restore the species (at [94]).
- I agree with the submission of the applicant that the present and likely future forestry operations of Forestry Tasmania in Wielangta will, in the context of the EPBC Act, have a significant impact on the eagle, notwithstanding the presence of other impacts which may be even more significant…. The forestry operations of Forestry Tasmania will, as the applicant contends, 'have a significant impact on the eagle because they form part of the well-established cumulative impact of native forest harvesting in Tasmania on the eagle'. This is in the context of such operations being controlled by one operator, Forestry Tasmania. Population decline caused by forestry operations in one area of the State impacts on the species generally by adding to its demise in circumstances where eagles have, as Mr Mooney said:

  '...very little flexibility built into their biology to allow them to compensate for an unnatural low productivity...' (at [102]).

Referring to a report stating 'Further work is needed but these preliminary results suggest that in some areas at least, where the species was known to occur prior to logging, the retention of a network of unlogged suitable habitat has assisted maintenance of the species in the local area.':

- This is small comfort to the species and is tantamount to saying that logging did not destroy the species completely in the relevant coupe because not all of its habitat was destroyed (at [135] – [136]).

Meaning of "protect"

- An agreement to 'protect' means exactly what it says. It is not an agreement to attempt to protect, or to consider the possibility of protecting, a threatened species. It is a word found in a document which provides an alternative method of delivering the objects of the EPBC Act in a forestry context…

  The method for achieving that protection is through the CAR Reserve System or by applying relevant management prescriptions. Does that mean the State's obligations are satisfied if, in fact, the CAR Reserve System or relevant management prescriptions do not protect the relevant species? I do not think so. If the CAR Reserve System does not deliver protection to the species, the agreement to protect is empty (in the absence of relevant management prescriptions performing that role). If relevant management prescriptions do not perform that role, the State should ensure that it does, otherwise it is not complying with its obligation to protect the species. To construe cl 68 otherwise would be to turn it into an empty promise (at [240] – [241]).
- Protection is not delivered if one merely assists a species to survive. Protection is only effective if it not only helps a species to survive, but aids in its recovery to a level at which it may no longer be considered to be threatened. Whatever protection may be provided to the parrot by the CAR Reserve System is minimal, as the evidence discloses that only a small part of the parrot population is likely to use the CAR reserves which are too small to be of any real assistance to the parrot (at [264]).
- It is unlikely the State can, by management prescriptions, protect the eagle. As to the beetle and the parrot, the State must urge Forestry Tasmania to take a far more protective stance in respect of these species by relevant management prescriptions before it can be said it will protect them. On the evidence before the Court, given Forestry Tasmania's satisfaction with current arrangements, I consider that protection by management prescriptions in the future is unlikely (at [282]).

Management prescriptions

- Further, in coupe 17E, Forestry Tasmania ignored a recommendation from the Senior Zoologist and logged areas of that coupe identified as prime swift parrot breeding habitat, reducing the relevant area's protection to a skyline constraint and five wildlife habitat clumps. The practical effect of the evidence of Dr John Whittington, General Manager, Resource Management and Conservation Division of DPIW, is that recommendations

from senior zoologists in accordance with the Adviser are negotiable, if Forestry Tasmania objects.

There was also evidence of a reservation area in coupe 17E, designed to protect the swift parrot, being logged 'by mistake' as well as evidence of a road being put through a swift parrot reserve area 'by mistake'. These matters illustrate the difficulty not only in having adequate management prescriptions to protect threatened species, and promote their recovery, but also the difficulty of actually implementing management prescriptions (at [289]-[292]).

Operation of the s.38 exemption

- The requirement in s 18(3) of the EPBC Act that an action not occur which is likely to have a significant impact on a listed threatened species must be seen in the context of an Act and Conventions which underlie the promotion of recovery of threatened species. Similarly, the exemption for RFA forestry operations in s 38 of the EPBC Act must be seen, in context, as providing an exception only if an alternative means of promoting the recovery of a species is achieved by a Regional Forest Agreement (at [301]).

Tasmanian Conservation Trust Inc v Minister for Resources [1995] FCAFC 1035

Facts:

The Administrative Procedures under the *Environment Protection (Impact of Proposals) Act 1974* (the **Administrative Procedures**) required that, as soon as possible after any initiative had been taken in relation to a proposed action under the Act (one which was likely to have a significant effect on the environment), the responsible Minister was to inform the Department of the Environment of the proposed action and designate a proponent.

Gunns Limited (**Gunns**) applied for a licence to export woodchips generated from northern Tasmanian forests, pursuant to the *Export Control (Unprocessed Wood) Regulations*. An environmental impact statement (**EIS**) was prepared for the Tasmanian woodchip industry in 1985. While that EIS contemplated the export of woodchips from north-west Tasmania generally, it did not deal specifically with the Gunns proposal.

Relying on the EIS, the Minister granted Gunns a licence to export up to 200,000 green tonnes of woodchips from June – December 1994. The Minister also provided a letter granting Gunns "in-principle approval" for the export of up to 200,000 green tonnes of woodchips until the end of 1999, subject to the issue of annual export licences.

The Tasmanian Conservation Trust (**TCT**) commenced judicial review proceedings seeking orders setting aside both decisions on the grounds that the Minister had failed to comply with the Administrative Procedures, as the Minister had not referred the Gunns proposal or designated a proponent in respect of the proposed action.

Legal issues:

- Did TCT have standing to bring proceedings?
- Did the Gunns proposal constitute an "initiative" for the purpose of the Administrative Procedures?
- Is a "proposed action" restricted to actions by the Federal government?
- Could the Minister rely on the 1985 EIS to determine whether the Gunns proposal was likely to have a significant impact on the environment?

Summary:

Sackville J was satisfied that the TCT was a "person aggrieved" and had standing to seek judicial review of the Minister's decisions. His Honour noted that the TCT was the peak environmental organisation in Tasmania and had been recognised through government funding and participation in various stakeholder processes. The TCT was actively involved in forest campaigns, both generally and specifically in relation to the forests affected by the Gunns proposal.

Sackville J rejected the Minister's argument that there was no new initiative, as the granting of the 1994 licence was based on assessments undertaken, and actions contemplated by, the designation of a proponent and preparation of the EIS in 1985. Though he conceded that *"there may well be circumstances in which an action or contemplated action by the Minister is so closely related to a previous action, such as the grant of an earlier licence or an earlier direction to designate a proponent, that the later action cannot properly be described as 'an initiative in relation to a proposed action'"*, Sackville J held that the events in respect of which the 1985 EIS was prepared were not sufficiently related to the current Gunns' application to satisfy this test. Accordingly, the

earlier designation did not prevent the Minister's actions in considering the export licence application in 1994 from being characterised as an 'initiative'.

Given his conclusion that the export licence application constituted an initiative, Sackville J held that the Minister had erred in not designating a proponent. It was up to the Minister to determine, in accordance with law, whether a proposed action would have a significant effect on the environment, which he held to mean "an important or notable effect on the environment". In this case, the Minister had applied the wrong test in determining whether the initiative (and its related proposed action) was likely to have a significant effect on the environment.

Sackville J considered that a "proposed action" was not limited to actions by the Commonwealth and could include actions by third parties. In this case, he was satisfied that the relevant "proposed action" was not confined to Stage 1 of the proposal, but included all the activities proposed by Gunns in its *Integrated Sawmill and Chip Proposal*. The Minister was therefore required to consider whether the woodchip operations and related infrastructure requirements resulting from the Gunns proposal were likely to affect the environment to a significant extent. It was not sufficient to merely consider whether the effect on the environment had been sufficiently considered by the earlier EIS, or whether the proposal was consistent with standards set out in the earlier document.

Having regard to the scale of the Gunns proposal, involving the export of 475,000 tonnes per annum, including site-specific, cumulative and continuing impacts, Sackville J was satisfied that the proposed action would have had a significant effect on the environment. He set aside the Minister's decision to grant the export licence.

Response:

The Minister appealed against the decision. Before the appeal was heard, the Administrative Procedures were amended by:

- Removing the concept of an 'initiative' and inserting an exception for Commonwealth actions which are covered by an existing and adequate assessment: and
- Inserting a definition of an 'environmentally significant action', which is restricted to Commonwealth actions that significantly affect the environment, permit, promote or facilitate an action by a third party that will significantly affect the environment.

A motion to disallow the amendments was defeated in June 1995. Following the passage of the amendments, the Minister discontinued his appeal against Sackville J's decision.

The *Environment Protection (Impact of Proposals) Act 1974* has since been repealed and replaced by the EPBC Act.

Relevant quotes:

- The draft and final versions of the EIS contain statements pointing to the adverse effect of road construction and logging operations on forests. They also draw attention to the impact on native fauna of clearfelling of forests. These would seem to reinforce what is tolerably clear in any event, namely, that unless there are special circumstances, the harvesting, transportation and processing of the quantity of logs required to produce 475,000 tonnes of woodchips is likely to have a significant effect on the forests in which the activities are to take place. This is so notwithstanding that some of the woodchips might be obtained by means other than logging of timber. Whether or not the effects on the environment are outweighed by other social or economic factors, is not the point…

  I should add that Gunns' proposal, as formulated in October 1993, clearly would have had other environmental consequences if implemented. Infrastructure costing in the order of $10 million would be required at the deep water port of Stanley, which is an historic town in an area designated as National Estate. A dedicated chipping facility would be constructed, involving some 40 construction jobs. The Integrated Proposal itself accepted that there would be concern about the movement of heavy transports in and out of Stanley, presumably over the whole of the ten year period of the proposal. Indeed the advice to the Minister, dated 1 June 1994, acknowledged that Stage 2 would "require more detailed assessment of the higher level of harvesting and possible impacts on the town of Stanley". This reinforces the conclusion that the Integrated Proposal must be regarded as having a significant effect on the environment (at [96]- [97]).

Richardson v Forestry Commission (1988) 164 CLR 261

Facts:

The Federal Government passed legislation establishing a Commission of Inquiry to investigate the potential inclusion of the Lemonthyme and Southern forests in the Tasmanian Wilderness World Heritage Area. The Act prevented the following activities in the area without Ministerial consent for the duration of the investigation:

> *(a) for the purposes of, or in the course of carrying out, forestry operations, to kill, cut down or damage a tree in, or remove a tree or a part of a tree from, the protected area;*
>
> *(b) to construct or establish a road or vehicular track within the protected area;*
>
> *(c) to carry out any excavation works within the protected area;*
>
> *(d) to do any other act prescribed for the purposes of this paragraph, being an act capable of adversely affecting the protected area.*

When the Forestry Commission continued to allow forest operations in the area, the Federal Environment Minister sought an injunction against the Forestry Commission to prevent further logging. Mason CJ granted the injunction (see **[1988] HCA 10**), but referred a number of constitutional matters to the full bench for consideration. In particular, the Forestry Commission argued that the legislation was invalid and, until land was included in the World Heritage List, any restriction on activities affecting potential heritage values was beyond the powers of the Federal government.

Legal issues:

- Was a prohibition on forestry and related activities in forest being considered for World Heritage listing within the objectives of the World Heritage Convention?
- Did the legislation discriminate against Tasmania?
- Was economic loss to the Forestry Commission, and the State of Tasmania, a relevant consideration in determining whether to grant an injunction to prevent forestry operations?

Summary:

The majority of the High Court (Mason CJ and Brennan J; Wilson, Dawson and Toohey JJ) was satisfied that the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* was entirely within power, as an exercise of the external affairs power.

The court observed that the World Heritage Convention did not merely impose obligations regarding land which has been entered on the World Heritage List, but also obligations to identify areas appropriate for protection. It was held that the Federal government's powers therefore extended to support a law aimed to discharge Australia's obligations to investigate land for possible inclusion in the World Heritage List, and to protect its potential heritage values in the interim.

The majority of the court held that all the listed activities were validly prohibited by the legislation as they presented a risk of adversely impacting on potential World Heritage values of the Lemonthyme and Southern Forests areas. Justice Deane considered the prohibition of activities listed in (b), (c) and (d) was too broad and disproportionate to any perceived risk, but was satisfied that the prohibition on logging was valid. In contrast, Gaudron J was not satisfied that any of the prohibitions were appropriately directed at protecting world heritage values, rather than the environment generally, and held that the provisions were invalid.

The Court held that the legislation did not discriminate against Tasmania. While the legislation was directed at property within Tasmania, the objectives of the Act related specifically to obligations in relation to the World Heritage Convention – the fact that the property under investigation happened to be in Tasmania was incidental.

Mason CJ and Brennan J (with whom other justice agreed) considered that economic hardship would not present a defence to a charge under the Act, and would be unlikely to influence a decision in relation to the granting of an injunction. However, in the absence of more facts, they declined to determine the issue.

Response:

The Commission of Inquiry (the **Helsham Inquiry**) resulted in a majority report recommending that most of the Southern Forests did not have World Heritage values. That finding was contrary to the evidence presented by 10 of the 11 consultants to the Commission, which supported the minority report of Commissioner Peter Hitchcock recommending that the whole of the Lemonthyme and

Southern Forests should be annexed to the Tasmanian Wilderness World Heritage Area.

After considerable lobbying by the consultants and ENGOs, the Federal government settled on a compromise including 262,000 ha of the Lemonthyme and Southern Forests and providing approximately $40 million in compensation to the Tasmanian government.

The Lemonthyme and Southern Forests area was nominated for inclusion in the Tasmanian Wilderness World Heritage Area in 1989. The IUCN recommended that the heritage area also be expanded to include the Denison / Spires / Maxwell River area to the west. Both areas (605,000 ha in total) were accepted for inclusion in the TWWHA in December 1989.

Relevant quotes:

- The… enactment of legislation prohibiting destruction of, or damage to, particular property, pending a determination of its status as a property to be nominated for inclusion in the World Heritage List may be supported as action which can reasonably be considered appropriate and adapted to the attainment of the object of the Convention, namely the protection of the heritage… [T]he Convention does not sustain the view that the duty to ensure protection does not arise or attach to land until the State identifies and delineates that land as part of the heritage (per Mason CJ and Brennan J at [22]-[23]).
- No doubt some of the acts prohibited… may be so trivial that they do not present a significant risk of real impairment to the world heritage characteristics of the land in question. Nonetheless the class of acts prohibited, namely tree-felling and removal in the course of forestry operation, road and track construction and excavation, are generally speaking acts involving a potential risk of injury to any qualifying areas which may be in the Lemonthyme and Southern Forests areas. It is therefore appropriate to single them out as objects of prohibition (per Mason CJ and Brennan J at [25]).
- [The] prohibition of active logging operations falls within a different category from all the other prohibitions contained in s.16(1)nin that it is confined to activities which are obviously capable of being seen as constituting a threat to the preservation of any actual or potential World Heritage areas in which they were carried on (per Deane J at [17]).
- The acts prohibited by s.16 are identified in general terms, but with sufficient clarity. They are acts of a nature calculated to have an adverse effect on the wilderness area that is said to constitute the natural or cultural heritage… (per Toohey J at [26]).

NEW SOUTH WALES CASES

Director-General, Department of Environment, Climate Change and Water v Forestry Commission of NSW [2011] NSWLEC 201

Facts:

The Forestry Commission of New South Wales (the **Forestry Commission**) is constituted under the Forestry Act 1916 and is responsible for sustainably managing native and planted forests for a wide range of economic, environmental and social values.[182] Between 29 April 2009 and 21 May 2009, the Commission carried out bushfire hazard reduction burning in the Nullica State Forest.

The Nullica State Forest included a significant exclusion zone, designed to protect the endangered Smoky Mouse. At the time of the offence this case was concerned with, the Smoky Mouse was listed as endangered under both the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Threatened Species Conservation Act 1995* (NSW) (**TSCA**).[183] By 21 May 2009 the hazard reduction fires set by the Forestry Commission had burned over 90% of the exclusion zone.

Section 133 of the *National Park and Wildlife Act 1975* (**NPWA**) requires a licence holder to comply with the conditions and restrictions attached to any licence under the NPWA or the TSCA. The Forestry Commission was charged with, and pled guilty to, the offence of breaching the conditions of its Integrated Forestry Operations Approval by carrying out burning in a Smoky Mouse Exclusion Zone.

Legal issues:

As the Forestry Commission pleaded guilty, the case was principally concerned with determining an appropriate sentence.

Summary:

In determining an appropriate sentence, Justice Pepper considered both objective and subjective circumstances in respect of the offence.

Justice Pepper found that, having regard to the proximity of the Smoky Mouse exclusion zone, it was foreseeable that harm could be caused by the conduct of the Forestry Commission.[184] Justice Pepper found that at all times the Forestry Commission had control over the operations,[185] and could have implemented a number of practical measures to prevent the harm from occurring.[189]

Justice Pepper was satisfied that the Forestry Commission did not deliberately commit the offence, or have a commercial motive in committing the offence. Her Honour concluded that the offence was of low to moderate objective gravity.[190]

Justice Pepper then considered the subjective circumstances, including the fact that the Forestry Commission had eight prior offences under environmental legislation. Although all eight offences arose out of circumstances materially different from those surrounding the commissioning of the fuel reduction burn, Justice Pepper concluded that the number of convictions suggested a 'reckless attitude' on the part of the Forestry Commission. Her Honour held that this prior criminality was an aggravating factor to be taken into account in determining an appropriate penalty.[191]

Justice Pepper ordered the Forestry Commission to pay $5,600 to the Department of Environment, Climate Change and Water for a project to monitor Smoky Mouse sites8 and to pay $19,000 for DECCW's legal fees.[192]

Relevant Quotes:

Forestry Commission's prior history of criminality

- It is true that all eight (prior) offences arose out of circumstances materially different from the commission of the present offence and were in breach of different environmental statutes than the one in consideration….. However, in my view, the number of convictions suggests either a pattern of continuing disobedience in respect of environmental laws generally or, at the very least, a cavalier attitude to compliance with such laws. I would attribute more weight to these past convictions than that suggested by the Forestry Commission (at [100]).
- Given the number of offences the Forestry Commission has been convicted of and in light of the additional enforcement notices issued against it, I find that the Forestry Commission's conduct does manifest a reckless attitude towards compliance with its environmental obligations. I, therefore, find the prior criminality of the Forestry Commission to be a relevant aggravating factor to be taken into account in the determination of the appropriate penalty to be imposed in these proceedings (at [103]).

Imposition of a penalty against the Forestry Commission:

- The sentence of this court is a public denunciation of the Forestry Commission and must ensure that the Commission is held accountable for its actions and is adequately punished (at [126]).

Environment Protection Authority v Forestry Commission of NSW [2004] NSWLEC 751

Facts:

In May 2003, a dirt road constructed by the Forestry Commission in the Chichester State Forest collapsed, resulting in pollution of the surrounding waterways.

The Forestry Commission was charged with offences against s120(1) of the *Protection of the Environment Operation Act 1997* for causing pollution through the manner in which the road was constructed. The Forestry Commission pleaded guilty and was ultimately convicted of these offences.

Legal issues:

- In determining an appropriate sentence, the Court considered the extent of harm caused, how foreseeable the harm was and the Forestry Commission's role in ensuring that its activities were conducted appropriately.
- Did the Forestry Commission's past environmental performance warrant stricter penalties?

Summary:

The Court was satisfied that the Forestry Commission was charged with the construction of the road and had total control over those operations.

The Court heard that the failure resulted from inadequate site planning, poor construction techniques and methodologies and unsuitable equipment.[193] The Court was satisfied that the harm caused by the road collapse was foreseeable,

and that Forestry Commission had not implemented quality assurance mechanisms to ensure that the road was appropriately constructed to avoid that outcome.

The Court considered that, given the Commission's past convictions for environmental offences, specific deterrence was required to remind those in authority of the need to observe maximum environmental safeguards in its operations. However, the Court took into account the remediation being undertaken by the Commission, the agreement to pay the EPA's legal costs and the fact that the Commission had introduced new systems designed to avoid similar failures in future.

The Court considered that the appropriate penalty was $40,000, reduced to $30,000 in light of the Commission's guilty plea, cooperation, promptness in reporting the offence and implementation of measures to minimise the risks in future.[194]

Relevant Quotes

- The Court is conscious that the Defendant is a statutory body. However when considering penalty that fact should make no difference compared to any other private organisation or individual (at [37]).

NSW Police v Ryan Benjamin Castle [20ll] NSWLC 22

Facts:

On 27 April 2010, Mr Castle was found sitting in a timber tripod in the Mumbulla State Forest, preventing ongoing logging operations by Forests New South Wales. Mr Castle refused to leave the tripod when directed by the Police. He claimed that the logging was unlawful, as the area had been gazetted as an 'aboriginal sacred place'. He also advised that he had notified the relevant authorities about the unlawful operations.

Mr Castle was forcibly removed from the tripod and charged with failing to comply with a direction given under s 199(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (**LEPRA**). He was also charged under s27(1)(a)(iii) of the Forestry Act 1916 for knowingly cutting Crown timber to make the tripod.

Shortly after Mr Castle's arrest, Forests New South Wales's logging operations were found to be unlawful and logging in the area was halted.

Legal issues:

- Was Mr Castle engaged in an "apparently genuine demonstration or protest" within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*?

Summary:

Magistrate Bone was not satisfied that there was any evidence that Mr Castle had cut down Crown timber or engaged in a course of conduct involving taking logs from State forest. The charge under the *Forestry Act 1916* was dismissed.[195]

Under s.200 of the LEPRA, the police are not authorised to give directions where a person is engaged in an apparently genuine demonstration. The Magistrate was satisfied that Mr Castle's protest was genuine, and the police therefore had no authority to direct him to leave the forest. The Magistrate also noted that actions that would otherwise be offences may be justified in some circumstances.[196] Taking into account that Mr Castle had notified the authorities, and that the logging operations were subsequently found to be unlawful, the Magistrate was satisfied that Mr Castle's protest was reasonable.

The Magistrate dismissed all charges against Mr Castle.

TASMANIAN CASES

King v Forest Practices Tribunal [2008] TASSC 1

Facts:

A group of residents objected to the declaration of a private timber reserve (**PTR**) on land in the Meander Valley Council area on a wide range of grounds. The Forest Practices Tribunal ultimately held that none of the objectors suffered disadvantage as a result of the PTR declaration.

One of the objectors, Mr King, sought judicial review of the Tribunal's decision. His application alleged that the Tribunal had erred in not considering that an adjoining owner suffered a direct and material disadvantage by virtue of losing the capacity to:

- influence any conditions that Council may have imposed on a planning permit issued under s.58 (for permitted uses);
- seek judicial review of a decision to grant a

permit; or

- commence civil enforcement proceedings under the *Land Use Planning and Approvals Act 1993* if permit conditions were breached.

The trial judge dismissed the application, and Mr King appealed to the Full Court.

Legal issues:

- Does loss of capacity to influence or seek to enforce a planning decision in relation to a permitted use constitute a "direct and material disadvantage" to an adjoining owner under the *Forest Practices Act 1985*?
- Could such a loss of capacity be contrary to the public interest, for the purposes of s.8 of the *Forest Practices Act 1985*?

Summary of judgment:

The Full Court (Underwood CJ, Slicer and Tennent JJ, in separate judgments) dismissed the appeal and upheld the Tribunal's conclusion that the declaration of the PTR was not contrary to the public interest and did not create any direct and material disadvantage to any of the objectors.

Slicer J observed that the legislative scheme clearly intended that, once declared as a PTR, forestry operations on the land would not be subject to the planning scheme. His Honour considered that, if a resulting loss of influence over the planning process was contrary to the public interest, declaration of a PTR would be contrary to the public interest in every case. As this could not have been the intention of the legislators, His Honour was not satisfied that loss of influence over planning alone could be contrary to the public interest.

Consistent with his decision in *Hayward v Forest Practices Tribunal, Slicer J* held that "direct and material disadvantage" should be given a broad meaning, but still required a connection to both the land and the person suffering the disadvantage. His Honour held that loss of an opportunity to be involved in a planning decision, along with every member of the general public, did not constitute a direct disadvantage particularly where the forestry use was permitted, so that involvement could never result in refusal).

Tennent J (with whom Underwood CJ agreed) also held that loss of any limited capacity to influence the planning process as a result of a PTR declaration was explicitly intended by the legislature and could not constitute a basis for a direct and material disadvantage.

Hayward & Anor v Forest Practices Tribunal [2003] TASSC 60

Facts:

The owner of land in the Meander Valley municipality had applied for a planning permit to establish a plantation on the land. The application was refused, and that refusal was subsequently upheld by the Resource Management and Planning Appeal Tribunal (**RMPAT**) on appeal. Less than two years later, the owner applied for the land to be declared a private timber reserve (**PTR**). Declaration as a PTR would remove the need to obtain a planning permit for any forestry operations on the land.

Adjoining owners, the Haywards, objected to a proposed declaration of the PTR on the grounds that they would be directly and materially disadvantaged by the proposed plantation activity due to:

- loss of amenity on their property;
- reduced traffic safety as a result of increased numbers of heavy vehicles on the rural road;
- loss of habitat for native wildlife using both their property and the adjoining plantation;
- adverse impacts of pesticides to be used on the plantation; and
- reduced property value.

The Forest Practices Tribunal held that, of these issues, only reductions in property value could constitute a "direct and material disadvantage" for the purposes of the *Forest Practices Act 1985*. Given the significant amount of plantation activity in the area, the Tribunal was not satisfied that the proposed PTR would have any material impact on the value of the Haywards' property.

The Haywards applied for judicial review of the decision, arguing that the Tribunal had adopted an inappropriately narrow interpretation of "direct and material disadvantage".

Legal issues:

- Could the owner apply for a PTR declaration, given the previous decision refusing to allow plantation activity on the land?
- Under the Land Use Planning and Approvals

Act 1993, if an application for a planning permit is refused by the RMPAT, no substantially similar application can be made for two years, unless the RMPAT consents. The application for a PTR declaration was made less than two years after the RMPAT decision to refuse the planning application.

- Is the Tribunal limited to considering grounds of "direct and material disadvantage", or is it required to also consider issues of public interest and suitability?
- Is a "direct and material disadvantage", for the purposes of establishing a right of objection to a PTR declaration, limited to financial disadvantage?

Summary:

Justice Slicer held that any application for a PTR declaration was governed by the *Forest Practices Act 1985* alone, and any restrictions on permit applications under the *Land Use Planning and Approvals Act 1993* did not affect the jurisdiction of the Forest Practices Tribunal to hear an application for a PTR declaration.

Justice Slicer observed that, while objections could have been raised by the local council in relation to suitability and the public interest, such matters were not raised. The only objection was from the Haywards, and the scope of their objection was limited by s,8 of the *Forest Practices Act 1985* to grounds of direct and material disadvantage. His Honour held that the Tribunal's considerations were necessarily confined to those grounds that the Haywards were entitled to raise.

His Honour held that "direct and material disadvantage" was not confined to financial loss and could extend to a wide range of adverse impacts for which there was a nexus with the use of the land for forestry operations. He also considered there the Tribunal, in concluding that no financial loss would directly result from the plantation proposal, had failed to take into account relevant evidence regarding loss of property value.

Justice Slicer indicated that the matter would be remitted to the Forest Practices Tribunal to reconsider whether the Haywards would suffer direct and material disadvantage, having regard to the broader test, and gave the parties an opportunity to make submissions regarding the rehearing.

Response:

The Haywards had not sought any order staying the operation of the Tribunal's decision while the judicial review application was heard. Following Justice Slicer's decision, the landowner advised the Supreme Court that the Forest Practices Board had since recommended declaration of the land, pursuant to the Tribunal's decision, and the Governor had recently declared the land to be a PTR. The landowner argued that remitting the application to the Tribunal for reconsideration was therefore pointless, as the land was now a declared PTR.

Justice Slicer made orders quashing the original Tribunal decision, and held that the recommendation of the Forest Practices Board based on that decision was void. He ordered that the matter be remitted to the Tribunal for reconsideration, and that the Forest Practices Board refrain from certifying any forest practices plan in respect of the land until further orders (see *Hayward & Anor v Forest Practices Tribunal & Anor* (No 2) [2003] TASSC 102).

Relevant quotes:

- The term "disadvantage" refers to the land and the "human condition" which optimistically is not confined to accumulation or maintenance of wealth. Ownership of land has a financial component but to an owner/occupier it includes amenity (at [40]).

Gunns Ltd v Kingborough Council [2005] TASRMPAT 150

Facts:

Gunns applied for a planning permit to clearfelling and subsequent reafforestation of native forest in the Environmental Management Zone under the *Kingborough Planning Scheme 2000*. Council refused the application on the grounds that the proposed forestry operations were contrary to the provisions of the zone, given the lack of provisions in the forest practices plan to manage potential impacts on threatened species and landscape values.

Gunns appealed against Council's decision, and a number of local residents joined the appeal. The residents raised concerns regarding nuisance from wood smoke and pesticides, impacts on water quality and visual impacts.

Legal issues:

- Can the Tribunal have regard to likely future forestry operations in considering the impacts of a proposal?
- Were the proposed forestry operations contrary

to the objectives of the Environmental Management Zone?

- Did the planning scheme requirement for forestry operations to be carried out in accordance with a forest practices plan effectively require Council's discretion to the exercised in accordance with the requirements of the forest practices system, rather than the planning scheme?
- Does the use of "should" statements in forest practices plan, coupled with the fact only 10% of forest practices plans are subject to independent compliance audits, mean the forest practices plan does not provide sufficient certainty as to protection of environmental values?

Clause 9.4.1.4 of the Scheme provided that Council may approve forestry operations in the Environment Management Zone where:

- *(i) A Forest Practices Plan has been prepared in accordance with the Forest Practices Act 1985; and*
- *(ii) No environmental nuisance would likely arise for neighbouring properties; and*
- *(iii) Appropriate mechanisms and systems have been identified to address water quality, vegetation management and local amenity, and*
- *(iv) Strategies have been identified to protect any environmental values identified; and*
- *(v) All relevant provisions of the Scheme are met.*

Clause 9.4.4.1 also allowed the Council to approve an application within 1km of a certified organic farm only where it was demonstrated that the farm will not be adversely impacted.

Summary:

The Tribunal held that it could not make any speculative assessment of, or have any regard at all, to the possibility of future forestry operations on adjoining land.

The Tribunal noted that, as forestry operations were a permissible use class in the Environmental Management Zone, it could not be argued that clearing tress was necessarily contrary to the zone objectives.

The Tribunal also noted that the planning scheme imposed several specific use standards in the Environmental Management Zone that were more specific than standards imposed by the Forest Practices Code, including the requirement to prevent environmental nuisance on neighbouring properties and adverse impacts on organic farms. The Tribunal considered that a nuisance or adverse impact could arise, notwithstanding full compliance with the Forest Practices Code.

The Tribunal held that the Scheme could impose higher standards than those prescribed by the forest practices system. Notwithstanding that conclusion, the Tribunal held that, in the absence of clear guidance regarding acceptable impacts in the Planning Scheme, the criteria in the Forest Practices Code provided a useful guideline. The Tribunal was satisfied that compliance with the provisions of the approved forest practices plan (with some minor changes) would prevent any of the significant impacts raised by the residents.

Council and the residents argued that the proposal failed to comply with the cl 9.4.1.4(iv) requirement to identify strategies to protect environmental values, as the removal of wet *E. globulus* forest would adversely impact on Swift parrot habitat. The Tribunal noted that wet *E.globulus* forest was under consideration for protection as foraging habitat for the Swift parrot. However, the Tribunal held that, until the vegetation community was formally recognised, there was no justification for protection in its own right. The Tribunal also noted that all but 0.5 ha of the *E. globulus* community would be regenerated within 7-20 years. Given the "temporary" nature of the vegetation loss, and the "variety and extent of other foraging resources", the Tribunal held that it was unlikely that the forestry operations would have any significant impact on the Swift parrot.

Council argued that the use of "should" statements meant that the forest practices plan could not demonstrate any commitment to implement strategies identified to protect environmental values. The Tribunal was satisfied that the use of "should" reflected the need for practical on-site flexibility and did not suggest any intention not to comply with the prescribed strategies. The Tribunal also held that the planning authority had a statutory duty to ensure compliance with its planning scheme, rather than relying on a forestry audit for compliance with the forest practices plan. However, the Tribunal held that specific conditions should be imposed requiring Gunns to provide satisfactory evidence to Council that visual impact and erosion control measures had been implemented.

The Tribunal was ultimately satisfied that the proposed forestry operations, conducted in accordance with the forest

practices plan, should be approved.

Relevant quotes:

Deference to the forest practices system

- The Tribunal accordingly does not consider that the Planning Scheme necessarily defers in all respects to the provisions of the Forest Management system, notwithstanding their greater particularity in most respects. That being said, the Planning Scheme provides no other particular guidelines which are presently relevant, and because the provisions of the Forest Management system do so, those provisions provide a useful guideline, if not necessarily an exhaustive test, of the acceptability of the proposed forestry operations Consistently with that it would still however be possible to impose a higher standard… than is prescribed by the Forest Practices Code (at [20]).

Swift parrot habitat

- The task for the Tribunal is to assess, on the evidence, the impact of the total and permanent removal of approximately one half hectare of the wet E.globulus forest on the site, for the roadway; and the other two and a half hectares which will regenerate to a flowering stage over somewhere between 7 and 20 years. As best it can on the available evidence, the Tribunal considers that the temporary nature of interruption of the food source for two and a half hectares, the permanent loss of only one half hectare, in the context of the variety and extent of the other foraging resources available for the Swift Parrot, means that it is highly unlikely that the proposed forestry operations will adversely affect the Swift Parrot species in any measurable way (at [45]).

Impact on visual amenity

- The Tribunal is satisfied… that many residents of the area are extremely conscious of the natural appearance of the upper slopes of the area at present, and of any intrusion by way of forestry activities upon those slopes. The Tribunal is also satisfied that for many of those residents, any visible evidence of the proposed forestry activities will constitute a source of annoyance and disappointment, and will be perceived by them as an appreciable reduction in the visual qualities which in part make up the amenity of the area as perceived by them. It is necessary however to assess the extent of the interference with that amenity, in the context of the overall amenity of the area. It is also necessary to divorce that consideration, in the context of the decision upon this appeal, from any consideration of what may occur in the future.

Enforcement of conditions in a forest practices plan

- It was the opinion of Mr Wapstra, as senior ecologist of the Forest Practices Board, that the use of a 'should' statement did not show a lack of commitment to managing the reserve, rather recognition of the requirement to minimise disturbance to the reserve through practical operational prescriptions. It was submitted on behalf of the Council that 'should' was defined flexibly in the Forest Practices Code, and there was therefore no assurance the measures so described in the Forest Practices Plan would necessarily be implemented. It was contended that trust was not enough, because all of the relevant witnesses for the appellant were from the 'forestry system'. There was a need, it was contended, to ensure that it was impossible to subsequently amend the Forest Practice Plan, as the system allows…
- The specific difficulty of applying particularised requirements to a forestry operation in a way which allows no deviation for practical reasons, is that such an application the Tribunal considers is simply not feasible. While it must be accepted that no human system is perfect, there was no evidence that the proposals contained in the Forest Practices Plan, particularly with the suggested variations by way of condition, were either not intended to be met or not reasonably achievable… (at [79] – [80]).

Associated with this issue is the evidence that only 10 per cent of the Forest Practices Plans, when implemented, are the subject of any audit on behalf of the Forest Practices Board. It was put that this is a system which is in essence wide open for non-observance of the Forest Practices Plan prescriptions; and that in the present case there should be a requirement that the implementation of the plan be subject

to independent audit. The statutory duty of the planning authority to ensure compliance with the provisions of the Planning Scheme, and planning permits, suffices in the case of urban development (at [81]).

Giles & Weston v Break O'Day Council & Denney [2001] TASRMPAT 150

Facts:

Break O'Day Council granted a planning permit authorising Mr Denney to carry out forestry operations on his property (Mr Denney also had a certified forest practices plan in relation to the proposed operations). Land within the Rural zone was to be clearfelled, while land within the Coastal and Resource Management Zone was to be selectively harvested. Consistent with the Forest Practices Code, the forest practices plan required habitat clumps and visual buffers to be retained and 10-20m streamside reserves.

Three community members who had made representations opposing the application appealed against the decision to grant the permit. The appellants argued (amongst other things) that the forestry operations would result in the spread of weeds, contamination of water supplies by pesticides, genetic transfer between plantation and native species, visual impacts and adverse impacts on habitat of the endangered Giant Velvet Worm, Wedge-tailed Eagle and Swift Parrot.

Legal issues:

- Did compliance with the Forest Practices Code demonstrate compliance with the acceptable solutions of the Planning Scheme?
- Did any impacts resulting from the forestry operations constitute an environmental nuisance?

Summary:

In the Rural Zone, forestry was a permitted use, subject to the provisions of the Wetlands and Waterways Code. The Code provided that any use which involved removal of vegetation within 30m of a waterway was discretionary, and required a developer to show that the removal would not *"adversely affect the capacity of the remaining vegetation to act as natural filters for nutrients and soluble pollutants and to prevent erosion and increased sediment flows."*

In the Coastal and Resource Management Zone, land clearing was a discretionary use. The intent of the zone included:

> *management of areas and resources in areas of high environmental value for reasons of environmental protection, nature conservation, recreation, scenic amenity, maintenance of natural processes, protection of fragile land forms, future development needs, catchment protection and public access.*

The Tribunal was satisfied that the impacts of the forestry operations were, other than in relation to the Giant Velvet Worm, were acceptable. The Tribunal did not consider that the impacts involved an environmental nuisance and, even if they did, the activities causing the nuisance was authorised by the forest practices plan and was therefore not "unlawful".

In the Coastal and Resource Management Zone, the Tribunal was satisfied that selective harvesting would reduce the moisture content of the soil and adversely impact on the extent of Giant Velvet Worm habitat. The Tribunal also considered that there was potential for chemicals used on the plantation to detrimentally affect the worm. The Tribunal held that the proposed selective harvesting was not consistent with the intent of the zone and overturned the decision to grant a permit for the harvesting activities.

In the Rural Zone, the Tribunal considered that providing 10-20m streamside reserves in compliance with the Forest Practices Code was not sufficient to satisfy the planning scheme requirement to demonstrate that removal of vegetation within 30m of the stream would not lead to adverse impacts. The Tribunal held that Mr Denney had not provided evidence to demonstrate that the lesser setbacks in the Forest Practices Code would not affect sedimentation or erosion, therefore the planning scheme requirements were not met.

The Tribunal recognised that forestry activities that did not involve vegetation removal within 30m of a waterway were permitted in the Rural Zone, therefore there was no basis to refuse to allow clearfelling on the land outside the required setback distance. The Tribunal ordered that a permit be granted for the proposed clearfelling, subject to a condition requiring 30m streamside reserves.

Relevant quotes:

- Having regard to the above evidence and findings the Tribunal finds that there is a significant risk that selective logging as proposed in the southern portion of [the

land], and the establishment of the plantation in areas adjacent to that selective logging, will impact adversely upon the Velvet Worm population of the area (at [44]).

- It was submitted on behalf of Mr Denney that prima-facie compliance with the Forest Practices Code 2000, which would occur by following the Forest Practices Plan as part of the proposal, was sufficient evidence to satisfy the [planning scheme requirements]. The Tribunal considers that while it may be inferred in general circumstances that the Forest Practices Code criteria are adequate to prevent erosion and increased sediment flows, there is no evidence sufficiently specific to show that following the prescriptions of the Code [will demonstrate compliance with the scheme] (at [52]).

VICTORIAN CASES

DPP v Brown (1998) 100 LGERA 181

This appeal was heard with two other respondents (DPP v Knight; DPP v Hess) in relation to an identical issue.

Facts:

The respondents were charged under s 95A(1)(b) of the *Conservation Forest and Lands Act 1987* (the **Conservation Act**) with obstructing the lawful carrying out of forest operations at Freddy Creek, part of the Goolengook River System in East Gippsland. The respondents defended the charges, claiming the forestry operations were unlawful, as they were conducted in a heritage river area contrary to the provisions of s10(5) and s15 of the *Heritage Rivers Act 1992*. Section 10(5) of the *Heritage Rivers Act* provided that timber harvesting was not to be carried out in any heritage area specified in column 4 of Sch 3, which included the Goolengook heritage area.

The map of the area established that the width of the relevant heritage river area was 200 m from the bank on either side. In four places on the map, however, the following notation appeared:

> *"Boundary is the natural features zone defined in the forest management plan"*

The Forest Management Plan for the East Gippsland Forest Management Area was published more than three years after the *Heritage Rivers Act 1992* came into operation. Under the Plan, the width of the relevant heritage river area was defined as 100 m from either bank.

In the first instance, the Magistrate was satisfied that the forestry operations were not lawful, as they were conducted within 200m of the river, contrary to the s 10(5) of the Heritage Rivers Act 1992. The DPP appealed against the decision, arguing that logging within 100 m of the heritage river was permitted by the Forest Management Plan.

Brown submitted that allowing harvesting within the lesser buffer zones provided by the Forest Management Plan would require a conclusion that Parliament had not adequately particularised the heritage river areas and left that task to be governed by a later administrative act (the making of the Forest Management Plan). Furthermore, when the *Heritage Rivers Act 1992* commenced, no forest management plan had existed to define the width of the heritage river. Therefore, the 200m buffer defined in the legislation should be preferred.

Legal issues:

- What was the legislative boundary of the relevant heritage river area - 100 metres from the river bank, as stipulated by the forest management plan, or 200m, as defined by the map in the *Heritage Rivers Act 1992*?
- Should the buffer zone under the forest management plan be given effect, despite its inconsistency with the *Heritage Rivers Act 1992*?

Summary:

Considering the *Heritage Rivers Act 1992* as a whole, Kellam J was satisfied that the words and the map in the Schedule expressly defined the area of the heritage river area to be 200 m on either side of the bank (at [26]).

The Court held that the manner in which the Forest Management Plan came into existence made it unlikely that Parliament had intended the Plan to define the boundary of a heritage river area pursuant to the Act. This was because the Plan:

- commenced three years after the Act;
- was not approved by Parliament, any Minister or the Governor-in-Council, and could have apparently increased or decreased the area

"shown bordered in blue" on the map without reference to Parliament (at [33]).

Kellam J agreed that it would be inconsistent with the express provisions and purpose of the *Heritage Rivers Act 1992* to find that the legislation itself did not adequately particularise the heritage river area (at [34]). Zones relied on by the DPP were identified by the Land Conservation Council. Though the Council is a body recognised and defined by the *Heritage Rivers Act 1992*, Kellam J observed that if Parliament intended to prescribe a heritage river area by reference to a zone identified by the Council, it would have expressly done so.

Kellam J upheld the Magistrate's finding that the heritage river area extended 200m either side of the river, and the DPP had failed to establish that the forestry operations in question were lawful.

Relevant quotes:

- It cannot be that Parliament intended a two-stage definition of the boundary of a heritage river area, nor can it be that Parliament intended that the boundary of a heritage river should stay undefined for an uncertain period following the proclamation of the Act (at [30]).
- However, even if Parliament… did intend that the boundary of the heritage river area would be defined by a forest management plan in the future, serious difficulties nevertheless remain as to how such a forest management plan would be created, defined and interpreted. Save for the words "the forest management plan" appearing in the rubric on the map, there is no further definition of it in the Act. The Forest Management Plan relied upon by the appellant is a document published by the Department of Conservation and Natural Resources in December 1995. Its status was not clearly established. It was not clearly identified in the rubric or any other part of the Act (at [31]).

Hastings v Brennan & Anor; Tantram v Courtney & Anor (No. 3) [2005] VSC 228

Facts:

The applicants were convicted of hindering or obstructing lawful forestry operations in East Gippsland. They argued that the logging was unlawful as it included destruction of rainforest and harvesting of protected timber. In particular, they argued that:

- the coupe boundaries had either been drawn to unlawfully include rainforest areas, or had failed to adequately separate the coupe from rainforest areas as required by the *Code of Forest Practices for Timber Production*;
- the logging operation itself resulted in the destruction of rainforest or the harvesting of other protected timber including nesting habitat for the Powerful Owl.

The Department of Sustainability and Environment (**DSE**) maintained that the logging operations were lawful and the applicants had acted unlawfully in obstructing the operations.

The applicants were initially unsuccessful in the Magistrates and County courts, before appealing to the Supreme Court.

Legal issues:

- Had DSE established that the forest operations in question were lawful?
- Were government officers bound by the *Code of Forest Practices for Timber Production*?
- Is wilful disobedience in relation to Code obligations required to establish that an operation is unlawful?
- Had the applicants been denied natural justice and the opportunity to advance their arguments in relation to the illegality of the forestry operations?

Summary:

Harper J was satisfied that the coupe boundaries were delineated, but that the area included in the coupe did not comply with the requirements of the Code relating to Protection of Rainforest (at [26]). Had the boundaries been lawfully drawn, the rainforest would not only have been outside the coupe, but beyond it at such a distance as to ensure its protection.

The Court considered that the relevant licence did not authorise the logging of a coupe that included, or was insufficiently separated from, rainforest. Harper J held that officers are required to minimise adverse effects and to comply with the Code provisions unless satisfied that there exists no feasible and prudent alternative to logging.

His Honour held that it was not necessary to establish wilful disobedience by an officer in order to demonstrate that logging operations were unlawful, it was sufficient to show that carelessness had resulted in non-compliance with relevant restrictions.

Harper J held that the appeal judge had failed to adequately consider evidence that the logging was illegal, or to provide adequate reasons for his decision. Harper J observed that the judge appeared to have predetermined the guilt of the applicants and had failed to afford them natural justice (at [33-34]).

Relevant quotes:

Logging of rainforest

The fact remains that the law, in the form of the *Code of Forest Practices for Timber Production*, forbids the commercial exploitation of rainforests. And in my opinion, logging of such forests would not necessarily be lawful even if they were encompassed within the boundaries of a coupe for which a licence had been issued pursuant to the *Forests (Licences and Permits) Regulations 1999*. Indeed, only if the relevant Administrative Office Head were satisfied pursuant to s 67(2) of the Act (a) that there was no feasible and prudent alternative to boundaries which included rainforest and (b) that all measures that could reasonably be taken to minimise the consequential adverse effects had been taken, that such inclusion would be lawful. Departmental carelessness which resulted in the inclusion of rainforest within the boundaries of a coupe is not covered by s 67 (at [26]).

Wilful disobedience

The judge appeared to take the view that only "a conscious disregard" by Departmental officers for the Code and other applicable instruments would cause any breach of the Code by them to result in unlawfulness. If this is so, then careless stupidity, resulting in (for example) large areas of rainforest being included in a coupe and subsequently being logged by the holder of a licence to cut and take away the forest produce of that coupe, would not render that forest operation unlawful. But in my opinion it is not so. The careless preparation of a Forest Coupe Plan which incorporated rainforest within the boundaries of the coupe would in my opinion be action contrary to that provision of the Code which provides that rainforest must be excluded from timber harvesting. It could not be said that, because no wilful disobedience was involved, the logging of rainforest within the coupe was lawful (at [20]).

Environment East Gippsland Inc v VicForests [2009] VSC 386

Facts:

Environment East Gippsland (**EEG**) sought an interlocutory injunction to restrain VicForests from carrying out logging of two State forest coupes on Brown Mountain, East Gippsland. EEG submitted that:

- The proposed logging failed to comply with the *Code of Practice for Timber Production 2007* (the **Code**), the *East Gippsland Forest Management Plan* (the **Plan**) and action statements concerning individual species promulgated by the Department of Sustainability and Environment (**DSE**) under the *Sustainable Forests (Timber) Act 2004* (Vic) and the *Flora and Fauna Guarantee Act 1988* (Vic);
- logging would therefore be unlawful given the environmental obligations upon VicForests to protect native fauna, because the area in which the coupes were located were major habitats for the Long-footed Potoroo, Spot-tailed Quoll, Orbost Spiny Crayfish, Sooty Owl and the large Brown Tree Frog. In particular, the Long footed Potoroo and the Sooty Owl had been detected in those areas.

VicForests submitted that:

- EEG lacked standing to bring the action, as they were not a peak body and had no government recognition;
- No breach had been established, therefore there was no serious question to be tried;
- The Code and Plan set out broad statements of principle rather than imposing specific responsibilities; and
- The balance of convenience did not favour a grant of injunction, as a sizeable financial loss would be incurred if the logging was prevented.

Legal issues:

- Did Environment East Gippsland have standing?
- Was VicForests under an obligation to conserve and manage flora and fauna habitat?

- Did the balance of convenience favour the granting of the injunction?

Summary:

The Court was satisfied that EEG had prima facie standing as the only body directly interested in the preservation of the natural habitat of the relevant area.

The Court held that the mandatory action provisions of the Code, the Plan and relevant action statements all imposed statutory obligations on VicForests. Particularly given the vulnerability of the affected species, these requirements were to be applied by VicForests in the event of detection of a threatened or endangered species in the preparation of plans and conduct of operations. At the very least, the Court was satisfied that there was a prima facie case that it was necessary for VicForests to apply the precautionary principle and to consider relevant scientific evidence, given that the potaroo was detected within a coupe (at [79]).

The Court was satisfied that the proposed logging would be likely to involve breaches of obligations due to the presence of endangered species in the area. The Court noted that the disadvantage to VicForests of an interim injunction was not as severe as they alleged, as any asset would be retained by them for future harvesting. In light of the irreversibility of the proposed logging and the potential impacts on endangered species, the balance of convenience strongly favoured the granting of the injunction while the matter was heard.

Relevant quotes:

Responsibilities imposed upon VicForests by the Plan, the Code and the action statements

- I have set out their provisions in some detail, as I think it necessary to understand that these are far from lofty statements of principle, but rather, given the inherent tension between principles of conservation and logging, are designed to set out precisely the manner in which VicForests will carry out its logging,. This is particularly so, it seems to me, where there is a question of whether a threatened or endangered species habitat will be affected (at [75]).
- The action statements are patently specific. Once the particular species is detected, then specific obligations are cast upon particular agencies of government including statutory authorities. Whilst I accept that there may be a real distinction as to which obligations contained within the action statements are cast upon particular statutory bodies (e.g. DSE, Parks Victoria, VicForests), the reference within the action statement to a specific entity does not, I think, necessarily remove the obligation of VicForests to comply with provisions of the action statement (at [77]).

The precautionary principle

- I am not persuaded that the reference to the precautionary principle is, at least on the analysis required for this application, simply a statement of objective or lofty principle. It is the terms of the Code and the emphasis on the mandatory nature of the obligation on VicForests both before and during operations that satisfies me that there is a prima facie case that it was obliged to comply with the Code in relation to both the application of the precautionary principle and the consideration of expert evidence relevant to the area the subject of logging (at [80]).
- VicForests contended that the declaration by the Minister of a [Special Protection Zone] 100 metres to the east and west of the Brown Mountain creek dividing the two coupes was sufficient to comply with its obligations under the action statement… For my part, at least on this application, I am not satisfied that the mere declaration of this area constitutes appropriate compliance with the wide range of requirements identified in the appendix, particularly those relating to the creation of a potoroo habitat. These requirements mandate careful consideration of the establishment of a habitat in the coupes (at [89]).
- Nor am I satisfied that the declaration of the [Special Protection Zone] satisfied the obligations cast upon VicForests by other parts of the Code. The detection of the potoroo raises the question of VicForests' application of the precautionary principle in relation to its logging activities as set out in the Code …[197] There is at least an arguable case that once the presence of the particular species is noted, then there is an obligation upon VicForests to comply with that principle in determining whether to commence or continue with operations[198] (at [90]).

Sooty owl

- … It has not been sighted by DSE officers or by any of the volunteers who conducted surveys of coupes on Brown Mountain. It is not at all clear at the present time, as to whether it inhabits the area, in the sense of roosting or nesting. This would be necessary, I think, to trigger the application of the various statutory obligations (at [95]).

Balance of convenience

- Irreparable harm will be done to the habitat of the native fauna, and particularly that of the detected potoroo. I accept that there will be significant financial ramifications for VicForests by the granting of an interlocutory injunction, but, as I have said, that needs to be balanced against the irreversible damage that will be caused to the habitat, bearing in mind that the potoroo is an endangered and threatened species (at [104]).
- In reaching this conclusion, I have thought long and hard about the adverse economic consequences to VicForests, its customers and its contractors. Notwithstanding these matters I have formed the firm opinion that the legislature intended that its logging operations be carried out with clear and specific consideration of the environmental impact of such an enterprise upon threatened species; a potential breach of these guidelines runs contrary, I think, to the underlying policy of the Code, the Plan and the action statements… (at [106]).

Environment East Gippsland Inc v VicForests [2010] VSC 335

Facts:

Environment East Gippsland (EEG) sought to restrain the logging of four coupes located in the valley of Brown Mountain Creek, East Gippsland. They successfully obtained an interlocutory injunction to suspend logging operations pending the result of these proceedings.[199]

EEG submitted that:

- proposed logging would breach the conditions pursuant to which VicForests were permitted to lawfully undertake timber harvesting;
- the precautionary principle should be applied in respect of habitat preservation for endangered species, namely the Long-footed Potoroo, Greater Gliders, Yellow-bellied Gliders, Giant Burrowing Frog, Large Brown Tree Frog and Spot-tailed Quoll.

VicForests denied that a number of the endangered species in question had been detected in the Brown Mountain coupes. They further contended that:

- the prescriptions developed for logging the coupes, coupled with the provision of conservation reserves in the surrounding area, would adequately protect the conservation values of the area; and
- it was for Department of Sustainability and Environment (**DSE**) to stipulate any further requirements for habitat retention by way of Special Protection Zones (**SPZ**). Unless DSE did so, VicForests were entitled to undertake logging in accordance with permissions they currently held.

Legal Issues:

- Did the presence of relevant endangered species trigger a requirement for VicForests to provide a SPZ, Special Management Zone or habitat retention area?
- In the absence of a requirement by DSE for habitat retention by way of a SPZ, was VicForests under any obligation to protect the habitat?
- Did EEG have standing to bring proceedings?

Summary:

On evidence, Osborn J was satisfied that EEG had standing to bring the proceedings. Osborn J noted that EEG (through its unincorporated predecessor) had been involved in consultative processes in the formulation of the forest management plan, was a user of the affected forest areas and was a government-funded body representing the general public interest.

Osborn J held that the existence of several endangered species in the area required provisions for Special Management Zones and SPZs. The Court was satisfied that, unless VicForests complied with the requirements of relevant Action Statements under the *Flora and Fauna Guarantee Act 1988* and the conditions of the allocation order and Timber Release Plan, logging at Brown Mountain would be unlawful (at [756]).

Given the evidence that the Long-footed Potoroo had been

detected in the coupe areas, compliance with the Action Statement required provision of a Special Management Zone and habitat retention area (at [13]). Exceptionally high densities of Greater Gliders and Yellow-bellied Gliders within the coupes also required provision of an SPZ of approximately 100 hectares, pursuant to the East Gippsland Forest Management Plan and conditions of the relevant approvals for timber harvesting (at [14]).

<u>The precautionary principle & the Giant Burrowing Frog, Large Brown Tree Frog, Powerful Owl, Sooty Owl and the Spot-tailed Quoll</u>

Osborn J held that the *Code of Practice for Timber Production* required VicForests to apply the precautionary principle (as defined in the *Sustainable Forests (Timber) Act 2004)* when conducting timber harvesting (at [15]). The application of the principle in relation to the Brown Mountain coupes required completion of further field surveys in respect of the Giant Burrowing Frog and Large Brown Tree Frog.

The precautionary principle also required the completion of re-evaluations underway with respect to management area provisions relating to the Powerful Owl and Sooty Owl and, in the event of detection of the Spot-tailed Quoll, the completion of a review of the system of reserves within the East Gippsland area.

Osborn J held that proposed logging at Brown Mountain would be unlawful unless these reviews were carried out. On the basis of the available evidence, Osborn J upheld EEG's application and granted a conditional injunction on the basis that it was in the public interest to prevent unlawful logging operations.

Relevant quotes:

Application of the legislative framework and the precautionary principle

- The balance struck by [the relevant legislative and regulatory framework] includes explicit recognition that harvesting planned by reference to a range of competing considerations (including conservation matters) will nevertheless be subject to overriding and ongoing obligations relating to the protection of endangered species. The nature of such obligations falls principally to be determined by the specific provisions of the framework relating to each species… but also by the ongoing application of the precautionary principle (at [300]).
- The submissions of EEG on bases other than the precautionary principle do not advance the matter. The obligations of VicForests' under s 4(2) of the FFG Act will be complied with if the precautionary principle is observed (at [606]).

Flora and Fauna Guarantee Act 1988 Action Statements ("FFGAS")

- Until and unless the requirements of the FFGAS are met however, logging will be unlawful because the entitlement of VicForests to log is conditional upon compliance with the FFGAS. The fact that it does not lie within the hands of VicForests alone to achieve compliance with the FFGAS does not remove its obligation to meet the relevant precondition as to provision of retained habitat before it can log lawfully (at [422]).

SPZs relating to the Greater Glider and the Yellow-bellied Glider

- In these circumstances, the specific provision contained in the conservation guideline constitutes a standard which has been incorporated as a condition of the allocation order and TRP. The guideline contained in the FMP has crystallised as a condition of the allocation order and TRP. If the trigger occurrence specified in the FMP occurs then the standard requires the inclusion of approximately 100 hectares of suitable habitat in an SPZ (at [656]).
- VicForests submits that the requirement does not crystallise unless DSE specifies an SPZ. I accept that this is correct in the sense that it is not capable of performance until the form of an SPZ is finalised. Nevertheless the logging of the Brown Mountain coupes (and in particular coupe 15) will breach the requirements of the FMP if no SPZ has been created in response to the standard it specifies. In these circumstances, logging would take place in breach of the requirement to create an SPZ of approximately 100 hectares of suitable habitat. *Accordingly, the better view is that logging should not be permitted to proceed until compliance with the FMP is achieved* (at [700]).

MyEnvironment Inc v VicForests [2012] VSC 91 (Unreported)

Facts:

MyEnvironment sought to restrain VicForests from commencing logging at three coupes in Freddo and South Col, near Toolangi. The group also sought a declaration that current logging in parts of Gun Barrel was unlawful, and an order restraining the resumption of logging at that site.

MyEnvironment claimed that the sites were special protection zones (**SPZ**) and habitat for the Leadbeater Possum (**LBP**), an endangered species listed under the *Flora and Fauna Guarantee Act 1988* (Vic) (FFGA).

The Leadbeater Possum Action Statement (**LBP AS**), made under the FFGA, stated that a crucial component of the LBP's habitat was nest-tree abundance – specifically, hollow-bearing trees (**HBT**). Both the LBP AS and the applicable Forest Management Plan seek to conserve areas of potentially optimum LBP habitat, identifiable by criteria relating to vegetation characteristics, rather than by detection of the species.

A core dispute between the parties was whether the LBP AS and Forest Management Plan relevantly provided for exclusion zones to be created by reference to specified densities of "old" HBT, or for all HBT.

MyEnvironment submitted that the logging of the Toolangi coupes was unlawful because:

- those sites contained zone 1A forest, as defined in the LBP AS or the FMP; or
- it would breach the precautionary principle, having regard to underlying considerations of ecologically sustainable development and the need to complete a series of alternative adaptive procedures as a precondition to any further logging.

VicForests contended that:

the LBP AS did not impose any obligations, other than those outlined in the Forest Management Plan;

Gun Barrel did not contain zone 1A forest. No final forest coupe harvesting plans had been developed for Freddo and South Col, however VicForests did not intend to log any parts of those coupes which constitute zone 1A;

- the precautionary principle did not give rise to an enforceable legal obligation with respect to timber harvesting in the Toolangi coupes;
- there was no real threat of serious or irreversible danger to the environment if the Toolangi coupes were logged;
- if the precautionary principle is engaged, the proposed timber harvesting would be undertaken in accordance with the proper application of such a principle; and
- the adaptive management measures put forward by MyEnvironment were not proportionate to any threat of danger to the environment.

Legal issues:

- Did the proposed coupes contain LBP zone 1A habitat?
- Does the criteria for zone 1A forest relevantly require patches of forest of more than 3 hectares containing at least 12 mountain ash HBT per hectare of any age, or must such HBT be mature and senescing trees?
- Was there an obligation to comply with the precautionary principle?
- Were the proposed adaptive management measures proportionate to the threat to the LBP?

Summary:

Osborn JA concluded that the LBP AS describes Zone 1A habitat by applying a density factor to mature HBT, and contemplates that the exclusion zone scheme is to be implemented through the Forest Management Plan. The Court held that the LBP AS did not impose zone 1A obligations independently of the FMP. Pursuant to the Forest Management Plan, the 'hollow-bearing tree' density factor for identifying Zone 1A habitat relates to mature or senescing trees.

Osborn JA held that there was no evidence that the sites contained sufficient density of hollow-bearing trees to constitute zone 1A protection. Further, VicForests' intentions with respect to Freddo and South Col had not yet crystallised into proposals which could be said to breach the zone 1A prescription.

Osborn JA was also not satisfied that precautionary principle applied, as MyEnvironment had failed to establish that there was a threat of a serious or irreversible damage to the environment resulting from the proposed variable retention harvesting of the Gun Barrel site, or the as yet unresolved proposals to harvest timber at the Freddo and South Col

sites. His Honour held that the adaptive management measures proposed by MyEnvironment were not directly responsive or proportionate to any identified threat which could result from the variable retention harvesting of Gun Barrel (at [23]).

Osborn JA dismissed MyEnvironment's application, concluding that:

- the initial and proposed logging of Gun Barrel did not breach LBP AS or FMP requirements, or the precautionary principle; and
- the proposals to log Freddo and South Col had not progressed to the point where it could be said that such logging should be restrained on the basis of unlawfulness, either by breach of the LBP AS or the FMP, or the precautionary principle.

Response:

VicForests applied for orders that MyEnvironment pay the costs of proceedings from the date of a detailed offer of settlement made on its behalf, which was not accepted by MyEnvironment.[200] MyEnvironment opposed the application on the basis that

- the proceedings were brought in the public interest;
- the proceedings raised a matter of particular public importance in respect of the construction of the Central Highlands Forest Management Plan, which was resolved in part in MyEnvironment's favour; and
- MyEnvironment is a non-profit organisation carrying out its activities for the benefit of the Victorian and Australian community.

The Court held that VicForests had successfully defended proceedings and made a reasonable offer of settlement, and was therefore entitled to costs.

Osborn JA noted at [19] that the public interest characteristics of the proceeding did not outweigh VicForests' claim for costs. Neither at common law, nor pursuant to the provisions of the Civil Procedure Act, is it is sufficient simply to characterise proceedings as public interest litigation in order to avoid the normal rule as to costs.[201]

However, it was held that VicForests should not get its costs on an indemnity basis, given that proceedings were of a public interest character and raised a question of general public importance regarding interpretation of the relevant controls that had broader implications beyond the three coupes in issue. Moreover, in one respect at least, MyEnvironment was successful, namely concerning whether the words "mature and senescing" should be construed cumulatively or as alternatives.

The application was therefore granted in part.

Relevant quotes:

Interpretation of the Leadbeater Possum Action Statement

The objectives, definitions and management of the zoning system will be as follows:

Zone 1A — Leadbeater's Possum (and other wildlife) conservation as the major priority.

- *mature ash forest (>120 years old) and mixed aged ash forest where the oldest age class is mature (>120 years old).*
- *regrowth ash forests with at least 12 live hollowbearing trees per 3 ha.*
- *the minimum area for assessment and establishment of Zone 1A type forest shall be 3 hectares.*

- It seems to me that the better view is that the second dot point is part of the product of the revision intended to relate to "good habitat with living old trees". It relates to HBT which are mature (at [157]).
- The purpose stated for the revised zone 1A explicitly identifies zone 1A as concerned with living old trees. The identification of this purpose follows:
  - the initial description of essential habitat which relates to large old HBT;
  - the initial description of optimum habitat which includes trees with the present potential to be used as nest trees (ie large old HBT);
  - the statement of the relevant conservation management objective as identifying and taking measures to protect all areas of optimum and potentially optimum habitat;
  - the identification of the major challenge for long term conservation of the LBP as the protection and continuing development of old trees with suitable hollows for nesting and shelter;

- the discussion of ecological issues specific to the taxon which identifies the need for old growth montane ash forest trees as an element of LBP habitat;
- the endorsement of changed timber harvesting practices away from clear felling in order to create a long term supply of old aged trees; and
- the rationale for the previous guideline stated in the Draft Strategies and Guideline which referred to multi-age structured forest where the latter contains more than 12 living, emergent potential nest trees per 3 hectares (at [158]).

- Taken as a whole, the antecedent matters I have referred to strongly support the view that the reference to "living old trees" in the stated purpose of the zone 1A provisions is not coincidental or irrelevant. It accurately describes the category of HBT in regrowth forest to which zone 1A is directed (at [160]).
- [The last substantive paragraph of the LBP AS] makes clear that, whilst the intended management actions provide necessary "directions and options for the conservation of the LBP", the management of particular areas will take into account other considerations. It is the "relevant area management plans" which crystallise and "determine" the prescriptions governing zone 1 A. I do not read the final sentence which states that intended actions in the LBP AS 'should' be incorporated in FMPs as necessarily requiring that they be so included in the precise terms in which they are stated in the LBP AS, or precluding refinement of those actions within the FMP(at [208]).

Meaning of 'living mature and senescing'

- I do not accept MyEnvironment's submission that the words "living mature and senescing" are to be understood as a guide or indicator of the kinds of trees that will often meet the definition. The FMP is intended to be utilised by foresters. The inclusion of the words "living mature and senescing" within the management prescription would be grossly misleading if this were not intended to indicate the ambit of the prescription (at [240]).
- The words utilised in the management prescription must be accepted as intended to "detail specific conditions or standards which are to apply to forest operations in the vicinity of … [the] threatened fauna"[202] (at [242]).
- The utilisation of a specific prescription is also to be contrasted with the management guideline which concludes the earlier provisions relating to HBT generally. The prescription is not simply intended to "give direction" to forest managers. If it were so intended, it would be entitled a "management guideline"[203](at [243]).
- In my view, the prescription relates to HBT which are either mature or senescing. If it did not, the word 'mature' would be superfluous, as the evidence establishes (and VicForests concedes) that a senescing tree of the relevant species is necessarily one which has previously been mature (at [252]).

Meaning of the word 'patches'

- I do not accept that 'patches' is simply a synonym for areas. A patch must be a patch of forest. I do accept, however, that it need not be regular in configuration. It is an ordinary English word and its applicability is a question of fact (at [253]).
- In the present case, however, no matter how hypothetical patches are configured, the evidence does not establish the required density of mature or senescing trees in Gun Barrel. MyEnvironment's evidence identified polygons which would meet the prescription if it were to apply to all living trees of the requisite species containing hollows, but that evidence does not demonstrate that the relevant criteria relating to "mature and senescing" trees are met (at [254]).

The precautionary principle

- In the *Telstra* case, Preston CJ noted that relevant factors bearing on the question whether there is a threat of serious or irreversible damage to the environment may include:
  - the spatial scale of the threat (for example, local, regional, statewide, national, international);
  - the magnitude of possible impacts, on both natural and human systems;
  - the perceived value of the threatened environment;

- the temporal scale of possible impacts, in terms of both the timing and the longevity (or persistence) of the impacts;
- the complexity and connectivity of the possible impacts;
- the manageability of possible impacts, having regard to the availability of means and the acceptability of means;
- the level of public concern, and the rationality of and scientific or other evidentiary basis for the public concern; and
- the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts, and the difficulty and expense of reversing the impacts.[204] (at [274])
- …[I]t will be easier to identify a threatened breach of the precautionary principle when a specific action threatens direct serious or irreversible damage to an aspect of the environment of extreme sensitivity and/or novel qualities. The more generalised the threat and the more indirect and less immediate the damage to a sensitive aspect of the environment, the more difficult it will be to be satisfied that the precautionary principle requires abstinence from a particular action (at [268]).
- As I said in the *Brown Mountain* case,[205] the requirements of the precautionary principle fall to be considered in the light of the whole of the evidence bearing on the relevant facts as it now is, and not as it was at the time VicForests completed planning for operations in the coupes in issue (at [269]).
- Evidence with respect to the identification and circumstances of essential habitat for a particular threatened species which was not identified during the planning process may thus establish a threat to the environment potentially justifying the application of a precautionary approach (at [270]).
- *The precautionary principle is not, however, directed to the avoidance of all risks.* The degree of precaution appropriate will depend on the combined effect of the seriousness of the threat and the degree of uncertainty. The margin for error in respect of a particular proposal may be controlled by an adaptive management approach, but the adaptive management measures must bear directly and proportionately on the risk (at [314]).

Whether the overall system of reserves and exclusion zones should be reviewed

- The proposition that the overall system of reserves and exclusion zones should be reviewed does not, however, compel the conclusion that the variable retention harvesting of Gun Barrel has the capacity to materially affect the overall adequacy of such a system (at [302]).
- Such review will necessarily involve an evaluation of factors bearing on the sustainable ecological use of the whole of the forest affected by the FMP. Such a review involves policy considerations not readily justiciable before this court (at [303]).

IF the proposed logging of Gun Barrel did engage the precautionary principle

- If the logging were regarded as involving a threat of serious or irreversible environmental damage in the relevant sense, it might be said to be attended by material scientific uncertainty[206] in that:

  a) the overall extent of LBP habitat in the Central Highlands effectively protected after the 2009 fires is uncertain; and

  b) the capacity of the LBP to survive the 'bottleneck' reduction in optimum habitat in or about the period between 2020 and 2075 is uncertain (at [311]).
- In turn, if this view were taken, the burden would shift to VicForests to show that the threat was negligible.[207] Assuming for present purposes that this burden could not be discharged, nevertheless MyEnvironment faces a further fundamental difficulty in establishing that the relief it seeks is proportionate to the threat alleged (at [312]).

Gun Barrel site

- It follows from my conclusions with respect to the LBP AS and the FMP that the logging of Gun Barrel will not be contrary to the balanced provision of reserves, exclusion areas and forest harvesting expressly contemplated by both the LBP AS and the FMP. Both these documents make clear that the planning of such provisions involves a consideration not just of potential environmental consequences, but also of social and economic and other considerations (at [283]).
- In relative terms, the further logging of Gun Barrel involves an area which is *proportionally insignificant* to the total area preserved as habitat (at [284]).

WESTERN AUSTRALIAN CASES

South-West Forest Defence Foundation v Department of Conservation and Land Management (No 1) (1996) 131 FLR 225

Facts:

The South-West Forest Defence Foundation (**South-West**) and Friends of Jane sought an injunction to prevent logging operations in Jane Forest, in an area listed on the Register of the National Estate under s 26 of the *Australian Heritage Commission Act 1975*.

South West claimed that the National Estate conservation values were a relevant consideration that Department of Conservation and Land Management (the **Department**) had failed to take into account. South West also claimed that the Department had failed to fulfil its duty to identify, locate and seek to conserve endangered flora and fauna before commencing logging under the *Conservation and Land Management Act 1984*.

The Department sought leave to strike out sections of South-West's statement of claim on the grounds that there was no basis for any of the causes of action alleged against them.

Legal Issues:

- Did South-West have standing?
- When should a plaintiff be permitted to proceed with a claim of doubtful legal strength? Was an application for the striking out of an amendment to a statement of claim the appropriate venue for this decision?
- Did s 33 of the *Conservation and Land Management Act 1984* or Chapter 1 of the Forest Management Plan 1994 create duties and relevant considerations upon which a court could grant relief?
- Would failure to apply the precautionary principle provide grounds for injunctive relief?

Summary:

Chapman AM was satisfied that South West had standing to seek the injunction but was unsure that the group had an arguable case. He cited authority in *Kimberley Downs Pty Ltd v Western Australia* that a court at first instance should be careful not to stifle the development of law by summarily rejecting a claim where there is a "reasonable possibility that, as the law develops, it will be found that a cause of action will lie".[208] Chapman AM held that the law in environmental cases was still developing and it would be inappropriate to stifle development at the interlocutory stage of a trial. In particular, he observed that the significance of National Estate listing was difficult to determine at a strike out application, which was a factor counting against the application.[209]

Chapman AM held that the *Conservation and Land Management Act 1984* did not make provisions of the *Wildlife Conservation Act 1984* applicable to specific activities of the Department or its logging contractors, because the *Wildlife Conservation Act 1984* did not bind the Crown or its agencies. Despite this, the Department was "obliged to perform their functions in accordance with the *Wildlife Conservation Act*, for example in relation to the provisions dealing with flora. It is just that the *Wild Life Conservation* imposes no obligations on the defendants in relation to fauna".[210] Chapman AM held that there was a case to be put at trial regarding whether the Department had performed its functions in accordance with the Act.

The Court held that the precautionary principle, as defined under the *Environment Protection Act 1986*, may apply prior to the commencement of logging. In this situation, where logging had already commenced, the precautionary principle required appropriate monitoring and subsequent adjustments if there was a significant risk that a forest management procedure could lead to an irreversible consequence. Chapman AM was satisfied that an injunction would be an appropriate remedy if such a case could be proven.[211]

Chapman AM struck out one paragraph from the statement of claim alleging that the Minister was severably liable for actions taken by members of the Department, but otherwise ordered that the matter proceed to trial for determination of the legal issues.

Response:

The Department appealed against the decision to the Full Court of the Supreme Court of Western Australia. The appeal was heard in conjunction with the appeal in *Bridgetown-Greenbushes Friends of the Forest Inc & Anor v Executive Director of the Department of Conservation and Land Management* (below).

Relevant Quotes:

Potential harm of logging:

- In essence, the plaintiff seeks to confine logging in this forest because of the possible impact it will have on the environment. Once the logging has taken place it may be too late to address the issues raised in this matter. I would have thought that given the facts of this particular case a court might well find that special circumstances exist and would be more inclined to entertain the claim made even though it may not strictly fall into the criteria which courts have followed in the past (at [236]).
- …[G]iven the nature of this particular action and the consequences which may flow if logging were to take place without the appropriate matter being fully considered and taken into account, I am not at this interlocutory stage prepared to hold that there is no prospect of a court exercising its discretion. It would seem to me that considering the sensitive area of the law into which this matter falls it may well depend upon the facts as found by the court (at [240]).

Bridgetown-Greenbushes Friends of the Forest Inc & Anor v Executive Director of the Department of Conservation and Land Management (1997) 18 WAR 126

Facts:

Bridgetown-Greenbushes and others sought declaratory and injunctive relief against in relation to logging proposed to be carried out in Hester and Kerr State Forests in accordance with certain operational plans. The groups claimed that the operations would be in breach of the law, being contrary to the Forest Management Plan, provisions of the *Wildlife Conservation Act 1984* and departmental guidelines in relation to logging standards. The Department of Conservation and Land Management (the **Department**) sought to strike-out the claims.

The appeal was heard in conjunction with the appeal from *Southwest Forest Defence Foundation v Department of Conservation and Land Management* (1996) 131 FLR 225.

Legal Issues:

- Do management plans impose legal duties or obligations on the Department to consider matters listed under s 33 of the *Conservation and Management of Land Act*?
- Were the logging operations in breach of specifications prepared by the Department? If so, what was the consequence of such a breach?
- Were Bridgetown-Greenbushes and other members of the local community denied natural justice by the Department's failure to consult them in relation to the preparation and implementation of the various logging plans?

Summary:

Section 33 of the Conservation and Land Management Act

The Court held that the Minister has a duty to manage the land to which the Act applies, but the powers granted to manage the land did not impose enforceable duties.[212] Forest management plans impose a duty to manage land in accordance with the plan, however the Department retains discretion to decide the best way to do so. The Court held that the Minister was not bound to consider the Forest Management Plans as a 'relevant consideration' because they were so general that It was "impossible" to regard them as giving rise to justiciable issues of fact.[213]

Ministerial Conditions under the Environmental Protection Act 1986

The Court upheld the earlier decision that the *Wildlife Conservation Act 1984*, in so far as it deals with fauna, does not bind the Crown, its agents or servants. Though acknowledging that the Department had effectively taken

over the forest industry and those activities that would otherwise have been subject to the Act, the Court held that the interpretation of the *Wildlife Conservation Act* must be derived from its terms and cannot fluctuate according to the way in which State departments conduct their activities.

Logging Manual

The Court held that the *Manual of Logging Specifications* was an administrative instrument only, with no statutory force. As a consequence, the Department's failure to comply with the manual did not constitute a breach of any obligation.

Natural Justice

The Department had a general obligation to perform its functions in accordance with the rules of natural justice. However, the Court was not satisfied that the plaintiff groups had demonstrated that they held any legitimate expectation regarding consultation or involvement in the decision making process. The Court concluded that the plaintiffs had standing to bring proceedings, but no legitimate expectation concerning natural justice.

Response:

The applicants in both *South-West Forest Defence Foundation (No 1) v Department of Conservation* and *Land Management and Bridgetown/Greenbushes Friends of the Forest v Executive Director of the Department of Land Management* sought special leave to appeal to the High Court.

By majority, the High Court held that the matters were very complex and would involve a great deal of time in a case that would only result in an advisory opinion. Consequently, it was inappropriate to grant special leave. The applicants were advised to reformulate their pleadings and attempt a second law suit.

ENDNOTES

1. ABARES 2011, Australia's forests at a glance 2011. Available at http://adl.brs.gov.au/data/warehouse/pe_abares99001800/Forests_at_a_glance_2011.pdf

2. Commonwealth of Australia, 1995. *National Forest Policy Statement: A New Focus For Australia's Forests* (2nd edition)

3. *Brown v Forestry Tasmania* and Other (No 4) [2006] FCA 1729. The *Wielangta* decision was successfully appealed to the Full Federal Court (see s.2.4.2 of this report), however Justice Marshall's commentary in relation to the RFA regime was not overturned.

4. See Arup, T. 8 April 2013. "Fears for Leadbeater's Possum". *The Age*. Available at lm.theage.com.au/victoria/fears-for-Leadbeater's-possum-20130408-2hhde.htm

5. Department of the Environment, Water, Heritage and the Arts. October 2009. *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*: Final Report (the Hawke Review). Available at www.environment.gov.au/epbc/review/publications/final-report.html

6. G Musselwhite and G Herath. 2005. "Australia's Regional Forest Agreement Process: Analysis of the Potential and Problems". 7 *Forest Policy and Economics* 579, 580.

7. *EPBC Act*, s.38

8. Above, n2.

9. Above, n2, "The Vision", p.3.

10. National Forest Policy Statement, above n 2.

11. A full list of RFAs is available on the Department of Agriculture, Fisheries and Forestry website, www.daff.gov.au/rfa/about

12. N Hammond-Deakin. 2012. "Forests" in Laws of Australia 2012 edition, . Lawbook at [14.10.750]

13. Above n 6 at [14.10.260]

14. J Tribe. 1998. 'The Law of the Jungles: Regional Forest Agreements', 15 *Environment and Planning Law Journal* 136

15. See, for example, *Regional Forest Agreement for the Southern Region of NSW 2001*, cll 76, 80 and 81

16. Commonwealth of Australia (DAFF). 1995. The RFA Process: The Commonwealth Position, pp4-5

17. EPBC Act, s.38; *Regional Forest Agreement Act 2002* (Cth), s.6(4)

18. Above n6 at [14.10.260]

19. For example, see clause 23 of the Eden NSW Regional Forest Agreement 1999 and clause 23 of the South West Forests Regional Forest Agreement 1999. Please note, the clauses refer to the Environment Protection (Impact of Proposals) Act 1974, predecessor to the EPBC Act.

20. The Hawke Review, above n5, s. 10.10, p197

21. The Hawke Review, above n5, section 10.11, p197

22. Allan Hawke. 2011. 'Review of the EPBC Act', 1 National Environmental Law Review 33.

23. The Hawke Review, above n5

24. Department of Agriculture, Fisheries and Forestry. 2009. "Senate Environment, Communications and Arts Committee Inquiry into the Operation of the EPBC Act: DAFF Response to Committee Questions of 30 March 2009". Available at www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eca_ctte/completed_inquiries/2008-10/epbc_act/submissions/sublist.htm

25. Tasmanian Regional Forests Agreement 1997, clause 96

26. See note 3 above

27. Commonwealth Government and Tasmanian Government. 2007. Variation to the Tasmanian Regional

Forest Agreement – February 2007. Available at

www.daff.gov.au/__data/assets/pdf_file/0015/156003/variation-tas-rfa.pdf

28. The terms of each Integrated Forestry Operations Approval and licence vary

29. See Forestry Corporation website at www.forests.nsw.gov.au/resources/pubs

30. The Forestry Corporation may issue timber licences, forest product licences, forest materials licences, clearing licences: Forestry Act 2012 (NSW), ss.38–40; Forestry Regulation 2012, cll. 34–36

31. Nature Conservation Act 2002, Schedule 3A

32. This has yet to be tested – while approval is not required under the Forest Practices Act, the exemption from requiring approval is provided under the Forest Practices Act and may therefore still fall within "RFA activities"

33. See clause 47 of the North-East RFA, clause 48 of the West Victoria RFA, clause 36 of the East Gippsland RFA clause 47 of the Central Highlands RFA and clause 47 of the Gippsland RFA

34. Compliance with the Code of Practice for Timber Production is required for all forestry operations, as per s.46 of the Sustainable Forests (Timber) Act 2004

35. This standard is implemented through the Code. The definition of precautionary principle under the Code is "Precautionary principle – when contemplating decisions that will affect the environment, the precautionary principle requires careful evaluation of management options to wherever practical avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various options. When dealing with threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

36. This was highlighted by the decision in Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director

of the Department of Conservation and Land Management (1997) 94 LGERA 380 that the Department was not

bound to protect fauna under the Wildlife Conservation Act 1950

37. Forestry Act 2012, s.69M(2)

38. Forestry Act 2012, s.10(1)(c)

39. See, for example, Integrated Forestry Operations Approval for the Eden Region 1999, cl 8(2),

40. N Hammond-Deakin and S Higginson. 2011. If A Tree Falls: Compliance Failures in the public forests of NewSouth Wales, Environmental Defender's Office (NSW) Ltd, Sydney, Australia, p17.

41. Forestry Act 2012, ss.69S(1), (2).

42. Forest Practices Authority. 2010. Forest Practices Authority and DPIPWE Agreed Procedures. Available atwww.fpa.tas.gov.au/__data/assets/pdf_file/0010/57718/Forest PracticesAuthority_DPIPWE_agreed_procedures_2010.pdf

43. Forest Products Association. Review of the biodiversity provisions of the Tasmanian Forest Practices Code: A Report to the Forest Practices Authority, April 2009. Available at www.fpa.tas.gov.au/__data/assets/pdf_file/0018/58140/Biodiversity_review_report.pdf

44. Forest Practices Authority. 2012. Annual Review 2012: Biodiversity Review Summary. Available at www.fpa.tas.gov.au

45. [2005] TASRMPAT 150

46. Giles & Weston v Break O'Day Council & Denney [2001] TASRMPAT 150

47. S 40 STF Act

48. Section 2.1.3 of the Code of Practice for Timber Production

49. Section 2.2. 2 of the Code of Practice for Timber Production

50. EDO Vic. 2012. Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988, 23 March 2012, p12

51. Environment East Gippsland v VicForests [2010] VSC 416 at [742]-[743]

52. My Environment Inc v Vic Forests (MyEnvironment)[2012] VSC 91

53. MyEnvironment, above n 52, at [301]

54. MyEnvironment, above n52 at [333]

55. Victorian Auditor General. 2009. Administration of the Flora and Fauna Guarantee Act 1988: Final Report. Available at www.audit.vic.gov.au/reports__publications/reports_by_year/2009/20090401_flora_fauna.aspx; EDO Vic, above n 46 at p12; Lawyers for Forests and The Wilderness Society, Forest Law Reports: Evaluation of Victoria's Forestry Conservation Framework, 2010, p.120

56. Conservation Commission of Western Australia. 2012. Forest Management Plan 2004–2013 End-of-term audit of performance report, p57.

57. Australian Network of Environmental Defenders Offices, Assessment of the Adequacy of Threatened Species and Planning Laws in all Jurisdictions of Australia, December 2012, p51

58 Conservation Commission of Western Australia. 2013. Report and Recommendations of the Environmental Protection

Authority: Proposed Forest Management Plan 2014-2023. Available at http://edit.epa.wa.gov.au/EPADocLib/Rep %201483%20FMP%20PER%20010713.pdf

59. Conservation Commission of Western Australia. 2012. Forest Management Plan 2004–2013 End-of-term audit of performance report. p16.

60. For example, in the MyEnvironment case, VicForests witness Michael Ryan the surveying of site for leadbeater's possum habitat was undertaken by a forester employed by VicForests. See also Biodiversity Review Panel. 2008. Review of the biodiversity provisions of the Tasmanian Forest Practices Code. Unpublished report to the Forest Practices Authority, Hobart, Tasmania at p 79

61. Jan McDonald, 'Regional Forest (DIS) Agreements: The RFA Process and Sustainable Forest Management' (1999) 11(2) Bond Law Review 295, 317.

62. National Forest Policy Statement, Above n2, p8

63. Council of Australian Governments, National Climate Change Adaptation Framework (COAG 2007).

64. S Spencer. 2009. Final Report on Progress with Implementation of NSW Regional Forest Agreements: Report of Independent Assessor (November 2009), p45. Available at

www.daff.gov.au/__data/assets/pdf_file/0007/1546711/assessors-report.pdf

65. Above n 64, p46.

66. Above n 64.

67. Above, n 64.

68. Another example is provided by the MyEnvironment case, where the impact of the 2009 bushfires on the Leadbeater's Possum has not been considered under forestry protection measures considered by the RFA

69. Conservation Commission of Western Australia. 2012. Forest Management Plan 2004–2013 End-of-term audit of performance report. pp6-7.

70. EPBC Act, s.139

71. See Wielangta decision at [301]

72. Kivi v Forestry Commission of NSW (1982) 47 LGRA 38; see also John Whitehouse. 2001. Development and Planning Law in New South Wales, CCH, Sydney at 71-060

73. Jarasius v Forestry Commission of NSW (No 1) (1988) 71 LGRA 79

74. Forest Practices Act 1985, s.31

75. Above, n 43

76. Wielangta, above n3

77. Wielangta, above n3, at [301]

78. Forestry Tasmania v Brown [2007] FCAFC 186 at [60]

79. Hawke Review, Above n 5. Chapter 10: Regional Forest Agreements. 10.17

80. The MyEnvironment case is currently subject to appeal.

81. Hammond-Deakin and Higginson. Above n 40

82. Above n 40, Chapter 4. See also the Office of Environment and Heritage/Environment Protection Authority website, 'Recent forestry regulatory activities; Compliance update'. Available at www.environment.nsw.gov.au/forestagreements/recentactivity.htm

83. Department of Environment, Climate Change and Water v Forestry Commission of New South Wales [2011] NSWLEC 102 at [100]

84. Above n 83, at [103]

85. Forest Practices Act 1985, s.25A

86. Forest Practices Act 1985, s.4E(1)(b); Forest Practices Authority. Annual Report 2010-2011. Available at www.fpa.tas.gov.au/__data/assets/pdffile/0003/72327/ Forest Practices Authority 2010-11_ annual report . pdf

87. Forest Practices Authority. Annual Report 2010-2011 (above n 86), p18

88. See media release from Gavin Jennings, then Minister for Environment, quoted in EEG case (above n 47) at [60]

89. EEG case (above n 51) at [214]

90. EEG case (above n 51) at [155]

91. Auditor-General's report, above n 55, at pp vii – ix and 9

92. Auditor-General's report, above n 55, at p 22

93. Auditor-General's report, above n 55, at pp vii; 10; 12; 13; 19 and 23

94. Auditor-General's report, above n 55, at p viii

95. Auditor-General's report, above n 55, at p x

96. EEG case (above n 51) at [691]

97. EEG case (above n 51) at [361 – 401]

98. Sections 58 and 61 of the Forest Products Act 2000

99. Previously, the DEC undertook the roles of both the Forest Products Commission and the Conservation Commission. Responsibility for those roles was delegated to the Commissions in order to manage the perception of a conflict of interest within the DEC. For further discussion, see M Barker and M Bennett. "In Search of Sustainability: Forestry Law and Policy in Western Australia". Available at www.edowa.org.au/files/articles/13_forestpolicy.pdf 100 Office of the Auditor General Western Australia. Supply and Sale of Western Australia's Native Forest Products: Report 10. 26 June 2013. Report and summary available at https://audit.wa.gov.au/wp-content/uploads/2013/06/report2013_10.pdf

101. Hawke Review, above n 5, 10.18

102. Office of Environment and Heritage website, 'Recent forestry regulatory activities; Compliance update'. Available at www.environment.nsw.gov.au/forestagreements/recentactivity.htm

103. Forest Products Association, above n 44

104. Wielangta, above n 3, at [124]

105. Forest Practices Act 1985, s.4E(1)(b); Forest Practices Authority Annual Report 2010-2011, above n 86

106. 124 investigations were conducted, however 32 remained ongoing at the end of the financial year. Forest Practices Authority Annual Review, Compliance Report 2012, above n 44 www.fpa.tas.gov.au/__data/assets/pdf file/0006/79431/Forest PracticesAuthorityannualreview2012_presentationCompliance.pdf

107. Commonwealth of Australia (Department of Agriculture, Fisheries and Forestry). 2012. "Forest Industries – Key

Performance Indicators", Table 4. Available at www.daff.gov.au

108. Lawyers for Forests and The Wilderness Society, Forest Law Reports: Evaluation of Victoria's Forestry

Conservation Framework, 2010, p 76

109. Lawyers for Forests and The Wilderness Society, above n 106, p 20.

110. See details at www.depi.vic.gov.au/forestry-and-land-use/forest-management/regional-forest-agreements

111. Details in relation to the monitoring project are available on the DEC website at www.dec.wa.gov.au/ourenvironment/science-and-research/landscape-conservation-research/forestcheck.html

112. Hawke Review, above n 5, 10.22 – 10.25

113. Office of Environment and Heritage, above n 100

114. Department of Environment, Climate Change and Water v Forestry Commission of New South Wales [2011] NSWLEC 102 at [79]

115. Environment Protection Authority v Forestry Commission of New South Wales [2004] NSWLEC 751

116. Above n 112

117. Above n 112 at [64]

118. N Hammond-Deakin, above n 12, p31 See also Appendix 2, which comprises a table of maximum penalties

under key State and federal legislation

119. Above n 43

120. Offenders can be issued with verbal or written notifications requiring action to be taken to address noncompliance(s.41). Offenders can also be prosecuted for undertaking forest operations without a ForestPractices Plan (s.17), failing to comply with a Forest Practices Plan (s.21), not complying with a notification orfailing to submit a compliance report (s.25A). The Forest Practices Authority can elect to impose a fine as analternative to prosecution (s.47B)

121. 124 investigations were conducted, however 32 remained ongoing at the end of the financial year. ForestPractices Authority Annual Review, Compliance Report 2012, www.fpa.tas.gov.au/__ data/assets/pdf file /0006/79431/ Forest PracticesAuthorityannual review 2012_presentationCompliance.pdf

122. Forest Practices Authority. 2012. Annual Report 2011-2012, p 27

123. Above n 118, p 28

124. Above n 46, p 27

125. Above n 115

126. Sustainable Forests (Timber) Act 2004, s.45

127. Flora and Fauna Guarantee Act 1988, s47

128. For example, see the submission of the Conservation Council of WA in relation to the draft Forest Management Plan 2014-2023.

129. A recent 7.30 Report on ABC1 revealed DEC's poor enforcement record in relation to illegal harvesting ofsandalwood (see www.abc.net.au/7.30/content/2012/s3622123.htm). An Australian Institute of Criminology report in 2010 also noted, in relation to illegal native vegetation clearing: "In Western Australia, actual investigative work was deemed to be 'limited' and focused mostly on those cases that were 'least complex and least important'" (see www.aic.gov.au/publications/current%20series/rpp/100-120/rpp109/09.html)

130. See Environmental Protection Authority of Western Australia. 2010. Forest Management Plan 2004-2013 Midterm audit of performance report: Report and Recommendations of the Environmental Protection Authority. Report No 1362. p10.

131. J Prest. 2011. "Forests Law", Chapter 13 in Farrier and Stein, Environmental Law Handbook, David Farrier and Paul Stein (eds), (Redfern Legal Centre Publishing, 2011), p 549

132. King v Forest Practices Tribunal [2008] TASSC 1

133. [2005] TASRMPAT 150

134. Clause 52.18 of the Victorian Planning Provisions.

135. Equity matters are court cases that include claims for civil relief which does not involve the recovery of debts or damages. Claims for injunctions to restrain wrongful conduct are heard in the Equity Division of the Supreme Court

136. SAI Global Limited, Audit Report: Recertification audit for VicForests, 9 October 2012, p 4

137. See information at http://Leadbeater's.org.au/vicforest-charge/

138. Hastings v Brennan & Anor; Tantram v Courtney & Anor (No. 3) [2005] VSC 228

139. Bridgetown-Greenbushes Friends of the Forest Inc and Anor v Executive Director of the Department of Conservation and Land Management, unreported, Supreme Court of WA – Parker J (9 August 1995)

140. South-West Forest Defence Foundation v Department of Conservation Management (No 1) (1998) 154 ALR 405

141. MyEnvironment Inc v VicForests [2012] VSC 111 (27 March 2012)

142. The Wilderness Society Inc v The Hon Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCA 1863 at [30] – [31]

143. Unreported, NSW Local Court, Batemans Bay, Magistrate Pearce,12 April 2011

144. [2011] NSWLC 22

145. Unreported, NSW Local Court, Deniliquin, 1 December 2009

146. R v Flint, Daines and McLean, (2009) 1 December, NSW Local Court, Deniliquin, unreported

147. Above, n 144

148. Unreported, NSW Local Court, Moruya, Magistrate A Mijovich, 2009

149. Above n 146

150. See, for example, Glaetzer Sally, 'Gunns 20 in the dust', The Mercury, 30 January 2010,

http://www.themercury.com.au/article/2010/01/30/124821_todays-news.html

151. See, for example, Lusted v Doornbusch [2011] TASMC 28

152. See Dawtrey, Z. 'Tears as protestor jailed', The Mercury, 23 February 2012. http://www.themercury.com.au/article/2012/02/23/303481_scalesofjustice.html Ali Alishah was also given a three-month suspended sentence for trespass and nuisance associated with the protest action.

153. Preshaw v Howells [2010] TASMC 10; Preshaw v Pearce [2010] TASMC 11

154. See www.allanabeltran.com/weld-angel.html

155. Gunns Limited v Alishah (No 4) [2010] TASSC 24, [59], upheld on appeal Alishah v Gunns Ltd [2010] TASFC 6

156. Above n 149

157. See http://www.police.tas.gov.au/uploads/file/Miscellaneous/Tasmanian%20Police%20Offences%20Act

%201935%20-%20Public%20Consultation.pdf

158. Hastings v Brennan & Anor; above n 136 at [134]

159. Peter Walsh MP, 14 March 2012. 'Retraction and Apology to MyEnvironment'. Available at peterwalsh.org.au/_blog/Media_Releases/post/Retraction_And_Apology_To_Myenvironment_Inc_/

160. See www.indymedia.org.au/2012/07/26/simon-peterffy-cops-40-hours-community-service-for-savingnumbats

161. Forestry Act 2012, s. 69T(1)

162. Forestry Act 2012, s.69V(1)

163. Forestry Act 2012, s.69V(1)

164. Forestry Act 2012, s.69ZA

165. Forestry Act 2012, s.69W

166. Forestry Act 2012, s.69X

167. The categories are defined in State Forests of NSW. 2010. "Managing Our Forests Sustainably: Forest Management Zoning in

NSW State Forests", Operational Circular 19/10.

168. For example, the Integrated Forestry Operations Approval for the Eden Region 1999 provides that logging operations are

restricted in State forest Areas declared to be a special management zone or classified forest management zone; cl 19(1).cl19(1)(a)

169. Forest Practices Act 1985, ss.17(2),) and 21(1)

170. The Sustainable Forests (Timber) Amendment Act 2013 (Amendment Act) had received royal assent, but had notyet come into force at the time of publication. It makes a number of changes to the Victorian Forest Management System,and which weaken environment protection measures. For example, under the Amendment Act, there is no limit on the terms of an Allocation Order, and no requirement to review an Allocation Order every 5 years. Further, Vicforests, and not the Secretary to DPI, is responsible for approving Timber Release Plans.

171. The Code is prepared under Part 5 of the Conservation Forests and Lands FL Act 1987.

172. Sustainable Forests (Timber) Act 2004 s46

173. The Allocation order can be found here: http://www.dse.vic.gov.au/__data/assets/pdf_file/0011/102116/GG2004S176.pdf

174. However, under the Sustainable Forests (Timber) Amendment Act 2013, Vicforests, not the Secretary for DPI, will approve the TRPs.

175. The Victorian Government previously proposed amendments to allow forestry operators to apply for exemptions fromthis legislation. Though abandoned by the Government in early 2013, such a proposal may be considered as part of the ongoing Forest Biodiversity Project. See n 3.

176. Brueckner, M & Pierre Horwitz. 2005. "The use of science in environmental policy: a case study of the Regional Forest Agreement process in Western Australia" in Sustainability: Science, Practice and Policy. Volume 1, Issue 2, p 19

177. Section 10, Conservation and Land Management Act 1984 (WA)

178. Section 19, Conservation and Land Management Act 1984 (WA)

179. Contracts to remove "forest produce", other than products related to harvesting activities, remain the responsibility of the DEC.

180. The draft management plan is available at www.conservation.wa.gov.au/management-planning/managementplans/draft-forest-management-plan-2014-2023.aspx

181. TWS also challenged the validity of the referral, and the decision to assess the proposed action on the basis of preliminary documentation, however those issues are not considered in this summary.

182. Ibid [9].

183. In September 2010 the Smoky Mouse was listed as critically endangered under the TSC Act for reasons not related to the offence.

184. Ibid [82].

185. Ibid [88].

186. Ibid [87].

187. Ibid [90].

188. Ibid [103].

189. Ibid [128].

190. Ibid [130].

191. [2004] NSWLEC 751, [16].

192. Ibid [38].

193. Ibid.

194. Ibid at [15].

195. Clause 2.2.2 of the Code.

196. See the observations as to the application of the precautionary principle of Osborn J in Western Water v Rosen [2008] VSC 382, [107-]109].

197. See Environment East Gippsland Inc v VicForests [2009] VSC 386

198. MyEnvironment Inc v VicForests [2012] VSC 111(Unreported)

199. At [14], citing Southwest Forest Defence Foundation v Department of Conservation and Land Management (No 2) (1998) 154 CLR 411.

200. See the definition of management prescription: Forest Management Plan for the Central Highlands, published by the Department of Sustainability and Environment, May 1998, 2.

201. Ibid.

202. Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133 at [131]

203. Environment East Gippsland Inc v VicForests [2010] VSC 335 at [179] (the Brown Mou tain case)

204. Brown Mountain, [194]–[198].

205. Brown Mountain, [199].

206. Unreported, Supreme Court, WA, Library No 6414, 25 August 1986; Hospital's Contribution Fund of Australia v Hunt (1983) 44 ALR 365; South-West Forest Defence Foundation (No 1) v Department of Conservation and Land Management (No 1) (1996) 131 FLR 225 ('South-West Forest Defence Foundation v Department of Conservation and Land Management'), 230.

207. South West Forest Defence Foundation v Department of Conservation and Land Management, 234.

208. Ibid. 237-238.

209. Ibid, 236.

210. Bridgetown-Greenbushes Friends of the Forest Inc and Another v Executive Director of the Department of Conservation and Land Management (1997) 18 WAR 126 (Bridgetown) at 137.

211. Bridgetown, 140.

212. Ibid, 141-142.

213. Ibid, 142-143.



ONE STOP CHOP

HOW REGIONAL FOREST AGREEMENTS STREAMLINE ENVIRONMENTAL DESTRUCTION

www.edovic.org.au/blog/RFA-report

Biodiversity in Australia is in serious decline
Scientists' Statements

Biodiversity in Australia is in serious decline as successive State of the Environment reports have indicated:

> "*We have limited information on the state of many individual species or groups of species. However, the evidence from changes in extent, composition and quality of vegetation communities, and from case studies on selected species, points towards continuing decreases in population sizes, geographic ranges and genetic diversity, and increasing risks of population collapses in substantial proportions of most groups of plants, animals and other forms of life across much of Australia*."
>
> State of the Environment Report 2011

> *"As reported in SoE2001, biodiversity continues to be in serious decline in many parts of Australia (Williams et al 2001). This legacy effect represents the consequence of past actions and it will be some time before responses to recent actions can be seen. Recognising change is difficult because of the imperfect knowledge of the condition and trend of biodiversity at a range of scales. Also unknown are the implications of change for sustaining Australia's natural systems and heritage."*
>
> State of the Environment Report 2006

The attached Scientists' Statements are illustrative of the processes of decline under Regional Forest Agreements where State governments are responsible for managing native forests sustainably so as to ensure conservation of biodiversity.

> Professor David Lindenmayer. *Montane eucalypt forests, Leadbeater's Possum and clearfall logging*
>
> Dr Rohan Bilney. *Impacts of logging on owls and their prey*
>
> Assoc/Prof Michael Calver. *Fauna decline in southwest forests of Western Australia*
>
> Assoc/Prof John Bailey. *Poor implementation of agreed measures to protect biodiversity in forests available for logging*

Professor David Lindenmayer
Montane eucalypt forests, Leadbeater's Possum and clearfall logging

1. In the last 15 years, what broad trends in terms of biodiversity have you observed in native forests? In your answer, focus on the geographical areas and species that are the subject of your research and expertise.

My work for over 30 years has been in the ash-dominated tall eucalypt forests east of Melbourne in Victoria, south-eastern Australia. These forests are dominated by Mountain Ash (*Eucalyptus regnans*), the tallest flowering plant in the world, and Alpine Ash (*Eucalyptus delegatensis*).

The broad trends in these forests are of severe declines in the abundance of particular species, especially mammals such as arboreal marsupials. This is largely because the population of large hollow-bearing trees has collapsed. At the time of European settlement (around 1800) 30-60% of the ash forests was old growth; now only 1.16% of Mountain Ash forests is old growth (1886 ha out of 161 200 ha) and only 0.37% of the remaining Alpine Ash is old growth.

The fate of the endangered Leadbeater's Possum (*Gymnobelideus leadbeateri*) exemplifies what is happening. It is largely confined to the montane ash forests of the Central Highlands of Victoria. The last 50 years have set Leadbeater's Possum very clearly on an extinction trajectory with massive declines in range and abundance. This is primarily caused by a catastrophic decline in populations of large old trees which in turn is creating a shortage of nesting and denning sites for cavity-dependent species like Leadbeater's Possum. Moreover, in areas burned by fire and in salvage-logged forests, there have been few if any records of Leadbeater's Possum or of most other arboreal mammals (e.g. the Greater Glider).

The evidence is clear and very strong – without intervention, there is a high risk that Leadbeater's Possum will be extinct in the next 20-40 years.

2. Is native forest logging having impacts on biodiversity and threatened species in native forests? If yes, describe that impact. In your answer, focus on the geographical areas and species that are the subject of your research and expertise.

The factor that has changed demonstrably in the last 50 years is industrial scale clearfell logging. This is the key threatening process in this ecosystem and is having negative impacts on forest landscapes, forest biodiversity, vegetation structure, landscape heterogeneity and fire dynamics in an array of ways.

First, logging is rapidly accelerating the loss of large old hollow-bearing trees which are the critical habitat attribute for an array of cavity-dependent species. Clearfelled areas do not support viable populations of large old trees. These are typically destroyed in logging operations or if retained they die or collapse soon after logging. Logged areas remain unsuitable for cavity-dependent species for over 150 years.

Second, logging is having major impacts on cavity-dependent species through changing the structure and vegetation composition of landscapes. Logging patterns create a series of closely juxtaposed logged areas which render the landscape unsuitable for species like Leadbeater's Possum which require extensive areas of suitable habitat.

Third and very importantly, there is compelling evidence that logging increases the fire-proneness of wet forest landscapes. For a few years after logging, very young forests are less fire-prone but during the following 10-50 years, rapidly regrowing stands are more susceptible to canopy-consuming , high-severity wildfire. The effect on Leadbeater's Possum is devastating – the species is absent from burnt areas and the population of large old trees on which the species depends is further reduced.

In 2009, 60,000 ha of ash forest was burnt by wildfire, including about 42% of the then remaining Leadbeater's Possum habitat. Since then, our repeated surveys at long-term sites have indicated that Leadbeater's Possum does not occur on burned sites, even those subject to moderate or low severity fire.

3. Based on your answers to questions 1 and 2, is native forest logging conducted in a way that:

a). Avoids and minimises impacts on biodiversity; and

No. It has been widely known since for at least 20 years that clearfell logging is a significant threat to Leadbeater's Possum. Large areas of intact forest are critically important for its survival. In 1997 our research, cited in the Victorian Government Recovery Plan (1997—2002), predicted that the species would decline massively in the period up to 2020 and face a population 'bottleneck' until 2075 because of the decline in hollow-bearing trees due to logging and fire. The Recovery Plan's recommendations were not implemented. The Plan has not been updated. There has been no serious action by either the Victorian or Commonwealth government to avoid or minimize the impacts of logging on Leadbeater's Possum.

b). Protects biodiversity from long-term decline.

No. Forest management practices cannot be claimed to be ecologically sustainable unless there are viable populations of Leadbeater's Possum maintained in the wild and in perpetuity. All existing data gathered in recent years clearly indicates that Leadbeater's Possum is heading for extinction.

Following the catastrophic 2009 fires, successive state governments worked on a policy of no net loss to industry. Remaining unburnt forest is being liquidated at an even faster rate and Leadbeater's Possum is being driven on an extinction trajectory. The Commonwealth government has not intervened.

4. What research and expertise is this statement based on? (Attach a short CV)

See attached CV. I have undertaken 31 years of applied research published in 880 scientific articles and 36 books - our forest research is widely regarded as some of the best in the world.

Professor David Bruce Lindenmayer BSc, Dip. Ed., Ph.D., DSc, FAA

CURRICULUM VITAE

CONTACT DETAILS

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EDUCATION

2008 **Elected Fellow of the Australian Academy of Science**

2003 **DSc.** (ANU).

1990 **Ph.D.** (ANU). Post-Graduate Scholarship Award 1988-1989.
Thesis title: *"The ecology and habitat requirements of Leadbeater's Possum".* [Nominated for Crawford Prize]

1986 **Diploma of Education**. (University of Adelaide).

1982 **Bachelor of Science.** (The Australian National University).

ACADEMIC EMPLOYMENT

2013-2018 ARC Laureate Fellow, Fenner School of Environment & Society, The Australian National University

2007-ongoing **Research Professor E2** Fenner School of Environment & Society, ANU.

2006-2010 ANU Hub Leader – Commonwealth Environmental Research Facility (CERF)

2006-2010 Adjunct Professor. University of Melbourne.

2004-2006 **Research Professor E1** Centre for Resource and Environmental Studies, ANU.

2000-2004 **Senior Fellow** (Level D) Centre for Resource & Environmental Studies, ANU.

1999-2000 **Senior Fellow** - Jointly appointed CRES and SRES, ANU.

1997-1998 **Jointly-appointed Fellow** - CRES and SRES, ANU.

1996-1997 **Fellow.** CRES, ANU.

1995-1996 **Research Fellow**. CRES, ANU.

1992-1995 **ARC Post Doctoral Fellow**. CRES, ANU.

1990-1992 **Consultant Scientist II** (Level 3), Dept. Conservation & Environment, Victoria.

MAJOR PRIZES AND SCHOLARSHIPS

2013 Finalist. Prime Minister's Environmentalist of the Year Award

2013 Jim Pojar Award for the book “Salvage Logging and its Ecological Consequences".

2012-18 ARC Laureate Fellow, Fenner School of Environment & Society, The Australian National University

2012 Whitley Award. Special Commendation Certificate for 2012 for distinction in the promotion of Australia's fauna and especially its conservation.

2012 Top post-graduate supervisor Award. The Australian National University, Canberra.

2012 Finalist Eureka Prize for Environmental Research

2011 Whitley Award for Ecological Zoology for the book *Forest Phoenix*.

2011 Awarded DL Serventy Medal for Ornithology
2011 Finalist. Banksia Award for Land and Biodiversity.
2011 Finalist. Eureka Prize for Science Communication.
2010 Winner of Eureka Prize for Environmental Research
2010 Whitley Award for Zoological Text for the book *Forest Pattern and Ecological Process*
2009 Winner of Australian Ecological Research Award
2009 Awarded Senior Research Fellowship – Land and Water Australia
2009 Finalist. Prime Minister's Environmentalist of the Year.
2008 Elected Fellow of Australian Academy of Science
2008 Winner of International Distinguished Service Award, International Society for Conservation Biology
2006 Whitley Award for Best Conservation Text for the book *Practical Conserving Biology*
2006 Awarded inaugural DaimlerChrysler Prize
2006 Made Honorary Adjunct Professor at University of Melbourne
2004 Awarded Australian Natural History Gold Medallion
2004 Awarded leading Principal Investigator for Earthwatch Institute
2003 Awarded DSc, ANU
2003 Awarded Australia's top innovative thinker in Environmental Science by "The Bulletin" magazine
2003 Awarded Bullard Fellowship to Harvard University, Harvard Forest, USA
1999 Whitley Award for Best Conservation Biology text (with Professor Mark Burgman)
1999 Winner. Eureka Science Prize. Contributions to population modelling (with Professor Hugh Possingham)
1997 Whitley Award for Best Conservation Biology text *Wildlife and Woodchips*
1997 Finalist. Banksia Environmental Science Award.
1996 Finalist. Eureka Prize for Environmental Research.
1993 William Evans Visiting Fellow, University of Otago: Studies of GIS and wildlife management
1992 Awarded ARC Post-doctoral Fellowship (June 1992–December 1995)
1988 National Primary Science Teacher's Award

RESEARCH PROGRAMS

The effectiveness of landscape restoration for biodiversity. Woodland conservation and restoration. Forest ecology and management. Habitat fragmentation, Applied wildlife and conservation management, Landscape ecology and natural resource management, The ecology and conservation of arboreal marsupials, Integrated wildlife management and timber production, The effectiveness of wildlife corridors and areas of retained vegetation for the conservation of forest dependent fauna, Endangered species conservation and management, Extinction risk assessment, Fire effects on vertebrates.

RESEARCH SUPERVISION

Postdoctoral fellows – 29 since 1999 (was not allowed to supervise post-docs until that date)

- 8 current post-doctoral fellows

PhD – 53 completions

- 17 current PhD and MSc students being supervised

MSc – 2 completions

PUBLICATIONS RECORD

888 published works, including:
36 books (25 1st authored)

490 papers in refereed scientific journals (192 1st authored)
14 papers in press
38 papers submitted to journals currently under peer review
88 refereed book chapters (65 1st authored)
215 non-refereed publications
70 conference papers/posters

Dr Rohan Bilney
Impacts of Logging on Owls and Their Prey

1. In the last 15 years, what broad trends in terms of biodiversity have you observed in native forests? In your answer, focus on the geographical areas and species that are the subject of your research and expertise.

Over the past 10 years my main research has focused on the ecology of Sooty Owls (*Tyto tenebricosa*) and Powerful Owls (*Ninox strenua)* and their prey (small mammals) in Gippsland in far eastern Victoria. Over this time I have noticed several issues of conservation concern: 1) low and declining breeding success, 2) population decline of owls, 3) low prey populations. Adding to these concerns, of the 4.5 million hectares of forest considered occupied by Sooty Owls in Victoria, over 3 million hectares have been burnt since 2002, equating to over 66% of the Sooty Owl distribution in Victoria. This area is also core Powerful Owl habitat. Therefore, populations of both owl species have declined dramatically due to a combination of large fires and (probably) long-term drought. The low breeding success is undoubtedly due to low prey availability, which reduces the capacity for owl populations to increase and repopulate recently burnt habitats (owls typically prefer long-unburnt habitats).

Recent research has shown that Powerful Owl populations have declined dramatically within unburnt forest in recent years, probably relating to declines in their principal dietary item in tall forests, being the Greater Glider (*Petauroides volans*). Despite these declines and temporary 'loss' of habitat associated with widescale fires, conservation measures for these owl species across the state of Victoria remain unchanged. It is highly probable that conservation targets of trying to conserve over 500 pairs across the state are not currently being met. Of concern, the population of both owl species is being subjected to further pressure from logging that continues to reduce available habitat.

2. Is native forest logging having impacts on biodiversity and threatened species in native forests? If yes, describe that impact. In your answer, focus on the geographical areas and species that are the subject of your research and expertise.

Logging has considerable short-term impacts upon owls, but the long-term impacts appear to vary geographically due to differing prey availability.

In Gippsland, where my studies are focused, both the owls and their main prey species are hollow dependent, requiring hollows for nesting and roosting (Powerful Owls don't roost in hollows). Hollow-dependent prey species (e.g. Sugar Glider *Petaurus breviceps*, Greater Glider) constitute on average 75% of the dietary intake of the owls. This high reliance is due to dramatic declines in small mammals (e.g. especially terrestrial native rodents, bandicoots) associated with European settlement. In many areas hollow-dependent arboreal mammals are virtually the only common species remaining. Clear-fell logging significantly reduces the density of hollow-bearing trees, dramatically affecting populations of arboreal mammals. Therefore logging dramatically reduces small mammal 'biomass' available for native predators, thereby reducing the carrying capacity of the landscape.

The capacity for small mammal populations to recover post clear-fell logging is constrained by the dramatic alteration of forest composition and structure. This is particularly the case in dry lowland forest types where virtual monocultures can regrow (particularly Silvertop Ash *Eucalyptus sieberi*) which supports very low densities of arboreal mammals due to forming few hollows and is nutritionally poor (for folivorous species such as Greater Glider, *Trichosurus spp.* and Common Ringtail Possum *Pseudocheirus peregrinus*). Even regrowth forests >45 years old support very few arboreal mammals, and my research has shown that owls tend to avoid such areas, probably due to the lack of prey available. Although some eucalypt species can begin forming hollows within ~100 years old, with forest composition altered there is limited capacity for hollow-dependant mammals to achieve the same abundances as prior to logging.

Owl nest and roost hollows are likely to be lost during logging activities, but how this impacts upon owl populations remains unknown. It is considered that nesting hollows are sufficiently abundant in most forested landscapes (including heavily logged areas), as the owls only require one hollow for breeding per year (several nesting hollows may be required within a home-range long-term).

Overall, logging activities have dramatically affected the 'carrying capacity' of the landscape for owls long-term (in terms of mammalian biomass). Research from southern NSW has shown that owl populations have increased in logging regrowth, but this appears to be driven by the abundance of Common Ringtail Possums that are prevalent within understorey vegetation in the area. A similar pattern does not occur in my study area of Gippsland, as Common Ringtail Possums are uncommon. A reduction in carrying capacity of the landscape would impact upon home-range size, breeding success and population densities of owls within the landscape.

3. Based on your answers to questions 1 and 2, is native forest logging conducted in a way that:
a) Avoids and minimises impacts on biodiversity; and
b) Protects biodiversity from long-term decline.

No. Clear-fell logging alters forest structure and composition to the detriment of owls and their prey. It is a major cause of decline of numerous forest dependent species, and therefore represents a major threatening process. Although only a small area is harvested every year, it is important to recognise that the impacts of logging are cumulative (clear-fell logging has been occurring >50 years), and targeted towards fertile tall forest environments, thereby having a disproportionate impact on some species and regions.

The number of hollow trees retained within logging coupes post harvesting still results in significant decline in hollow densities, and often hollow trees are killed or consumed by post-harvest fires – negating leaving 'habitat trees' there anyway.

To protect biodiversity from long-term decline, habitat must be promoted and protected and the threats mitigated. Logging in no way addresses these issues (can actually promote some threats, such as feral species – rabbits, deer and feral predators, while also influencing fire severity).

In Victoria, conservation measures (*Flora and Fauna Guarantee Act* 1988 Action Statements) were devised 15 years ago for the Powerful Owl and 11 years ago for the Sooty Owl. These primarily aimed at ensuring sufficient unlogged habitat existed to support a viable population (of 500 pairs) throughout the state. Since this time there has been no alteration to conservation measures despite recent research seriously questioning the effectiveness of current conservation measures and despite the extent of forest recently burnt, low owl breeding success, declining owl population and declining prey population. Of concern, in recent years forest fuel reduction burning targets have been dramatically increased and there appears to have been no modification of logging practices so suitable owl habitat continues to be detrimentally modified.

4. What research and expertise is this statement based on? (Attach a short CV)

I have been conducting research on owls and mammals in Gippsland for over 10 years, which includes conducting Honours and PhD at Deakin University (2004-2009). Due to work and my own research I have undertaken numerous surveys throughout forested ecosystems in Victoria, including into the impacts of logging. I have also read numerous scientific studies on these topics (see short CV attached).

Dr Rohan Bilney: Brief Curriculum Vitae

Contact details
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Bairnsdale, Victoria 3875
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Education
Bachelor of Science (Zoology, Ecology & Evolution) – Monash University, 2001-2003
Bachelor of Environmental Science (Honours) - Deakin University, 2004
Doctor of Philosophy – Deakin University, 2005-2009

Employment
Since 2011 I have worked as an ecologist primarily undertaking fauna surveys in eastern Victoria.

Publications
My main research papers include:

Bilney, R.J. (2014). Poor historical data drive conservation complacency: the case of mammal decline in south-eastern Australian forests. *Austral Ecology* online early

Bilney, R.J. (2013). Geographical variation in the diet of the powerful owl *Ninox strenua* at a local scale. *Australian Journal of Zoology* 61, 372-377.

Bilney, R.J. and L'Hotellier, F. (2013). Observations of Masked Owls *Tyto novaehollandiae* in East Gippsland, Victoria. *Australian Field Ornithology* 30, 113-125.

Bilney, R.J. (2013). Home-range, diet and breeding of a Powerful Owl *Ninox strenua* in East Gippsland. *Australian Field Ornithology* 30, 40-46.

Bilney, R.J., White, J.G. and Cooke, R. (2011). Reversed sexual dimorphism and altered prey base: the effect on sooty owl (*Tyto tenebricosa tenebricosa*) diet. *Australian Journal of Zoology* 59, 302-311.

Bilney, R.J., Cooke, R. and White, J. (2011). Potential competition between two top-order predators following a dramatic contraction in the diversity of their prey base. *Animal Biology* 61, 29-47.

Bilney, R.J., White, J., L'Hotellier, F.A. and Cooke, R. (2011). Spatial ecology of sooty owls in south-eastern Australian coastal forests: implications for forest management and reserve design. *EMU* 111, 92-99.

Bilney, R.J., Cooke, R. and White, J. (2010). Underestimated and severe: Small mammal decline from forests of south-eastern Australia since European settlement, as revealed by a top-order predator. *Biological Conservation* 143, 52-59.

Bilney, R.J., Cooke, R., and White, J. (2006). Change in the diet of Sooty Owls since European settlement: from terrestrial prey to arboreal prey and increased dietary overlap with Powerful Owls. *Wildlife Research* 33, 17-24.

Assoc/Prof Michael Calver
Fauna decline in southwest forests of Western Australia

1. *In the last 15 years, what broad trends in terms of biodiversity have you observed in native forests? In your answer, focus on the geographical areas and species that are the subject of your research and expertise.*

My experience is with animal ecology in the southwest forests of Western Australia. While I have not personally engaged in long-term biodiversity survey projects, the results of studies published in the peer-reviewed literature show either on-going declines or lack of recovery in a range of threatened species from the region. I expect these results to be synthesised in the forthcoming new edition of the Action Plan for Australian Marsupials and Monotremes, to be published later this year.

2. Is native forest logging having impacts on biodiversity and threatened species in native forests? If yes, describe that impact. In your answer, focus on the geographical areas and species that are the subject of your research and expertise.

Native forest logging in southwestern Australia impacts on biodiversity and threatened species by changing forest age structure, species composition and physical structure. Forest is converted from predominantly old trees to younger trees (with a reduction in resources such as hollows that old trees provide), trees of commercial value are encouraged at the expense of other species and the forest structure is opened. Fauna dependent on the resources large, old trees provide are disadvantaged and the changed forest structure and associated disturbance facilitates ingress by exotic predators.

3. Based on your answers to questions 1 and 2, is native forest logging conducted in a way that:
   a. Avoids and minimises impacts on biodiversity; and
   b. Protects biodiversity from long-term decline.

Provisions in the Western Australian Forest Management Plan 2014-2023 seek to minimise impacts on biodiversity and to reduce the risk of long-term decline. These include measures for protecting soil and water quality, managing diseases such as dieback caused by *Phytophthora cinnamomi*, controlling pest outbreaks (including exotic pests and predators), maintaining on-going biodiversity monitoring, use of independent experts to calculate sustained yield, biodiversity-sensitive logging protocols including protection of key food plants, protection of old growth forest and establishment of more formal conservation reserves. Despite these approaches, my specific concerns are:

- rigorous policing, given that the initial Environmental Protection Authority assessment of the plan imposed no checks/conditions on implementation (although some were subsequently imposed on appeal, it is unclear who will ensure that they are enforced)

- a lower level of environmental protection for logging based on the Regional Forest Agreement compared to other forest uses such as mining that are covered directly under the EPBC Act.

4. What research and expertise is this statement based on? (Attach a short CV)

I have researched and published on the birds and mammals of Western Australia's southwest forests for over 30 years, as well as studies of forest history and aspects of forest policy. I have also had a smaller involvement in rehabilitation studies of tuart trees from the region.

Assoc/Prof Michael Calver
Associate Professor in Biological Sciences

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Phone: (within Australia) 08 9360 2277 (outside Australia) +61 8 9360 2277

Publications

Wooller, R.D. and Calver, M.C. (1981). Feeding segregation within an assemblage of small birds in the Karri forest understorey. *Aust. Wildl. Res.* 8, 401 - 410.

Calver, M.C. and Wooller, R.D. (1981). Seasonal differences in the diets of small birds in the Karri forest understorey. *Aust. Wildl. Res.* 8, 653-657.

Wooller, R.D. and Calver, M.C. (1988). Changes in an assemblage of small birds in the understorey of dry sclerophyll forest in south-western Australia after fire. *Aust. Wildl. Res.* 15, 331 - 338.

Calver, M.C., Hobbs, R.J., Horwitz, P. and Main, A.R. (1996) Science, principles and forest management: a response to Abbott and Christensen. *Australian Forestry* 59, 1-6.

Calver, M.C. (1997). Hollow arguments? *Emu* 97, 183-184.

Calver, M.C. and Dell, J. (1998) Conservation status of mammals and birds in south-western Australian forests. I. Is there evidence of direct links between forestry practices and species decline and extinction? *Pacific Conservation Biology* 4, 315-325.

Calver, M.C. and Dell, J. (1998) Conservation status of mammals and birds in south-western Australian forests. II. Are there unstudied, indirect or long-term links between forestry practices and species decline and extinction? *Pacific Conservation Biology* 4, 296-314.

Calver, M.C., Dickman, C.R., Feller, M.C., Hobbs, R.J., Horwitz, P., Recher, H.F. and Wardell-Johnson, G. (1998) Towards resolving conflict between forestry and conservation in Western Australia. *Australian Forestry* 61, 258-266.

Horwitz, P. and Calver, M.C. (1998) Credible science? Evaluating the Regional Forest Agreement process in Western Australia. *Aust. J. Envtl. Manage.* **5**, 213-225.

Calver, M.C., Bradley, J.S. and Wright, I.W. (1999) Towards scientific contributions in applying the precautionary principle: an example from south-western Australia. *Pac. Cons. Biol.* 5: 63-72.

Calver, M.C. (2003). The precautionary principle and ecosystem health: a case study from the jarrah forest, south-western Australia. Pp 935-947 in D.J. Rapport, W.L. Lasley, D.E. Rolston, N.O. Nielsen, C.O. Qualset, and A.B. Damania (eds) *Managing for healthy ecosystems*. CRC/Lewis Press, Florida.

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Assoc/Prof John Bailey
Poor implementation of agreed measures to protect biodiversity in forests available for logging

1. In the last 15 years, what broad trends in terms of biodiversity have you observed in native forests? In your answer, focus on the geographical areas and species that are the subject of your research and expertise.

Threatening processes are continuing in Australia and Western Australia to impact on biodiversity. In the forest areas declining rainfall is the dominant factor coupled with stressors such as ferals, weeds and dieback. Some species have continued to decline inspite of objectives in the 2004-2013 Forest Management Plan. The issue that has held back a more focussed response has been a denial of management causation from agency staff. I refer to the End-of Plan Audit of the 2004-2013 Forest Management Plan for evidence here.

2. Is native forest logging having impact on biodiversity and threatened species in native forests? If yes, describe that impact. In your answer, focus on your geographical areas and species that are the subject of your research and expertise.

While the 2004-2013 Forest Management Plan has a number of measures designed to mitigate impacts on biodiversity the issue is lack of diligent implementation. The implementation of biodiversity related Fauna Habitat Zones has not delivered the expected results because of poor choice of location. Again the End-of Plan Audit of the 2004-2013 Forest Management Plan can be referred to for confirmation.

3. Based on your answers to questions 1 and 2, is native forest logging conducted in a way that:
a. Avoids and minimises impacts on biodiversity; and
b. Protects biodiversity from long-term decline.

In both cases the answer is no. The major deficit is in implementation of agreed measures.

4. What research and expertise is this statement based on. (Attach a short CV)

My expertise is based upon a period of eight years as the Chair of the Conservation Commission of Western Australia responsible for the 2004-2013 Forest Management Plan. My CV is online.

Contact details

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3 September 2013

Dear Prime Minister Rudd,

cc Mr Abbott, Leader of the Opposition, COAG and Business Council of Australia members, federal election candidates,

We the undersigned are deeply dismayed by and oppose absolutely the move to transfer Commonwealth government responsibilities under the ***Environment Protection and Biodiversity Conservation Act 1999*** (EPBC Act) to state governments. We believe that this proposal will significantly weaken environmental protection.

As legal professionals with a strong concern for Australia's iconic environment, we wish to see Australia's federal environment laws set the necessary standard for the long term protection of our environment and biodiversity. It is incumbent on the Commonwealth to adhere to our commitments under the *Convention on Biological Diversity,* and, as part of that, ensure state laws require rigorous environmental assessment and approvals for any planning processes.

There is no evidence to support the view that the states can be entrusted to thoroughly apply national environmental protection measures. However, there is, unfortunately, much evidence to the contrary.

The Commonwealth Government has a crucial role to play in ensuring environmental protection and, as the keystone of our federal environment legislation, the EPBC Act is intended to protect environmental areas and wildlife that are so important and so at risk that their existence is of national significance.

Our iconic wildlife and environment are under greater pressure and face more threats than ever before. We need to strengthen rather than weaken environmental protection laws.

On many occasions, including the notorious proposals to dam the Franklin River or to re- introduce cattle grazing into Alpine National Parks, the Federal Government has stepped in to prevent state governments from carrying out environmentally damaging projects, and to ensure the protection of our unique landscapes and wildlife. It is clear that state governments are too close to many proposed developments and have a financial interest that clouds their decision-making, invariably to the detriment of the environment.

The serious problems with creating bilateral management arrangements with the states are already demonstrated by the Regional Forest Agreements (RFAs), which have led to long term controversy and conflict in every forest region, and the continued loss of native wildlife and forests around the country. These issues are documented in the recent 15 year review of RFAs, conducted by the Environment Defenders Offices – 'One Stop Chop: How Regional Forest Agreements streamline environmental destruction' (http://www.edovic.org.au/blog/RFA-report). Handing even broader environmental assessment and approval powers to the states would see irreversible environmental damage and conflict.

The recent decision by the Supreme Court of Western Australia, that found the Barnett Government's approval for a gas hub at James Price Point, Broome to be unlawful, is demonstrative of the environmental and legal issues that will emerge as a consequence of placing federal environmental issues in the hands of state governments.

Australia's environment is unique, precious and world class. For our wildlife and threatened wild places, please make a clear policy stand to prevent the weakening of our environment laws and to ensure that the Commonwealth's retains its essential environmental assessment and approval powers, and its role in preserving the natural environment.

Yours sincerely,

Adjunct Professor Rob Fowler

Law School, University of South Australia

Roland Browne

Principal, FitzGerald and Browne Lawyers
President, Environmental Defenders office (Tas) Inc.

Dr James Prest

Lecturer, Australian Centre for Environmental Law & the Centre for Climate Law and Policy ANU College of Law, The Australian National University

Dr Cameron Holley

Senior Lecturer, Faculty of Law, Research Affiliate, The National Centre for Groundwater Research and Training, The University of New South Wales

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Julia Dehm

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Australia's 5th National Report to the Convention on Biological Diversity
Brief comments, May 2014

Australia's 5th National Report was submitted on Friday 9 May 2014. The following brief comments on some aspects of the Report suggest that Australia is most unlikely to meet the Aichi Targets.

1. Biodiversity in decline

Australia's 5th National Report confirms that population size, geographic range and genetic diversity are decreasing in a wide range of species across all groups of plants, animals and other forms of life. Data remains inadequate for quantitative assessment.

2. Biodiversity funding significantly reduced

Australia's 2014-15 budget announced on Tuesday 13 May, four days after the National Report was submitted, contained significant reductions in biodiversity funding which will inhibit Australia's ability to meet the Aichi targets:

- The *Biodiversity Fund*, originally a six-year AUD$946 million program initiated in 2011 was defunded and not replaced.
- The *National Landcare Program* (merging the previous *Caring for Our Country* and *Landcare* programs) loses $484 million in funding. Its remaining funds (AUD$1 billion over four years) are directed largely towards improved on-farm management with amounts carved out for specific projects the largest of which is $50 million allocated to the *20 Million Trees* project (mainly urban tree planting).
- *Reef Trust* is a $40 million program to protect the Great Barrier Reef. Funds are redirected from the *National Landcare Program.*

3. Stakeholders not involved in Report preparation

Only government stakeholders are listed as having been involved in the Report's preparation (p.74). No effort was made to engage with non-government organisations or the community -- a consultation draft published with almost no publicity allowed for comments to be submitted between 31 March and 18 April; unsurprisingly it attracted only five submissions.

4. Aichi Targets not incorporated into domestic plans

Australia's *Biodiversity Conservation Strategy 2010-2030* was completed before the Aichi targets were agreed. It has not been reviewed or updated in line with the Aichi targets and this will not occur before the scheduled review of the Strategy in 2015.

Table 5 (p.48) summarises Australia's progress towards implementing the Aichi Targets and confirms that Australia has no targets directly corresponding to ten of the 20 Aichi targets. Quantitative measures of progress are not provided, only selective 'indicators of progress' most of which relate to outputs rather than outcomes. There are no 'expert qualitative assessments'.

5. Legislation further weakened

The Report notes that Australia has in force the *Environment Protection and Biodiveresity Conservation Act 1999* (EPBC Act) which enables a national scheme of biodiversity conservation. It states elsewhere that the government is progressing reforms to 'streamline environmental assessment processes' (p.32).

In fact it is handing responsibility for both assessment and decision-making under the EPBC Act to State and Territory governments or any other person or organisation authorised by those governments. The main petition discusses why this will render Australia's biodiversity protection standards even weaker than they have been under the EPBC Act itself.