SUBMISSION TO THE COMMONWEALTH GOVERNMENT INDEPENDENT REVIEW OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999*

BY LAWYERS FOR FORESTS INC

30 January 2009

Submission to the Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*

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Date: 30 January 2009

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1 Background to Submission

1.1 Lawyers for Forests Inc ("**LFF**") is a not for profit organisation incorporated in October 2000. It is an association of voluntary legal professionals working towards the protection and conservation of Australia's remaining old growth and high conservation value forests.

1.2 LFF welcomes the Independent Review ("**the Review**") of the *Environment Protection and Biodiversity Conservation Act 1999* ("**the Act**"), being undertaken by Dr Hawke pursuant to Section 522A of the Act, and the release of the Independent Review Discussion Paper ("**the Discussion Paper**"). The Act has now been in operation for almost 10 years and it is time to review its effectiveness.

1.3 LFF writes this submission in response to the terms of reference for the Review and the Discussion Paper.

1.4 LFF has a number of concerns regarding the operation of the Act. Its main concern is that the Act, and the implementation of the Act, does not adequately provide for the protection of the environment, (in particular Australia's biodiversity) or ensure ecologically sustainable development.

1.5 LFF's major concerns with the drafting and implementation of the Act are:

1.5.1 The exemption under section 38 of the Act ("**RFA Exemption**") which provides an exemption for logging operations conducted in accordance with the Regional Forestry Agreement ("**RFA**"). The RFA exemption should be removed from the Act.

1.5.2 The list of Matters of National Environmental Significance ("**MNES**") and the triggers for EIA) are too limited and should be expanded. The list of MNES should be expanded to include triggers for:

(a) Greenhouse gas emissions;

(b) Land clearing;

(c) Water use.

1.5.3 The Act is self-regulating. That is it relies on proponents properly referring proposals to the Commonwealth Minister for Environment Heritage and the Arts ("**the Minister**"). In these circumstances, and to ensure the Act is being complied with, it is crucial that public interest groups have standing to challenge decision making processes, and decision making occurs in an open, accountable and transparent manner.

1.5.4 However:

(a) the Act does not provide for the merits review of decisions relating to MNES;

(b) the threat of costs being awarded against public interest groups, and applications for undertakings for damages and applications for security for costs restricts those groups from utilising the appeal provisions of the Act; and

(c) the Act does not provide for sufficient public consultation.

1.5.5 The Act does not ensure that the cumulative impacts of proposals are considered.

1.5.6 The Act is not being implemented effectively. In particular, the Department of Environment, Water, Heritage and the Arts ("**the Department**") should be given sufficient funding to effectively implement the Act. It should be given adequate funding to, amongst other things, undertake site inspections, scrutinise and enforce conditions, and prepare recovery plans and threat abatement plans.

2 The RFA exemption should be removed

Introduction

2.1 Section 38 of the Act provides that:

> *"Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA".*

2.2 This means, among other things, that the following areas can be destroyed by logging without proper EIA under the Act:

2.2.1 National Heritage places;

2.2.2 declared Ramsar wetlands;

2.2.3 habitats of threatened species or endangered communities; and

2.2.4 habitats of listed migratory species.

2.3 The RFA exemption is inconsistent and contradicts the purposes of the Act which include:

2.3.1 "*to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance*";[1] and

2.3.2 "*to promote the conservation of biodiversity*".[2]

2.4 LFF has been advocating for the removal of the RFA exemption since the enactment of Section 38. LFF has brought its concerns in relation to the operation of this section to the attention of the Federal Government and Parliament on a number of occasions; most recently in its submission to the Senate Standing Committee on Environment, Communications and the Arts[3]. By not removing this exemption, the Commonwealth Government continues to support the destruction of threatened species habitat.

2.5 The Commonwealth Government should not prioritise the demands of a replaceable industry over the extinction of iconic species. It especially should not do this by

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[1] Section 3(1)(a) of the Act.

[2] Section 3(1)(ca) of the Act.

[3] Lawyers for Forests Inc., *Submission to the Senate Standing Committee on Environment, Communications and the Arts Committee Enquiry into the Operation of the Environment Protection and Biodiversity Conservation Act 1999* at http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/submissions/sub68.pdf, 23 September 2008.

providing the logging industry with an automatic and arbitrary exemption in the form of the RFA exemption.

The Rationale for the RFA Exemption is Flawed

2.6 The argument is often made that a rigorous impact assessment comparable to the EIA process provided for in the Act was in fact carried out in the course of undertaking the Comprehensive Regional Assessment (**"CRA"**) and implementing the Comprehensive Adequate and Representative ("**CAR**") reserve system under the RFA process. Further, it is also argued that State forest management systems adequately protect biodiversity.

2.7 The above argument makes three assumptions:

2.7.1 the RFA process involved a rigorous scientific analysis of Australia's forests, and identified those forests worthy of protection;

2.7.2 the States updated their forestry controls to incorporate knowledge gleaned from the process of developing RFAs;

2.7.3 the RFAs and State forest management systems are effective in protecting Australia's biodiversity.

2.8 None of these assumptions are correct.

The RFA Process did not involve a Rigorous Scientific Analysis of Australia's Forests

2.9 The first assumption is incorrect because the RFA process did not involve a rigorous analysis of Australia's forests. In Victoria, for example, the West Victoria CRA contains an acknowledgement of its deficiency. Volume 2 of the report at page 26 lists 38 endangered taxa. For five (or 13.2%) of these it is stated that the former Department of Natural Resources and Environment (Victoria) had insufficient data to establish whether the taxon was critically endangered, vulnerable, or at lower risk.

2.10 The RFA process was primarily a desktop study, based on existing (inadequate) knowledge. This led academic Martin Brueckner from the Edith Cowan University to comment on the public and scientific community response to the Western Australian RFA process as follows:

> *With regards to the adequacy of the data, it was suggested that many of the 'data sets that were available [were] totally inappropriate [for modeling purposes]'. This is why the same scientists believe that 'there needed to be data collected, not just data compiled'. However, 'there was no scope to go and acquire additional data which were [thought to have been] fundamentally required' for any flora and fauna modeling. Consequently, non-CALM scientists considered 'the outcomes …[as] quite flawed' and scientific conclusions as 'extremely suspect in the sense that they … [were] based on inadequate data' and not '… on a fair and comprehensive assessment of the entire forest region nor … on any assessment of major conservation requirements throughout the forest region'. To one CALM staff member the limited scoping of research projects was quite deliberate and based on the attitude that: 'We don't want a particular sort of information, we don't want good data sets on this, we don't want to know' which explains why CALM stood accused of a blanket approach to forest management*[4].

[4] Martin Brueckner, 'The Western Australian Regional Forest Agreement: Economic Rationalism and the Normalization of Political Closure' (2007) 66 *The Australian Journal of Public Administration*, 148-158.

2.11 LFF has commissioned Biosis Research, Natural Environment & Cultural Heritage Consultants, to review the adequacy of the scientific analysis undertaken under the RFA process. LFF expects this report shortly.

2.12 However, even if the RFA process involved a rigorous analysis of Australia's forests, there have been questions raised regarding the validity of the JANIS criteria on which the CRA Reserve System was based, and also whether the JANIS criteria were actually implemented in developing the CAR Reserve System[5].

The States have not Updated their Forest Management Systems

2.13 The second assumption is incorrect, in Victoria at least, because significant aspects of Victoria's Forest Management System have not been updated following the RFA process, nor has Victoria updated its forestry controls to incorporate knowledge gleaned from the process of undertaking the CRA. For example, a number of Forest Management Plans in Victoria ("**FMPs**") (the East Gippsland, Midlands and Otways FMPs) were prepared before the CRA was undertaken, but have not been updated since the completion of the CRA (and entry into the relevant RFA).

2.14 Whilst there have been regulatory and policy changes in Victoria (for example through the introduction of the *Sustainable Forests (Timber) Act 2004* (Vic)), the revised Code of Practices for Timber Production[6] ("**the 2007 Code of Practice**") does not differ significantly from the previous version. Forest Coupe Plans are still prepared in accordance with the relevant FMP. This process for approving logging operations 'on the ground' was already in place before the Victorian RFAs were executed, and has not been updated to reflect information gleaned through the CRA or subsequent processes.

RFAs are not Effective at Preserving Biodiversity

2.15 The third assumption is incorrect because it has been judicially determined that RFAs are ineffective at protecting Australia's biodiversity. This issue was examined in *Brown v Forestry of Tasmania No. 4* [2006] FCA 1729 ("***Brown***"). *Brown* considered this issue in relation to the Wielangta Stag Beetle, the Tasmanian Wedge Tailed Eagle and the Swift Parrot, and the Tasmanian RFA ("**Tasmanian RFA**").

2.16 In *Brown*, His Honour Justice Marshall made the following findings of fact:

2.16.1 Logging of the Wielangta Forest has and will have a significant impact on the Wielangta Stag Beetle, the Swift Parrot and the Tasmanian Wedge Tailed Eagle.

2.16.2 Logging had not been and would not be conducted in accordance with the Tasmanian RFA. This is because it had not been and could not be carried out in accordance with clause 68 of the Tasmanian RFA[7] as, among other

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[5] Refer to the submission of the Australian Network of Environment Defender's Offices to the Senate Inquiry into the operation of the Environment Protection Biodiversity and Conservation Act 1999, September 2008: at http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/submissions/sublist.htm .

[6] The Code of Practice for Timber Production, 2007 published by the Department of Sustainability and Environment replaced the Code of Forest Practices for Timber Production Revision No.2, November 1996.

[7] Clause 68 provides that "the State agrees to protect the Priority Species……. through the CAR Reserve System or by applying relevant management prescriptions"

things, the State had failed to protect the Wielangta Stag Beetle[8], the Swift Parrot[9] and the Tasmanian Wedge Tail Eagle[10] through the CAR Reserve System and by unsatisfactory management prescriptions and will not do so in the future based on previous behaviour.[11] The Court also found that clause 70 of the Tasmanian RFA[12] was breached because there had never been a recovery plan for the Wielangta Stag Beetle and the plans for the Tasmanian Wedge Tailed Eagle and the Swift Parrot had expired and, in any event, had never been fully implemented.

2.17 In short, His Honour Justice Marshall made findings of fact that the Tasmanian Government had failed to implement the Tasmanian RFA, and that in any event, the procedures put in place under the Tasmanian RFA were inadequate to protect the three endangered species referred to above.

2.18 Although Forestry Tasmania successfully appealed against the decision of Justice Marshall[13], neither the Full Court of the Federal Court nor the High court overturned these findings of fact. The appeal was successful on other grounds.

2.19 In reaching his decision at first instance, Justice Marshall stated:

> *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 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. <u>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</u>. 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. <u>To construe Clause 68 otherwise would be to turn it into an empty promise (emphasis added)</u>.*

2.20 However the Full Court of the Federal Court disagreed with this reasoning. It determined that the Tasmanian RFA <u>does not</u> impose an obligation to deliver protection to endangered species. Instead, the Full Court was satisfied that the mere maintenance of the CAR Reserves constituted the protection necessary for the three species.

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[8] Refer paragraphs 262 and 273

[9] Refer paragraphs 267 and 275

[10] At paragraphs 270 and 281

[11] Refer paragraphs 271 and 282 which are similar to the reasons given at paragraphs 38-40.

[12] Clause 70 requires "management prescriptions" identified in recovery plans to be implemented as a matter of priority.

[13] See *Forestry Tasmania v Brown* [2007] FCA FC 186

2.21 Ultimately, despite a finding of fact that the Tasmanian RFA was not implemented, and actions taken under the Tasmanian RFA failed to protect the three listed species, the result of the decision of the Full Federal Court is that Forestry Tasmania continues to have the benefit of the RFA exemption.

2.22 The reasoning of the Full Court highlights the fatal flaw in the operation of the RFA exemption. In the words of Justice Marshall, obligations under the Tasmanian RFA are "an empty promise" because even if implemented, the Tasmania RFA will not impose any actual obligation to protect endangered species.

2.23 Notwithstanding the decision of Justice Marshall in Brown, The Environment and Heritage Legislation Amendment Act (No.1) 2006 (Cwth) ("**the 2006 Amendment Act**") introduced section 75(2B). Section 75(2B) expanded the scope of RFA Exemption specifically directing the Minister not to consider the adverse impacts of an RFA forestry operation when considering the adverse impacts of a proposal generally. Ironically, this amendment came into force less than a month after Justice Marshall's decision[14]!

2.24 LFF has reviewed the Victorian RFAs. Like the Tasmanian RFA, the Victorian RFAs have not been properly implemented, and the Victorian forest management systems also fail to protect endangered species.

2.25 For example:

2.25.1 It appears there have been no annual RFA reports prepared for Victoria since 2002[15].

2.25.2 As far as LFF is aware, whilst the Statewide Forest Resource Inventory and Integrated Forest Planning System (required under all of the Victorian RFAs) are being prepared by the Victorian Government, neither have been finalised (nor assessed by the Commonwealth Government).

2.25.3 The Victorian RFAs list the *Flora and Fauna Guarantee Act 1988* (Vic) ("**FFG Act**") as one of the mechanisms by which threatened flora and fauna are protected in Victoria[16]. The FFG Act outlines a process whereby Actions Statements are prepared to outline the strategies to protect listed endangered species, or manage threatening processes. However, Action Statements have not been prepared for a number of listed threatened species or threatening processes:

(a) There are 570 listed threatened taxa of flora and fauna. Two-hundred and twenty-eight (or 40%) of Action Statements have been prepared for those listed flora and fauna.

(b) There are 37 listed threatening processes. Twelve Action Statements (or 32.4%) of Action Statements have been prepared for those threatening processes.

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[14] The decision of Justice Marshall was handed down on 19 December 2006. Section 75(2B) came into effect on 1 January 2007.

[15] Refer website http://www.daff.gov.au

[16] See, for example, clause 55 of the Central Highlands RFA, and clause 48 of the Gippsland RFA.

2.25.4 Even where Action Statements have been prepared they are not implemented.[17] Nor are they enforceable by members of the public. Further, and in any case, logging operations are effectively exempt from the operation of the FFG Act.[18]

2.26 Finally, it is impossible to argue that RFAs are effective in protecting biodiversity where the RFAs do not impose any requirement for either the Commonwealth Government or State Governments to add to the list of CAR reserves if a particular forest merits protection. For example, it may be ascertained on conducting a pre-logging survey, that a forest has special conservation value as the habitat of an endangered listed species. Instead, the RFAs specify that if the Commonwealth acts to protect additional forest, the Commonwealth will pay the relevant State compensation. Given this financial impediment, and lack of any obligation to add to the CAR Reserves, it is not surprising that the Commonwealth has failed to intervene to expand the CAR Reserves.

Conclusion

2.27 The arbitrary effect of the RFA Exemption is demonstrated by LFF's application to have an area placed on the National Heritage List. In September 2006, LFF, with the Central Highlands Alliance Inc, sought to protect the Baw Baw area from further logging, by applying to the former Minister to have it placed on the National Heritage List . LFF argued that the site had outstanding and unique natural heritage values on the basis that, amongst other things, it was the only habitat of the Baw Baw frog, an endangered species listed under the Act.

2.28 We have annexed a copy of the Department's reply to our 2006 application. The reply does not respond to either our request that that the area be emergency listed as a National Heritage area due to the existence of threatened species, or our assertion that National Heritage Values were under threat. It simply arbitrarily refers LFF to the operation of the RFA Exemption to exclude the Baw Baw area from consideration.

2.29 The destruction of the habitat of critically endangered species can and does occur "in accordance with" RFAs. This is illustrated by the logging of the habitat of the endangered Baw Baw frog and the Leadbeaters possum (both endemic to the Baw Baw area in Victoria[19]), which continues to occur in an area which is subject to an RFA.

2.30 It is important to understand that RFAs apply to a large proportion of Australia's forests, and that these forests are known to be "hotspots for diversity" across and between different species. Consequently, a large proportion of Australia's existing biodiversity, including listed species, is protected only by way of "an empty promise". There is no justification for the continued existence of the RFA exemption under the Act. This is particularly so when most other forms of development, of smaller scale and less environmental impact, do require referral under the Act. There is no reason to treat

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[17] Refer to LFF Review of the FFG Act for a summary of the deficiencies of the FFG Act at http://lawyersforforests.asn.au/pdf/FFG_review.pdf.

[18] Refer to the FFG Order 1988, made under section 48(3) of the FFG Act on 15 December 1998. Order 1988 expired 30 November 2003 but was renewed in January 2004.

[19] As classified by the *International Union for Conservation of Nature* at http://www.redlist.org.

logging, with its extensive impact on Australia's biodiversity, and its threatened species, as a special case.

2.31 Finally, it is important to note that removing the exemption does not of itself constitute a 'halt' to activities. Rather, it affords an opportunity to undertake proper EIA and assess the activity under the Act in order to promote more ecologically sustainable outcomes, including the preservation of threatened species habitat.

RECOMMENDATION

The Act should be amended to remove the exemption under section 38 of the Act for logging undertaken in accordance with an RFA, and require proper EIA to be undertaken for logging within old growth and high conservation value forests.

Section 75(2B) of the Act should also be repealed.

3 The list of matters of National Environment Significance should be expanded to include Greenhouse Gas, Land Clearing and Water Use Triggers

Greenhouse Gas Trigger

3.1 Climate change is the most serious environmental issue facing Australia and the world today. Awareness about the extent of climate change and of the catastrophic consequences of not acting have grown exponentially in recent years, as has the body of scientific knowledge about the effects of climate change. In recent years (whilst the Act has been operational) the Commonwealth Government has acknowledged the seriousness of climate change by creating a Department which specifically deals with the issue, and has committed to the introduction of the market-based Carbon Pollution Reduction Scheme ("**the CPR Scheme**") by 2010. The Act was formulated before these important developments took place, and consequently needs review and amendment in order to better integrate with recent legislative and scientific developments.

3.2 LFF is deeply concerned about the fact that activities which generate significant greenhouse gas emissions do not require referral under the Act. For example, the logging of native forests contributes heavily to climate change by releasing stored carbon, yet logging activities do not require referral under the Act, and have the benefit of the RFA Exemption.

3.3 Recent research has shown that Australia's old-growth forests are particularly effective as "carbon sinks", with anywhere between three and twenty times the carbon storage capacity attributed to them by official *Intergovernmental Panel on Climate Change* estimates[20].

[20] Brendan G Mackey, Heather Keith, Sandra L Berry and David B Lindenmayer, *Green Carbon, The Role of Natural Forest in Carbon Storage* (2008) Australian National University E Press ("**the Mackey Report**")

3.4 The Mackey report[21] highlights the carbon loss associated with the harvesting of old growth forests and replacing it with plantations stating:

> *Natural forests are more resilient to climate change and disturbances than plantations because of their genetic, taxonomic and functional biodiversity. This resilience includes regeneration after fire, resistance to and recovery from pests and diseases, and adaptation to changes in radiation, temperature and water availability (including those resulting from global climate change). While the genetic and taxonomic composition of forest ecosystems changes over time, natural forests will continue to take up and store carbon as long as there is adequate water and solar radiation for photosynthesis.*
>
> *The green carbon in natural forests is stored in a more reliable stock than in industrial forests, [plantations], especially over ecological time scales. Carbon stored in industrial forests has a greater susceptibility to loss than that stored in natural forests. Industrialised forests, particularly plantations, have reduced genetic diversity and structural complexity, and therefore reduced resilience to pests, diseases and changing climactic conditions.*
>
> *The carbon stock of forests are subject to commercial logging, and of mono-cultured plantations in particular, will always be significantly less on average (approximately 40% to 60% depending on the intensity of land use and the forest type) than the carbon stock of natural, undisturbed forests. The rate of carbon fixation by young regenerating stands is high, but this does not compensate for the smaller carbon pools in the younger-aged stands of industrialized forests compared with those of natural forests. Carbon accounts for industrialized forests must include the carbon emissions associated with land use and associated management, transportation and processing activity.*

3.5 Despite this increasing awareness and knowledge about greenhouse gas emissions and their relationship to climate change, the Act still contains no requirement that the Minister explicitly consider greenhouse gas emissions as a trigger for EIA under the Act, or indeed as a factor in decision-making. The 2006 "*Wildlife Whitsunday Case*"[22]confirmed this, concluding that the flow-on effects of greenhouse gas emissions from two coal mine proposals did not require the Minister's consideration.

3.6 *Wildlife Whitsunday* highlights the damage that the absence of a Ministerial requirement or "greenhouse trigger" is having on the effectiveness of the Act to consider the actual impacts of a proposed project, regulate proposals which involve extensive greenhouse gas emissions and therefore contribute to climate change and also impact on Australia's obligations under the *Kyoto Protocol.*

3.7 If Australia is to meet its international obligations under the *Kyoto Protocol,* it is essential that regulation of all significant climate change actions be regulated at a Commonwealth level. The proposed CPR scheme includes carbon emissions from forestry only on a voluntary opt-in basis. Therefore, in practice, forestry entities will only elect to join the CPR Scheme if their operation will be a net sequester of carbon. In effect, a significant source of greenhouse gas emissions will be left outside the CPR Scheme. If this regulatory void remains (as proposed in the recently released CPR Scheme White Paper) then it is especially critical that the proposed "greenhouse trigger" encompass land use change and forestry activities, including the logging of old

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[21] Op cite

[22] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736.

growth and high conservation value forests and land clearing, in order to give the Commonwealth power to robustly control and account for the greenhouse gas emissions generated by these activities.

3.8 The proposed trigger must control not just the regulation of major sources of new greenhouse gas emissions, but also the preservation and development of greenhouse sinks, such as old growth and high conservation value forests.

RECOMMENDATION

The Act should be amended to include a greenhouse gas emission trigger that recognizes any development (including the logging of old growth and high conservation value forests) that produces over 100,000 tonnes of CO2 equivalent per year as a MNES, which requires referral and EIA under the Act.

All sources of greenhouse gas emissions should be considered in calculating the CO2 equivalent emissions, including embodied energy associated with the building materials incorporated in a development, and the impact of any development on a carbon store.

Land Clearing Trigger

3.9 The impact of broad-scale vegetation clearance has an extensive impact on natural heritage and biodiversity, as well as being a major source of Australia's greenhouse gas emissions. Other environmental impacts include degradation of water and soil quality, and increased salinity. These are all issues of national significance and must be controlled at a national level.

3.10 LFF recognises that most states have legislation in place to control native vegetation removal. However the effectiveness of these controls vary from state to state.

3.11 Consistent standards should apply across Australia, in order for the Commonwealth to regulate large land clearing proposals which have environmental impacts of national significance.

3.12 LFF also recognises that the Act does require referral for land clearing proposals which have a significant impact on Ramsar Wetlands, the World Heritage Values of a World Heritage Property or Listed Threatened Species or Endangered Communities. However the referral process is indirect, in that the land clearing is not a trigger in and of itself. There is therefore the potential for large scale proposals to fall through the cracks, and not require referral.

3.13 It is for these reasons that LFF recommends that the list of MNES should be expanded to include a land clearing trigger, as described below.

RECOMMENDATION

The Act should be amended to include the following triggers:

- a trigger where a proponent clears more than 100 hectares of vegetation over any five year period;
- a trigger where a proponent removes vegetation which provides habitat for listed threatened species or ecological communities, or is listed critical habitat;
- a trigger where “high impact” activities trigger referral irrespective of the hectares of native vegetation proposed to be removed. The "high impact" activities should be listed in Regulations and include developments with a significant impact.

Water Use Trigger

3.14 With continued severe drought, the use of water and the balance between human water use and the environmental flows necessary to maintain ecosystems is an issue that has aroused significant public concern in recent years.

3.15 Further, our rivers and streams and water catchments cross state borders, and upstream proposals have an impact on downstream users. For these reasons, the use and regulation of water is a national and not a state issue. However, the Act only indirectly regulates our water catchments, rivers and streams by requiring referral where a proposal significantly impacts on a MNES.

3.16 LFF acknowledges the progress being made at the Commonwealth level on water issues, particularly through the National Water Initiative. The initiative highlights a shift in thinking on water regulation, from a the traditional state-based approach, to a more centralised and unified Commonwealth approach. This is a recognition of the trans-border nature of the issue. However, the Act has failed to keep pace with the National Water Initiative.

3.17 In these circumstances, LFF believes that a water trigger is required to ensure a robust EIA of development proposals which seek to use significant amounts of water, and a legislative framework at the national level and under which the environmental impact of water intensive development proposals are considered.

RECOMMENDATION

The Act should be amended to include a water use trigger where a person proposes to extract in excess of 10,000 megalitres of surface and/or ground water and where the extraction is likely to have a significant impact on:

- surface or groundwater-dependent ecosystems; or
- the environmental flows of any Australian river or stream which flows to another state or territory apart from the state or territory in which the development proposal is situated.

4 Public participation in decision making should be increased

The scope of merits review should be expanded

4.1 Section 487 of the Act extends standing to individuals and environmental organisations who have engaged in systemic conservation-related activities for at least 2 years to challenge decisions made under the Act. This section is an essential provision as the Act relies on proponents referring proposals to the Department for approval. Due to the lack of funding devoted to biodiversity protection, there is a heavy reliance placed on environmental groups to scrutinise decision-making under the Act. This is particularly the case when the Department is not provided with sufficient funds to undertake regular site inspections, or proactively enforce the Act. It is therefore essential that the Act provide public interest groups and individuals with rights to ensure that proponents do refer proposals to the Department, and decision making is made in accordance with the law.

Limitations of Section 487 Rights

4.2 The limitations of the rights granted under section 487 are twofold. Firstly, most decisions may only be challenged on the basis of the correctness of the process (judicial review) rather than on the substance of the decision (merits review). Secondly, there are practical deterrents to bringing applications under section 487, including exposure to significant cost penalties.

Access to Merits Review

4.3 Access to merits review of decisions is vital to the effectiveness of the Act. The fact that generally only judicial review is available allows a significant amount of discretion and power to the Minister personally, and expressly enables irrational or unreasonable decisions to be made. Third parties are denied the opportunity to question the logic underlying the decision, even if, on its face, a decision does not comply with the objectives of the Act.

4.4 The accountability provided by allowing judicial review under the Act is useful in the sense of ensuring that decisions under the Act are made in accordance with the law. However, the fact that this accountability is limited only to whether the decision is formally and procedurally correct admits the possibility that the wrong bases may underlie decisions without being subject to challenge. Judicial review does not require the Minister to make the best decision in the situation, or even to make a good or sensible decision. Judicial review of the substance of the decision only occurs when the decision is "...so unreasonable that no reasonable [decision-maker] ... could ever have come to it"[23].

4.5 If the Commonwealth Government is committed to ensuring decisions achieved the objects of the Act, then it should provide for appeals of its decisions on the merits.

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[23] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 223–4

RECOMMENDATION

The scope of merits review should be expanded to include:

- review of a decision whether referral is required under the Act;
- review of the level of assessment undertaken by the Minister;
- review of the Minister's decision to approve or refuse to approve a proposal;
- review of the conditions imposed by the Minister.

Cost barriers should be removed.

4.6 Although section 487 grants standing to public interest groups and individuals, this right to litigate public interest matters is at risk of being rendered nugatory by requirements that public interest groups and individuals provide undertakings for damages, provide security for costs and pay costs.

Undertakings for damages, security for costs applications and costs orders

4.7 The 2006 Amendment Act removed section 478, which provided that the Federal Court could not require an applicant for an injunction to give an undertaking to damages as a condition of granting an interim injunction. As a result of section 478 being removed, public interest groups will be dissuaded from applying for an interim injunction, even when an interim injunction may be required to prevent an imminent breach of the Act. Section 478 should therefore be reinstated to prevent this possibility.

4.8 The provision for respondents to request security for costs was designed to deter frivolous actions being brought. However, the logging industry has utilised the security for costs provisions to attempt to stymie legitimate applications. An example of the use of this technique in a general civil context was the forced abandonment of the Tasmanian branch of the Environmental Defender's Office's defamation case against Timber Communities Australia and others due to a security for costs order made against it[24].

4.9 The right to being an application for security for costs is not the appropriate mechanism to bring an end to frivolous applications, as the effect may be to end the bringing of legitimate applications. Security for costs applications should be expressly prohibited against applicants with section 487 standing who bring applications under the Act.

4.10 In addition, applicants in arguable cases that are not successful should not face significant costs orders. The possibility of adverse costs orders acts to deter applicants from bringing valid public interest litigation. This is especially prevalent in the Federal Court which is an expensive jurisdiction in which to litigate particularly by the standards of public interest litigants. In circumstances where an applicant with an arguable case is ultimately unsuccessful, the Act should provide that each party bear their own costs.

[24] Roland Browne, *EDO Bulletin*, (2004) Environmental Defender's Office (Tas) <http://www.edo.org.au/edotas/newsletter/bulletin18.pdf> at 22 September 2008

RECOMMENDATION

The Act should be amended to prevent proponents from applying for security for costs. It should also be amended to provide that each party should bear its own costs, unless a party has conducted a proceeding vexatiously.[25] Section 478 should also be reinstated.

Scope of public consultation should be expanded

4.11 In its current form, the Act does not provide members of the public with any right to review the merits of approval conditions, or enforce conditions. The only avenue for the public to participate in the formulation of conditions is by seeking an injunction under section 487, or otherwise challenging the Minister's decision, and then negotiating new conditions or having a Court impose new conditions. Even then such a challenge is hampered by practical deterrents and limitations as discussed above. [26]

4.12 Furthermore, the Department has shown disregard for the principles of procedural fairness and community participation in its approach to potential reform of the Act.

4.13 In 2006 when the most recent set of amendments were passed to the Act, the Department only allowed the public 14 days to make submissions on the Amendment Bill. The Amendment Bill was a 414-page, 696-paragraph Bill which sought to amend the Act that the Commonwealth Government refers to as "*the Australian government's premier piece of environment and heritage legislation*". The public were not granted any extensions of time within which to lodge submissions, and as a result the public was denied a reasonable opportunity to comment on an extensive and complex Bill that substantially amended the Commonwealth's only legislation enacted to protect Australia's natural heritage.

4.14 Furthermore, the 2006 Amendment Act also failed to take into account the findings and recommendations made at the national Biodiversity Summit 2006, which occurred approximately 3 weeks prior to the release of the Bill, and which reviewed the Act with a view to independently commencing a process for reform of the Act. This failure meant that the former Howard Government enacted the 2006 Amendment Act without considering the findings and recommendations made by Australia's leading scientists and academics working within the regime created under the Act.[27]

4.15 LFF is also concerned that a number of time-lines referred to in the Act are insufficient for the public to properly consider information and respond. For example, persons are given only 10 days to comment on whether an action is a controlled action after a referral is received by the Minister.[28] This is simply insufficient time for public interest groups to respond.

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[25] Refer section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) for an example of a provision to this effect.

[26] Refer paragraphs 4.1 - 4.10 above.

[27] Refer to http://www.biodiversitysummit.org.au/papers.html

[28] Refer to section 74(3) of the Act.

4.16 Further, there is no provision for public consultation on a number of important decisions under the Act. For example, there is no public consultation process before the Minister makes a decision as which assessment approach to use under Division 3 of Part 8 of Chapter 4 of the Act.

4.17 Finally, LFF is concerned that the 2006 Amendment Act reduced a number of rights of the public to participate in decision making processes under the Act. These include:

4.17.1 Removing the right for the public to request the emergency listing of a place on the National Heritage List.

4.17.2 Removing the right to appeal to the Administrative Appeals Tribunal against a decision by the Minister in relation to a permit issued, refused, varied, revoked or the conditions of a permit under Part 13A of the Act, or a decision to issue or refuse to issue a certificate under Section 303CC(5) of the Act, or to make, refuse to make, vary or revoke a declaration under Sections 303FN, 303FO and 303FP of the Act[29].

RECOMMENDATION

The Act should be amended to provide for greater public participation. The Act should be amended to provide for members of the pubic to have the right to comment on draft approval conditions, appeal against such conditions and enforce conditions.

Public participation rights removed under the 2006 Amendment Act (listed in paragraph 4.17 above) should be reinstated.

5 Cumulative Impacts of Proposals

5.1 The Act fails to consider the cumulative impact of proposals on MNES. LFF acknowledges that it is difficult to develop an EIA system which does consider the cumulative impact of proposals. However, the Department could develop policies to guide the exercise of decision making under the Act, and which set appropriate parameters or targets which assist in having the cumulative impact of proposals considered. If the policies are appropriately drafted and enforced, it would be possible to develop an EIA system which considered the cumulative impact of proposals.

5.2 For example, policies could be developed which set targets for the extent of land clearing, greenhouse gas emissions and water use. By setting such targets, and applying the policy, the Commonwealth could act to control the cumulative effect of proposals.

5.3 However policies are of little assistance if there are exemptions provided, they are not tightly drafted, and there is no independent umpire to ensure consistent decision making occurs in accordance with the policy. LFF therefore believes an independent tribunal should be established to review decisions made under the Act, and seek to ensure consistent decision making.

[29] Refer section 303GJ(2) of the Act.

RECOMMENDATION

The Act should control the cumulative impact of proposals. The Department should also prepare appropriately drafted policies to guide the exercise of decision making under the Act, with an independent tribunal established to review decisions made under the Act.

6 General Concerns About the Implementation of the Act

6.1 LFF is concerned that the administration of the Act is being rendered ineffective by the lack of funding provided to the Department.

6.2 The Department is not currently being provided with sufficient resources to implement the Act. Of particular concern is the lack of resources provided to prepare recovery plans and threat abatement plans, undertake site inspections, enforce the conditions of approvals, and to scrutinise the effectiveness of and enforce management plans prepared under such approvals.

6.3 The principal proactive measure by which the Commonwealth can protect listed threatened species and listed threatened ecological communities, and manage key threatening processes, is through the development of recovery plans and threat abatement plans. However the Minister is not obliged to make recovery plans for listed threatened species or ecological communities,[30] or prepare threat abatement plans for key threatening processes:[31]

6.4 As a result, many recovery plans and threat abatement plans have not been prepared. For example LFF understands that:[32]

6.4.1 There are 17 key threatening processes, and only 10 approved threat abatement plans. This means only 59% of threat abatement plans have been prepared.

6.4.2 There are 1,732 listed threatened flora and fauna, and 44 listed threatened ecological communities. 410 recovery plans have been prepare. This means only 23.7% of recovery plans have been prepared.

6.5 These figures reflect poorly on the Commonwealth Government's intent to act proactively to protect listed endangered species and communities and to manage threatening processes. The Department should be given sufficient resources to prepare a greater proportion of recovery plans and threat abatement plans.

6.6 However, recovery plans and threat abatement plans are only useful if they impose obligations on the Commonwealth Government to act proactively to protect the relevant species or community or manage the threatening process. However, the Act does not commit the Commonwealth Government to actively implement a recovery plan or threat abatement plan. Instead, a recovery plan or threat abatement plan is only relevant with respect to certain decisions made under the Act.[33] The Act should

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[30] Refer to Section 299AA of the Act.

[31] Refer to Section 270A of the Act.

[32] From analysing the website: http://www.environment.gov.au/epbc on 29 January 2009.

[33] Refer to Annexure 2 to this submission.

therefore be amended to commit the Commonwealth Government to act proactively and implement recovery plans and threat abatement plans.

RECOMMENDATION

The Department should be adequately funded, with particular attention directed to providing the Department with the funds to undertake site inspections and to scrutinise and enforce approval conditions. The Department should also be provided with sufficient funding to prepare recovery plans and threat abatement plans, an the Act amended to commit the Commonwealth Government to implementing them.

7 Other concerns

7.1 In addition to the reduction of rights of public participation discussed in paragraph 4.1-4.17 above, LFF is deeply concerned about a number of other provisions of the 2006 Amendment Act.

7.2 The 2006 Amendment Act expanded the potential scope for bilateral agreements and bilaterally accredited authorization processes[34]. State and Territory EIA processes are not necessarily sufficiently robust[35], and again, the bilateral accreditation process has the potential to exclude certain actions from proper and appropriate EIA.

7.3 The 2006 Amendment Act also introduced section 37A, which provides that the Minister may declare that certain actions do not require approval under Part 9 of the Act. This mechanism has the potential to subject decisions to undue political pressure, and to exclude certain actions from proper and appropriate EIA.

7.4 The 2006 Amendment Act also introduced section 158A. Section 158A prevents the Minister from (amongst other things) revoking or varying a previous approval notwithstanding that a 'Listing Event'[36] has occurred. A Minister is prevented under this section from imposing stricter controls in the event that the land developed, or adjacent land, is subsequently found to have increased environmental or heritage significance. This is inappropriate. The Minister should be able to revoke or amend the Development Approval in these circumstances to reflect any increased significance and to afford adequate protection to such an area.

7.5 The process for registering critical habitat was already underutilized prior to 2006, as there was (and is still) no public process whereby members of the public could put forward an area for nomination. The 2006 Amendment Act further undermined this process by introducing section 207A(1B), which provides that the Regulations can add additional considerations (or prohibit consideration of certain considerations), thereby providing scope for economic interests have precedence over biodiversity conservation objectives.

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[34] Refer sections 33 and 46 of the Act.

[35] For example, the *Environment Effect Act* 1978 (Vic) (**the Environment Effects Act**) governs EIA in Victoria. Amongst other things, it does not outline triggers for EIA, or outline the process for EIA in any detail. Nor does it guarantee the public will be consulted during the decision making process.

[36] For example, the property becoming a World Heritage Property, or a species becoming a threatened species - refer section 158A(1) of the Act.

RECOMMENDATION

Sections 33, 46, 37A, 158A, and 207(1B) of the Act should be repealed in their entirety.

8 Conclusions

8.1 The Act is a significant piece of legislation, and a significant improvement on the former *Environment Protection (Impact of Proposals) Act 1974* (Cth). It is also a model for states and territories to adopt.

8.2 However it has become apparent, following the decision of Justice Marshall in *Brown* that the RFAs and State forest management systems do not operate to protect Australia's biodiversity. Nor, given the deficiencies in the RFA process, and further information that has and will come to hand, should the RFAs be seen as adequately identifying those forests worthy of protection and those open to logging. By virtue of the existence of the RFA exemption, the Act therefore, does not operate to protect biodiversity in areas subject to the RFAs. As a result, the RFA exemption should be removed, and logging operations be subject to proper EIA under the Act.

8.3 Climate change was not the issue in 1998 that it is now. As a result, the Act should be amended to require referral of activities which would significantly increase Australia's greenhouse gas emissions. One of those activities is the logging of old growth and high conservation value forests. The argument for requiring such logging to be referred for EIA assessment under the Act under a greenhouse trigger is strengthened by the fact that the CPR Scheme proposes to effectively exempt logging operations from the CPR Scheme, by providing for an opt-in scheme for logging operations.

8.4 Land-clearing and water use must also be recognised as national issues, and as issues which increase Australia's greenhouse gas emissions and impact on its biodiversity. Land-clearing and water use triggers should therefore be incorporated into the Act.

8.5 The Act should provide for increased public participation in decision making, by expanding the scope of merits review, removing cost barriers and expanding the scope of public consultation. This would result in an Act reflective of community values and concerns, and would demonstrate a practical government commitment to transparent, open and accountable governance, as well as to environment protection objectives.

8.6 The Act should control the cumulative impact of proposals, with the Department developing policies which set out targets, and guide decision making under the Act. An independent tribunal should be established to ensure the policies are enforced, and consistent decision making occurs.

8.7 The Department should be adequately funded, with particular attention directed to providing the Department with the funds to undertake site inspections and to scrutinise and enforce approval conditions, and management plans prepared under conditions. The Department should also be provided with sufficient funding to prepare recovery plans and threat abatement plans, and the Act amended to commit the Commonwealth Government to implementing them.

8.8 The 2006 *Amendment Act* introduced a number of amendments which 'water down' the effectiveness of the Act. These include sections 36, 46, 37A, 158A and 207(1B). Those sections should be repealed in their entirety.

ANNEXURE 1

Reference: 2/10/269/0007
Contact Officer: Robert Bruce
Ph: (02) 6274 2160

Ms Vanessa Bleyer
President
Lawyers for Forests Inc and the Central Highlands Alliance Inc

By email to: vanessab@lawyersforforests.asn.au

Dear Ms Bleyer

I refer to your email of 13 September 2006 regarding a request to enter the Mount Baw Baw Area in the National Heritage List under the emergency listing provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (the Act).

As noted in the introduction to your request, before any action can be taken by the Minister on your request, two conditions must be met. Your request does not contain enough information under these two conditions to enable the Minister to make an informed decision on your request. Before proceeding, then, we will need you to provide the information to satisfy these requirements.

The first condition is that the Minister must believe that the application refers to a "place" that has or may have one or more National Heritage values.

A map by itself is insufficient to define the subject area precisely. A written boundary description that clearly identifies and defines the boundary of the area of your request is required. If the Minister decides to emergency list a place it must be gazetted with a full written description that unambiguously defines the place.

The second condition is that the Minister must believe that at least one of the National Heritage values you identify is under threat. The threat must have some characteristic and degree of immediacy that would warrant the use of the emergency listing powers.

From the information provided, it would appear that the Central Highlands and the Gippsland Regional Forest Agreements (RFA) cover all of the area the request refers to. If this is the case, then the provisions in the Act applying to regions covered by RFAs (sections 38-42 of the Act) would apply. Section 38 states that the Act does not provide for protection against forestry operations undertaken in accordance with a RFA. Consequently emergency listing would provide no protection from complying forestry operations. If such operations are the only threat to any National Heritage values then listing would have no effect and the Minister would be unlikely to agree to emergency listing.

The current submission refers to "the already listed area", meaning the Baw Baw National Park listed in the Register of the National Estate. The submission, however, is an application for listing of the place in the "National Heritage List". You should note that the two lists are quite separate and have quite different criteria and thresholds for assessment of heritage values. For further information on the two lists and their relevant criteria you may wish to visit the

Department's website. A fact sheet on the heritage lists is available for reference at: http://www.deh.gov.au/heritage/publications/factsheets/fact2.html

You should also note that all information you provide will be forwarded to other persons and organisations considered to have a major stake in the event of the Minister emergency listing the place.

You may be interested to learn that the Australian Heritage Council is currently assessing Baw Baw National Park against the National Heritage criteria. It is expected that it will pass its assessment to the Minister for a decision on listing the place in the National Heritage List sometime in 2007.

Yours sincerely

[**signed**]

Dr Robert Bruce

Director

Heritage Information Section

18 September 2006

ANNEXURE 2

List of decisions where the existence of a recovery plan is relevant:

1. When the Minister makes a declaration or accredits a management arrangement or authorisation process under section 33 to the effect that an action does not need approval under Part 9 (refer section 34D(1)(c), 34D(2)).
2. Where the Minister declares that an action does not need approval under section 37A (refer section 37G).
3. Where the Minister enters into a bilateral agreement containing a provision relating to threatened species or ecological community (refer section 53).
4. Where the Minister determines whether to approve an action under section 18 or 18A, or make an approval related to a threatened species or ecological community (refer section 149 and 146K).
5. Where the Minister determines whether to issue a permit under section 200.
6. Where the Minister prepares a list of exempt native specimens for the purposes of section 303DB.
7. Where the Minister enters into a conservation agreement under section 305(2).