

**SUBMISSIONS TO THE  
PURPORTED DRAFT VARIATION OF THE  
CODE OF PRACTICE FOR TIMBER PRODUCTION**



Lawyers for Forests Inc. A0040258T

On invitation by the Victorian government.

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## 1. INTRODUCTION

- (a) These submissions are made by Lawyers for Forests Inc (“LFF”) in response to the purported draft variation to the “Code of Forest Practices for Timber Production Revision Number 2 1996” (“**Current Code**”) titled “Code of Practice for Timber Production, Draft for Public Comment, February 2006” (“**Draft Code**”).
- (b) By making these submissions, LFF does not sanction the logging of Victoria’s native forests. If logging is to continue, LFF believes that, among other things, the logging must be better managed and far greater consideration be given to the conservation of Victoria’s remaining native forests.

## 2. APPROACH TO THESE SUBMISSIONS

- (a) These submissions adopt a predominantly legal approach to the Draft Code. They do not adopt a scientific or biological approach. This is because LFF is an organisation of legal professionals and so the majority of its members do not hold qualifications relating to science and biology.
- (b) LFF has, however, sought the view of many groups and individuals who have scientific and biological experience and expertise. LFF has also read submissions to the Draft Code of other individuals and groups. For these reasons, as well as through reading the Draft Code, LFF has formed the view that the Draft Code does not rely on biodiversity protection as its fundamental motivator, and it should. The Victorian government is otherwise doing a great disservice to the community. Biodiversity protection of Victoria’s native forests is now of greater importance to the current and future generations than the maximisation of its commercial value, which has decreased overtime. In comparison to the value of biodiversity and water quality and quantity protection, the commercial value of the cut timber from Victoria’s native forests is negligible.

- (c) Where these submissions make comments of a scientific or biological nature in any way, such views have been formed as a result of, among other things, the consultations and readings referred to in paragraph 2(b) above.

### 3. GENERAL COMMENTS ON DRAFT CODE

- (a) The Draft Code does not provide who or what entity is responsible for all of the obligations created under the Draft Code. The Draft Code should create certainty and not be ambiguous, and it should promote transparency. In the *Our Forests Our Future* policy statement, the Victorian government said that:
- i. it would conduct itself in a “*transparent way*” (page 2);
  - ii. the creation of Vicforests “*will transparently disentangle the commercial objectives from the regulatory functions of government*” (page 4); and, most significantly,
  - iii. “*the government will improve transparency in the allocation of rights and use of forest produce*” (page 4); and
  - iv. the government’s “*priorities will include making the application of the Code of Forest Practices for Timber Production more transparent*”.
- (b) For example, the fourth operational goal on page 16 should provide who or what entity is responsible for drafting the forest coupe plans.
- (c) The Draft Code should be amended to specifically state who or what entity is responsible for every obligation created under the Draft Code. The Victorian government’s policy statement as set out at paragraph 3(a)iv above has otherwise not been achieved by the Draft Code. This is a fundamental failure of the Draft Code.
- (d) The Draft Code does not provide for mandatory training and education of the entities and individuals that are required to fulfil obligations under or implement the Draft Code. The Draft Code should include mandatory minimum education and training. This was a recommendation made by

the Environment Protection Authority (“EPA”). Refer to paragraph 5(c) below in this respect.

- (e) The Draft Code does not always use mandatory language. It often uses narrative language. For example, under the heading 2.1 “Forest Planning”, the second sentence should be amended to read “Forest management planning must provide clear documentation...etc”. This amendment inserts the word “must” to make the statement a mandatory obligation rather than the previous narrative style. This is a common complaint throughout the Draft Code. Narrative language should be replaced with mandatory obligations otherwise the Code runs the risk, among other things, of being easily dismissed by the parties it is meant to regulate.
- (f) The government should move to provide greater protection to those parties. Those parties should not so easily be put at risk of setting up an unlawful logging operation and being in a position of having not complied with the law. The government should ensure it cannot be in a position to be said to have aided unlawful conduct.

#### **4. DRAFT NEW CODE OR VARIATION OF CURRENT CODE**

- (a) Section 31(1) of the *Conservation, Forests and Lands Act 1987 (Vic)* (“CFLA”) provides that the Minister may “make Codes of Practice”. Section 32 of the CFLA provides that the Minister “may vary or revoke a Code of Practice”.
- (b) The Draft Code is advertised to be a variation to the Current Code. The Victorian Government Gazette, No S 103, Tuesday 4 April 2006 provides that “*the Minister for Environment gives notice of a draft variation of the Code of Practice for Timber Production*”. The article published in the Herald Sun newspaper on 4 April 2006, includes the same statement.
- (c) LFF is of the view that the Draft Code is not a variation to the Current Code, but that it is a draft new Code. This is evident by, among other things:

- i. the reference on the covering page of the Victorian government's publication of the Draft Code as it being a "Draft for Public Comment". This suggests that it is a draft new Code of Practice;
  - ii. the title of the Draft Code printed on the covering page of the Victorian government's publication (being "Code of Practice for Timber Production") in comparison to the title of the Current Code (being "Code of Forest Practices for Timber Production Revision Number 2 1996"). The documents carry different titles that take different style and form; and
  - iii. the content of the Draft Code is substantively different from the Current Code. A simple perusal of the list of contents of each document conveys how different each document is from the other.
- (d) The Draft Code itself indicates that it must be a new draft document rather than a variation by reference to its content. For example, the sixth paragraph of page 6, under the heading "Background" in the "Explanatory Notes" provides that the Draft Code is produced as a result of *"substantial change in legislation and regulation governing forest management"*.
- (e) Additionally, a variation to a document would constitute amendments to it, such as removing a pre-existing sentence or paragraph and inserting a new sentence or paragraph. The amendments would be visible, for example, by using the Track Changes feature in Microsoft Word<sup>®</sup> to the Current Code. The Draft Code does not vary the Current Code. The Draft Code is a newly drafted document.
- (f) If the Draft Code is a new document rather than a variation, notice has not been properly given as required under the CFLA. Section 33 of the CFLA requires that notice be given of both the revocation of the Current Code and the draft new Code. If notice has not been properly given then the Draft Code may be void.

## 5. “EXPLANATORY NOTES” IN THE DRAFT CODE

### “Background” (page 6)

- (a) LFF is of the view that the content in the explanatory notes under the heading “Background” contains some information that is misleading or inaccurate. In the least, much of the information in the explanatory notes is mere opinion. Inaccurate or misleading information or mere opinion should not be contained in any legal document, including in the Draft Code.
- (b) An example of misleading information can be found in the second paragraph under the heading “Background”. That paragraph includes the statement that “...*public scrutiny of forest operations is now acknowledged as a necessary part of the right to use public resources*”. This statement suggests that the Victorian government accepts public scrutiny of logging and that the Victorian government accepts that the public has a right to go into State forest. LFF has observed the enactment of the *Safety on Public Land Act 2004 (Vic)* (“**SOPLA**”) and the *Sustainable Forests (Timber) Act 2004 (Vic)* (“**SFTA**”). These two pieces of legislation grossly increase the volume of criminal offences that individuals who scrutinise logging can be charged with in State forest in Victoria. More significantly, the SOPLA made it a criminal offence to go into an area of State forest that is being logged. So, the Victorian government through its own legislation has made clear that it does not accept public scrutiny of logging and that it does not accept that the public has a right to go into State forest. The information in the Draft Code must be accurate and the public must not be misled.
- (c) Another example of misleading information can be found in the fourth paragraph under the heading “Background”. That paragraph includes the statement that “...*forest manager’s continue to improve their management of forests...*”. The reports of the environmental audits of logging undertaken by the EPA reveal that forest managers have neither “improved” their management of forests nor that have they “continued” to do so. At best, the audit reports show that forest managers need to

improve their management of forests. In its 2005 audit report, released by then acting Environment Minister, Candy Broad, on 8 February 2006, the EPA recommended that there needed to be an increase in staff training to overcome so many breaches of the Current Code. Each of the yearly EPA audits has revealed that not a single logging coupe has properly complied with the Current Code.

- (d) The statement in the fourth paragraph of the “Background” goes on to say that the forest managers manage forests “...*within sound ecological limits...*”. This is mere opinion.
- (e) Another example of mere opinion can be found in the fifth paragraph under the heading “Background”. That paragraph includes a statement that “...*the [first] Code set out appropriate, responsible standards for timber production in State forests...*”. At most, it could be said that the first code attempted to set out such standards.
- (f) The explanatory notes should be re-drafted to remove any potentially inaccurate or misleading statements and to remove mere opinion.

“Contents of the Code” (page 7)

- (g) The second paragraph under the heading “Contents of the Code” provides that “*some of the relevant legislation and regulations that must be adhered to are listed in Appendix A*”. Legislation and regulations are amended from time to time. This sentence should be amended to include “as amended from time to time”.
- (h) Additionally, new legislation and regulations come into effect from time to time. For example, the proposed *Sustainable Forests (Timber Harvesting) Regulations 2006* have been drafted and may soon become law (see also paragraph 5(l) below). This part of the Draft Code should be amended to note that any relevant new legislation and regulations that come into effect must also be adhered to.
- (i) The fifth paragraph under the heading “Contents of the Code” suggests that Appendix A is an exhaustive list. This is in conflict with the second paragraph under this heading (referred to at paragraph 5(g) above). This is also in conflict with the general disclaimer at the bottom of page 9



of the Draft Code. This sentence should be amended from "...as listed in Appendix A" to "...including those listed in Appendix A".

- (j) The amendments set out at paragraphs 5(g) to 5(i) above provide certainty in the content of the Draft Code. The disclaimer in the Draft Code does not, and the disclaimer makes the Draft Code obsolete almost immediately upon its creation. This disclaimer should be removed.

#### "Application of the Code" (page 7)

- (k) The first paragraph under the heading "Application of the Code" provides that "*forest practices must be conducted in accordance with all applicable laws and regulations*". The Draft Code should also include that non-compliance with the code constitutes non-compliance with the law. This is an appropriate location for the insertion of this fact. We refer to paragraph 3(f) above and repeat that the Victorian government should make this abundantly clear so as to provide greater protection to the parties that the Draft Code is intended to regulate.

#### "Monitoring and compliance" (page 8)

- (l) Under the heading "Monitoring and Compliance" is a sub-heading "Public Land". The first paragraph refers to the *Timber Harvesting Regulations* 2000 being replaced before the Draft Code is finalised. LFF assumes that the proposed *Sustainable Forests (Timber Harvesting) Regulations* 2006 will be the replacement regulations. LFF notes that the Victorian government has only sought preliminary comments on the proposed regulations and that the Victorian government informed LFF by letter dated 16 December 2005 that it would later seek formal comments on the proposed regulations. Formal comments have not yet been sought.

#### "Terminology" (page 9)

- (m) The fourth paragraph under the heading "Terminology" explains "mandatory actions". The last sentence in that paragraph provides that "*failure to undertake a mandatory action would result in non-compliance with this code*". Whether it is in addition to or instead of the proposed

amendment at paragraph 5(k) above, this sentence should be amended to go on to say “which constitutes non-compliance with the law”. We again refer to paragraph 3(f) above and repeat that the Victorian government should make this absolutely clear so as to provide greater protection to the parties that the Draft Code is intended to regulate.

- (n) Paragraph 5 under the heading “Terminology” explains “guidance”. “Guidance” is the way that “mandatory actions” can be achieved. This paragraph is confusing, contradictory and creates uncertainty. This paragraph provides that “*failure to undertake any guidance action would not in itself constitute a breach of the code*”. This suggests that a “mandatory action” can still be achieved even if the associated “guidance” has not been followed. However, where there is an allegation that a “mandatory action” has not been followed the failure to follow the associated “guidance” could form the evidential basis to prove the failure to follow the “mandatory action”.
- (o) The Draft Code should be amended to provide that, where appropriate, the “guidance” must be followed to achieve the “mandatory action”. This will assist in providing certainty to those who have to adhere to and implement the Code. Of course, more can be done than what is provided under “guidance” to achieve the “mandatory action”, but the “guidance” must be followed as a minimum. We again refer to paragraph 3(f) in this respect.
- (p) In the least, some matters that are listed as “guidance” in the Draft Code are more properly suited to “mandatory actions”, which would be consistent with the statement that “*Forest managers are not obliged to conduct any of the actions covered under Guidance*” (page 9). For example, on page 18 the statements that “*Coupe location and dispersion of coupes within the forest will be consistent with Forest Management Plan strategies*” and “*The removal of timber as part of road construction will be considered within each Plan*” should be “mandatory actions”. The word “will” in both statements should be replaced with the word “must”.
- (q) The sixth paragraph under the heading “Terminology” provides that Management Procedures are “*consistent with operational goals and*

*mandatory actions of this Code*". That means that Management Procedures must be complied with and that a failure to comply with Management Procedures is a failure to comply with the law. The Draft Code should be amended to make this clear to avoid uncertainty. We again refer to paragraph 3(f) above.

**6. CHAPTERS 2 & 3 – APPLICATION OF THE CODE**

Chapters 2 and 3 of the Draft Code relate to scientific and biological matters. We refer to paragraph 2(a) above. LFF is not making submissions on scientific and biological matters. However, LFF understands that the Draft Code has some significant inherent flaws in its attention to and dealings with such matters. LFF have read submissions from other groups and individuals in this respect and supports some of the matters raised in those submissions.

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For and on behalf of the Executive Committee