

FORESTS LAW REPORTS:

Evaluation of Victoria's Forestry Conservation Framework





Prepared by Lawyers for Forests Inc and the Wilderness Society (Victoria) Inc

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This document does not purport to contain legal advice.

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Evaluation of the success of the EPA's forestry audit scheme in Victoria, Australia 2002-2007

This report is authored by Vanessa Bleyer. Special thanks is extended to Sophie Bird, Sarah Bifano, Nicholas Harrison, Hui-Chi Goh, Adam Menary and Luke Chamberlain for their assistance and support in the preparation of this report.

A INTRODUCTION

- (a) Logging of native forest is rampant in Victoria, Australia. It is the State government in Victoria that is ultimately responsible for logging. This remains the case following significant governance and legislative restructure between 2004 and 2007.
- (b) In 2003, an independent audit system for native forest logging was implemented for the first time. It took place annually for 5 years, coming to an end in 2007. Logging then returned to being unaudited. In 2011, it is suggested that another audit process will be initiated.
- (c) This document commences with an outline of the legal framework relevant to the audit process. The auditing related to compliance with the code of practice applicable to native forest logging. As a result, the analysis of the legislative regime is focused on the law relevant to the code of practice in effect during the audit period.
- (d) This document then proceeds to outline the audit of logging in State forest in Victoria during its 5 years of implementation and makes findings including in respect of the success of it. The report concludes with a number of recommendations designed to improve the forest audit program.

B THE LEGAL FRAMEWORK

- (a) Logging in State forest in Victoria is governed by a complex legislative framework. Several pieces of legislation passed by the Victorian parliament apply to logging activities. Subordinate regulations, codes and regulatory instruments are incorporated into the structure.
- (b) This was the case both before and after the legal restructure of the regime in the decade between 2000 and 2010.

1. The previous legal framework

- (a) In 2002, the Department of Natural Resources & Environment was restructured following the State government election that year and became the Department of Sustainability & Environment (**DSE**). At that time, the DSE together with the Department of Primary Industry (**DPI**) controlled all aspects of native forest logging in Victoria.
- (b) They did so under a number of pieces of legislation. One such piece of legislation is the Conservation, Forests and Lands Act 1987 (Vic) (the Conservation Act). It has amongst its purposes establishing a framework for a land management system¹ and allows the relevant Minister to "make codes of practices which specify standards and procedures for the carrying out of any objects or purposes of" the logging legislative regime.² Codes of practice made under the Conservation Act are required to be complied with.³
- (c) The Code of Forest Practice for Timber Production 1996 (**the 1996 Code**) was made under the Conservation Act. The 1996 Code required, among other things, that forest coupe plans be produced.⁴ A forest coupe plan was defined in the 1996 Code as a plan that "must be prepared for each

¹ Section 1(b), the Conservation Act.

² Section 31, the Conservation Act.

³ Section 39, the Conservation Act.

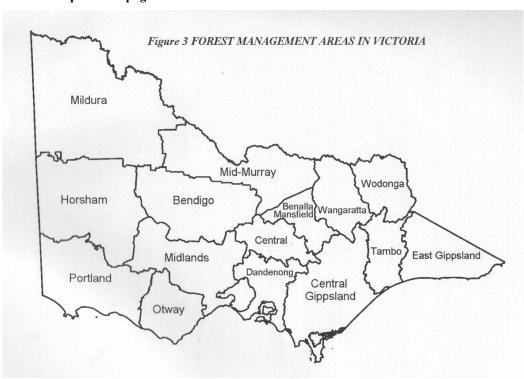
⁴ Page 18, the 1996 Code.

harvesting operation in public native forest and will contain a map identifying the area and a schedule incorporating the specifications and conditions under which the operation is to be administered".⁵

(d) The 1996 Code provided that a forest management plan (**FMP**) must be created for each forest management area (**FMA**).⁶ At that time, the entire State was divided into 15 FMAs.⁷ The 15 FMAs are set out in the first column of *table 1*. A diagram of the FMAs under the 1996 Code can be viewed at *image 1*.

Image 1

FMAs as depicted on page 7 of the 1996 Code



(e) The 1996 Code also provided that FMPs should "meet the requirement for sustainable yield under the Forests Act 1958 (Vic)" (the Forests Act).⁸

⁵ Page 64, the 1996 Code.

⁶ Page 14, the 1996 Code.

⁷ Page 7, the 1996 Code.

⁸ Page 14, the 1996 Code.

Forest management plans are working plans made under the Forests Act.⁹ The 1996 Code provides that the Forests Act "relates" to the 1996 Code.¹⁰

- (f) The Flora and Fauna Guarantee Act 1988 (Vic) (the FFG Act) is another piece of legislation that was and continues to be relevant to logging. The FFG Act has amongst its purposes "to establish a legal and administrative structure to enable and promote the conservation of Victoria's native flora and fauna". The objectives of the FFG Act include guaranteeing that all types of Victoria's flora and fauna flourish and retain their potential for evolutionary development in the wild, conserving Victoria's communities of flora and fauna, managing potentially threatening processes, ensuring that any use of flora and fauna by humans is sustainable and ensuring that the genetic diversity of flora and fauna is maintained. 12
- (g) The FFG Act creates a process for the listing of flora and fauna where such flora and fauna are in a demonstrable state of decline which is likely to result in extinction.¹³ The FFG Act requires "action statements" to be established for the listed threatened species as soon as possible after the listing.¹⁴ Action statements regularly identify logging as a reason for the species decline and imposes obligations on the way in which logging should be undertaken in areas inhabiting the threatened species relevant to each action statement.
- (h) The 1996 Code provides that the FFG Act "relates" to the Code. ¹⁵ The 1996 Code also provides that FMPs should "provide protection for all flora and fauna listed as threatened under the" FFG Act. ¹⁶

⁹ Section 22, the Forests Act.

¹⁰ Page 2, the 1996 Code

¹¹ Section 1, the FFG Act.

¹² Section 4(1)(a) to (e), the FFG Act.

¹³ Part 3, the FFG Act.

¹⁴ Section 19, the FFG Act.

¹⁵ Page 2, the 1996 Code.

¹⁶ Page 14, the 1996 Code.

(i) The government granted licences to individuals who were then empowered to undertake the logging. The then Forests (Licences and Permits) Regulations 1999 (Vic) required the licence holders to comply with the 1996 Code.¹⁷

2. The current legal framework

- (a) In 2004, a new piece of legislation came into existence, named the Sustainable Forests (Timber) Act 2004 (Vic) (the SFT Act). The SFT Act continues to govern native forest logging in Victoria at the time of publication of this document, with no public plans at a government level to make any amendment to it.
- (b) The SFT Act has as one of its purposes providing a framework for "sustainable forest management" and "sustainable timber harvesting" in State forest in Victoria. The SFT Act enables the government to allocate timber for logging to VicForests. VicForests is a State owned commercial enterprise.
- (c) VicForests was created in 2003 and assumed some of the logging responsibilities from the DSE. The particular purpose of establishing VicForests was to create a statutory body to undertake the management and sale of timber resources in Victorian State forests on a commercial basis.¹⁹
- (d) The allotment of timber is through "allocation orders". An allocation order includes, among other things, the conditions to which VicForests is subject in carrying out logging. One such condition is that VicForests comply with the Code of Practice for Timber Production 2007 (the 2007 Code). The 2007 Code came into effect that year and replaced the 1996

¹⁷ Section 10, Forests (Licences and Permits) Regulations 1999 (Vic).

¹⁸ Section 1, the SFT Act.

¹⁹ Victorian government gazette, no. S 198, 28 October 2003.

²⁰ Part 3, the SFT Act.

²¹ Section 15(1)(c), the SFT Act.

Code. Before the 2007 Code came into effect, VicForests was required to comply with the 1996 Code.

- The 2007 Code was first produced by the government in 2006. The (e) Conservation Act requires any new code to be advertised in the Government Gazette and a newspaper generally circulating throughout the State.²² 12 conservation groups, being the Australian Conservation Foundation Inc, The Central Highlands Alliance Inc (now My Environment Inc), Environment Defenders Office (Victoria) Ltd, Environment East Gippsland Inc, Environment Victoria Inc, Forest Action Trust, Friends of the Earth (Melbourne) Inc, Goongerah Environment Centre, Lawyers for Forests Inc, Victorian National Parks Association Inc, The Warringal Conservation Society and The Wilderness Society (Vic) Inc, brought to the government's attention that the government had not properly advertised the proposed new code as required under the Conservation Act. As a result, the new code was not implemented in 2006 but was ultimately implemented in 2007 after the government's proper compliance with the Conservation Act.
- (f) The SFT Act requires the Minister to review an allocation order every 5 years. In determining whether to amend or vary an allocation order following a review, the Minister must have regard to a number of matters. These include VicForests' compliance with the allocation order including the conditions specified in the order (which included compliance with the 1996 Code and now requires compliance with the 2007 Code) and, expressly, their compliance with the then 1996 Code and now 2007 Code during the time since the commencement of the allocation order. 24
- (g) After an allocation order is made, VicForests must prepare a timber release plan (**TRP**) before logging can take place in an area to which an allocation order applies.²⁵ The TRP is submitted to the Secretary of the DSE for

²² Section 3, the Conservation Act.

²³ Section 18, the SFT Act.

²⁴ Section 19(d) to (f), the SFT Act.

²⁵ Section 37(1), the SFT Act.

approval.²⁶ The Secretary can only approve the TRP if the Secretary is satisfied that the plan is not inconsistent with the allocation order to which it relates (which included a condition that the 1996 Code be complied with and now includes a condition that the 2007 Code is complied with) and, expressly, was not inconsistent with the 1996 Code and now is not inconsistent with the 2007 Code.²⁷ The Secretary can approve the TRP subject to conditions.²⁸ It is a condition of the TRP that the code is complied with.

- (h) Section 46 of the SFT Act imposes an obligation on VicForests to comply with any code that relates to timber harvesting, which included the 1996 Code and now includes the 2007 Code.²⁹ The obligation is also imposed on persons who have entered into an agreement with VicForests (such as logging contractors).³⁰
- (i) The SFT Act makes it an offence to undertake "unauthorised" logging in Victoria.³¹ The maximum penalty for natural persons is 60 penalty units and the maximum penalty for a body corporate is 240 penalty units.³² The term "authorised operations" is defined in Section 45(2) of the SFT Act to include operations undertaken in accordance with a TRP. This suggests that it may be an offence not to comply with the code in force at the relevant time.
- (j) From the matters set out at paragraphs (c) and (f) to (k) in Part A(2) of this document above, it is evident that the law clearly requires compliance with the code of practice in force at the relevant time, particularly given the plain language of the cited sections of the statutory instruments and the repetition of the compliance obligation.

²⁶ Section 39, the SFT Act.

²⁷ Section 40(1), the SFT Act.

²⁸ Section 40(2)(b), the SFT Act.

²⁹ Section 46, the SFT Act.

³⁰ Section 46(d), the SFT Act.

³¹ Section 45(1), the SFT Act.

³² Section 45(1), the SFT Act.

- (k) The 2007 Code provides that "compliance with this Code on public land (chapter two) is required under the conditions of licences and authorities issued under the provisions of the Conservation, Forests and Lands Act 1987, the Forests Act 1958 and the Sustainable Forests (Timber) Act 2004".33
- It also maintains the existence and reliance on FMPs, as was the case under (1) the 1996 Code.³⁴ Now, however, there are 14 FMAs, not 15 as was the case under the 1996 Code. The 14 FMAs are set out in table 1 comparatively with the previous 15 FMAs.

Table 1

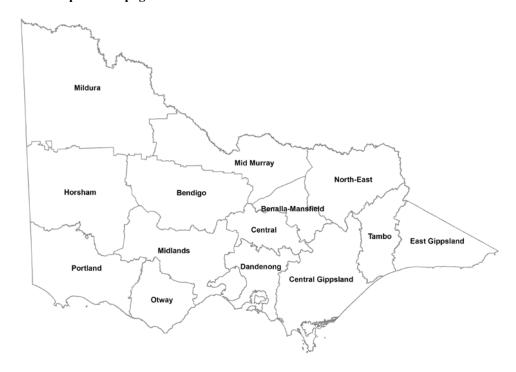
FMAs under the 1996 Code	FMAs under the 2007 Code
Benalla-Mansfield	Benalla-Mansfield
Bendigo	Bendigo
Central	Central
Central Gippsland	Central Gippsland
Dandenong	Dandenong
East Gippsland	East Gippsland
Horsham	Horsham
Mid Murray	Mid Murray
Midlands	Midlands
Mildura	Mildura
Wodonga	North-East
Wangaratta	
Otway	Otway
Portland	Portland
Tambo	Tambo

³³ Page 6, the 2007 Code. ³⁴ Page 13, the 2007 Code.

(m) A diagram of the FMAs under the 2007 Code can be viewed at *image 2*.

Image 2

FMAs as depicted on page 12 of the 2007 Code



3. A breach of the Code is a breach of the law

- (a) In 2005, the Supreme Court of Victoria delivered judgment in a case that determined that a breach of the Code is a breach of the law. Hastings v Brennan and Anor; Tantram v Courtney and Anor (No 3) [2005] VSC 228 (the Hastings case) involved judicial review of a finding of guilt of Anthony Hastings and Gregory Tantrum for hindering or obstructing "lawful" logging operations in Victoria.³⁵ In quashing the decision against Mr Hastings and Mr Tantrum, his Honour Justice Harper reviewed some of the legislative framework under which logging in Victoria is undertaken.
- (b) His Honour held that compliance with the code (which was then the 1996 Code) is required by law where "[the] Code is incorporated in or adopted by(a) a relevant law, or (b) a condition specified in an authority given under a

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³⁵ Hastings v Brennan and Anor; Tantram v Courtney and Anor (No 3) [2005] VSC 228 at [3] and [4].

relevant law."³⁶ His Honour found that the relevant law was the Forests (Licences and Permits) Regulations 1999 (Vic) which was in force at the time and which required those holding licences to log to comply with the code.³⁷

- (c) This decision was central in determining the binding nature of the code on logging practices in Victoria. The Court found that, provided the regulations were properly in force at the relevant time, a person can be said to be acting unlawfully when they are in breach of those regulations and so when they fail to comply with the code.
- (d) Given that VicForests is required to comply with the code through the allocation order, TRP and specifically through the SFT Act itself, the code is incorporated in or adopted by a relevant law. As a result, the Hastings case can be applied to the current legislative regime rendering a breach of the 2007 Code by VicForests a breach of the law.
- (e) On 11 August 2010, his Honour Justice Osborn of the Supreme Court of Victoria delivered judgment in Environment East Gippsland v VicForests. His Honour found that "VicForests accepts that non-compliance by it with requirements for mandatory actions specified in the Code of Practice would result in unlawful activity". His Honour granted an injunction restraining VicForests from logging at Brown Mountain in East Gippsland for various reasons including because VicForests was proposing to do so in the absence of complying with the 2007 Code.

4. General outline of the 1996 Code

(a) The 1996 Code was divided into two sections. The first section comprised explanatory notes. The second section was made up of three chapters, the

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 $^{^{36}}$ Hastings v Brennan and Anor; Tantram v Courtney and Anor (No 3) [2005] VSC 228 at [19].

³⁷ On cit n17.

Environment East Gippsland v VicForests [2010] VSC 335 (11 August 2010) at [172].

first being introductory in nature, the second applying to public land and the third applying to private land.

- (b) Chapter 2 of the second section was titled "application of the code public land native forests", and spanned 23 pages. It addressed:
 - i. regional forest planning, whereby FMPs are required to be prepared;³⁹
 - ii. the establishment and tending of "timber stands", whereby regeneration and reforestation is aimed to be achieved following logging;⁴⁰
 - iii. timber harvesting, whereby forest coupe plans are to be produced and water quality and yield, conservation of flora and fauna, rainforest protection, protection of landscape values are considered, among other things;⁴¹ and
 - iv. roading including planning, location and construction.⁴²
- (c) The 1996 Code divided obligations into goals and guidelines where a goal is a "desired environmental outcome adopted to guide the formulation of strategies for the management of human activities which may affect the environment" and a guideline "provides guidance on possible means of meeting desired environmental outcomes" and may be "quantitative or qualitative". 44 As a result, the 1996 Code lacked mandatory obligations.

5. General outline of the 2007 Code

- (a) The 2007 Code is divided into 4 sections:
 - i. general;
 - ii. application of the code public forests;
 - iii. application of the code private native forests; and
 - iv. application of the code plantations.

³⁹ Pages 13 and 14, the 1996 Code.

⁴⁰ Page 15 to 17, the 1996 Code.

⁴¹ Page 18 to 27, the 1996 Code.

⁴² Page 28 to 36, the 1996 Code.

⁴³ Page 3, the 1996 Code.

⁴⁴ Page 3. the 1996 Code.

- (b) Chapter 2, "application of the code public forests", addresses:
 - i. forest planning, where FMPs are considered and mandatory actions are created for the performance of FMPs;⁴⁵
 - ii. environmental values in public forests, where water quality and conservation of biodiversity is considered;⁴⁶
 - iii. forest regeneration and management;⁴⁷
 - iv. roading, where road planning must minimise risks to environmental values, water quality and river health and where roads must be maintained;⁴⁸ and
 - v. timber harvesting, where forest coupe plans continue to be required and which must indicate where harvesting is not permitted.⁴⁹
- (c) The 2007 Code is divided into principles, operational goals, mandatory actions, legal requirements and guidance. A code principle is a "broad outcome that expresses the intent of the code for each aspect of sustainable forest management".⁵⁰
- (d) An operational goal is the "desired outcome or goal for each of the specific areas of timber production operations, to meet the code principles".⁵¹
- (e) Mandatory actions are "actions to be conducted in order to achieve each operational goal. Forest managers and operators must undertake all relevant mandatory actions to meet the objectives of the code. Mandatory actions are focussed on practices or activities. Failure to undertake a relevant Mandatory Action would result in non-compliance with this Code". 52

⁴⁵ Page 13, the 2007 Code.

⁴⁶ Page 18 to 22, the 2007 Code.

⁴⁷ Page 23, the 2007 Code.

⁴⁸ Page 27 to 32, the 2007 Code.

⁴⁹ Page 33 to 35, the 2007 Code.

⁵⁰ Page 7, the 2007 Code.

⁵¹ Ibid.

⁵² Ibid.

- (f) The creation of mandatory actions in the 2007 Code is an improvement on the 1996 Code. In Environment East Gippsland v VicForests, his Honour Justice Osborn found that "non-compliance [with the 2007 Code] is potentially capable of demonstration where the statement of mandatory actions contains a clear proscription or prescription... Most relevantly for present purposes the requirement to comply with measures specified in a relevant [actions statement under the FFG Act] constitutes a specific prescription". 53
- A legal requirement "identifies some of the laws of the State of Victoria or (g) the Commonwealth that may be particularly relevant to an activity."⁵⁴ The 2007 Code explains that, for the assistance of the forest owner and manager, "this Code of Practice identifies legislation, regulations and codes that must be observed. The list may not be comprehensive, and obligations may change during the life of this Code. It is the responsibility of the user to ensure that all relevant legal requirements are met". 55
- (h) Guidance "provides possible means for achieving operational goals or mandatory actions, including reference to documents that may assist forest managers. Forest managers and operators are not obliged to conduct any of the actions covered under guidance. This allows for innovation and advances in technology to provide continual improvement in addressing the requirements of the code. Failure to undertake any guidance action does not in itself constitute non-compliance with the code, however it should be noted that guidance generally supports or expands upon mandatory actions".56

⁵³ Environment East Gippsland v VicForests [2010] VSC 335 (11 August 2010) at [173] to [174].

⁵⁴ *Op cit* n50 ⁵⁵ *Ibid*.

⁵⁶ Ibid.

C THE AUDITS

History of the EPA audits

- (a) Until 2002, no independent audit of logging had been undertaken in Victoria. That year, the Victorian government produced the "Our Forests Our Future" policy wherein the government committed itself to making the application of the 1996 Code more transparent by introducing "community audits" on public land.⁵⁷ To achieve this outcome, the then environment Minister appointed the Environment Protection Authority (**EPA**) to in turn appoint independent auditors to assess compliance of the 1996 Code on public land.
- (b) The EPA is established under the Environment Protection Act 1970 (Vic)⁵⁸ (the Environment Protection Act). The EPA has amongst its powers to:
 - i. be responsible for and co-ordinate all activities relating to... protecting and improving the quality of the environment;⁵⁹
 - ii. promote continuing: improvements in the efficiency with which resources are used, having regard to the principles of environment protection, in industrial enterprises and processes; and, reductions in the ecological impacts of industrial enterprises and processes;⁶⁰
 - iii. publish reports and information with respect to any aspects of environment protection;⁶¹
 - iv. provide information and education to the public regarding the protection and improvement of the environment;⁶² and
 - v. report to the Minister upon matters concerning the protection of the environment... and upon any matters referred to it by the Minister.⁶³

⁵⁷ Our Forests Our Future: balancing communities, jobs and the environment, February 2002.

⁵⁸ Section 5, the Environment Protection Act.

⁵⁹ Section 13(b), the Environment Protection Act.

⁶⁰ Section 13(cd), the Environment Protection Act.

⁶¹ Section 13(i), the Environment Protection Act.

⁶² Section 13(I), the Environment Protection Act.

⁶³ Section 13(o), the Environment Protection Act.

- (c) The EPA also has the power to appoint any person to be an environmental auditor.⁶⁴ The function of an environmental auditor is to conduct environmental audits and prepare environmental audit reports.⁶⁵
- (d) When the audits began, the DSE was responsible for logging. When VicForests assumed responsibility for logging, the EPA audits continued until 2007. At the time of publication of this document, there have been no annual audits published by the EPA since the report relevant to the 2006-2007 logging season.

EPA audit 2003

- (a) The 2003 audit was the first independent auditing of compliance with the 1996 Code undertaken by the EPA. The audit related to the 2002 to 2003 logging season. The EPA engaged Dr David Telford of GHD Pty Ltd to conduct the audit. GHD Pty Ltd is an "international network of engineers, architects and environmental scientists serving clients in the global markets of water, energy and resources, environment, property and buildings, and transportation". The service of the service of
- (b) Dr Telford had a support team of individuals with expertise in forestry, ecology, soil science and engineering, some of who attended each audit. The team was comprised of:
 - i. Richard Hart, Principal Forester, GHD Pty Ltd;
 - ii. Adam Beaumont, Forester, GHD Pty Ltd;
 - iii. Steve Mueck, Senior Botanist, Biosis Research Pty Ltd;
 - iv. Andrew Hill, Botanist, Biosis Research Pty Ltd;
 - v. Dr Ian Sargeant, Soil Scientist, Ian Sargeant & Associates;
 - vi. Peter Tange, EPA; and

⁶⁴ Section 53S(1), the Environment Protection Act.

⁶⁵ Section 53S(5)(a) and (b), the Environment Protection Act.

⁶⁶ Page 1, the 2003 audit report.

⁶⁷ http://www.ghd.com.au

- vii. Georgie Wettenhall, EPA.⁶⁸
- (c) Following the audit, a report was produced titled "Timber Production on Public Land 2003: findings and recommendations" (the 2003 audit report).
- (d) Interested stakeholders were invited to attend coupe audits⁶⁹ and consulted prior to the audit being undertaken.⁷⁰ The 2003 audit report does not contain any stakeholder feedback.
- (e) Liaison between the auditor and the DSE was through the EPA and Forestry Victoria, which represented the DSE.⁷¹
- (f) The audit examined 30 logging coupes throughout Victoria, representing about 7 per cent of coupes logged during the 2002 to 2003 logging season. These coupes were selected from 4 FMAs, being East Gippsland, Central Gippsland, Central and Portland.⁷²
- (g) Given 455 coupes were logged in the 2002 to 2003 logging season and that there were 15 FMAs, the audit results from 30 coupes in 4 FMAs cannot be seen as representative of the level of code compliance in Victoria at that time.
- (h) The 2003 audit report explains that a "numerical, risk based process was developed for coupe selection". Before the appointment of the EPA to conduct audits under the 1996 Code, the DSE self-audited. The 2003 audit report states that the coupe selection process used by DSE when it audited itself "could not be replicated due to the lack of availability of required

 $^{^{\}rm 68}$ Page 8, Timber Production on Public Land 2003: findings and recommendations.

⁶⁹ Page 7, the 2003 audit report.

Page 3, the 2003 audit report.

⁷¹ Page 1, the 2003 audit report.

⁷² Part 3.4, the 2003 audit report.

information". The 2003 audit report is ambiguous as to how the audited coupes were selected.

- (i) Assessment of the selected coupes was undertaken by reference to a "coupe assessment workbook" prepared for each coupe. The workbook addressed sections 2.3 and 2.4 of the 1996 Code, being "timber harvesting" and "roading for timber production". ⁷⁴ As a result, the selected coupes were not audited in respect of planning or regeneration. The coupes were not assessed before they were logged nor well after they were logged. The coupes were only assessed not long after logging had completed.
- (j) In addition, not all of sections 2.3 and 2.4 of the 1996 Code were audited. For example, some elements relating to water yield protection, reserved area protection and rainforest were not audited.⁷⁵
- (k) As a result of the matters set out at paragraphs (i) and (j) above, compliance with only a small part of the 1996 Code was assessed in the 2003 audit.
- (l) The workbooks included a scoring key by reference to a number of criteria including coupe plan, landscape values, log landing and dumps, boundary tracks, habitat trees, camp sites and litter removal. Scores ranged from "not applicable" to 0, 1 or 2 depending on compliance with each aspect of criteria. If a criterion achieved the highest score, this would indicate 100% compliance.⁷⁶
- (m) During attendance at each coupe, one person on the audit team would be responsible for completing the scoring for a section of the workbook allocated to that person.⁷⁷ As a result, scoring was not peer reviewed or

⁷³ Page 4, the 2003 audit report.

⁷⁴ Page 5, the 2003 audit report.

⁷⁵ Page 6, the 2003 audit report.

⁷⁶ Appendix I, the 2003 audit report.

⁷⁷ Page 6, the 2003 audit report.

considered by other team members. This may have created inconsistency in the scoring process.

- (n) If DSE had itself sighted breaches of the 1996 Code before the EPA attended the coupe to conduct the audit, such instances were not included in the 2003 audit report.⁷⁸ As a result, the 2003 audit report is not a full assessment of code compliance.
- (o) The 2003 audit report does not clearly state when notice was given of the coupes to be audited. The report provides that "once coupes within an FMA had been selected for audit, a copy of the respective coupe plans for those coupes was requested from DSE". ⁷⁹ If notice was in fact given before any or all of the subject coupes were logged, the audit process would have been undermined.
- (p) The scores for each coupe arising from each workbook were totaled and a compliance percentage calculated. The EPA determined that 85% compliance was an acceptable level of compliance, which is the score that represented the average coupe score. Despite this being the scoring approach adopted in the audit, the 2003 audit report states that a score below or above 85% cannot be seen as a fail or pass.⁸⁰
- (q) The lowest scoring coupe was in the Central FMA and scored 51% (the coupe is named C28 in the 2003 audit report). The highest scoring coupe was in the Central Gippsland FMA and scored 96% (the coupe is named C6 in the 2003 audit report). 81
- (r) In coupe C28, the eastern boundary went through a special protection zone. Under the relevant FMP, no logging should take place in a special

⁷⁸ Page 6, the 2003 audit report.

⁷⁹ Page 5, the 2003 audit report.

⁸⁰ Page 10 and 11, the 2003 audit report.

⁸¹ Page 11, the 2003 audit report.

protection zone.⁸² In addition, there was no compliance with landing rehabilitation, litter was present,⁸³ the filter crossing strip had been inadequately managed⁸⁴ and a culvert became blocked by debris pushed in by harvesting operations causing water to flow over the road.⁸⁵

(s) Coupe C6 was located in the Thomson water supply catchment. 86 Crossdrains had been installed more than necessary resulting in unnecessary soil disturbance. 87

(t) The EPA found that:

- i. the failure to comply with the 1996 Code can be overcome by ongoing training of DSE officers to provide consistency in code interpretation and proper code application;⁸⁸
- ii. the 1996 Code should be amended to require rehabilitation of snig and forwarding tracks, 89
- iii. forest operations managers should be made accountable for code compliance; 90
- iv. there were infrequent inspections by forest officers of coupe operations in East Gippsland;⁹¹
- v. issues identified in DSE self-audits remained issues in the EPA 2003 audit, including insufficient coupe plan and map preparation and insufficient habitat tree marking and protection. The EPA found these are ongoing issues that have not reflected continual improvement;⁹²

⁸² Page iii, the Central FMP.

⁸³ Page 13 and 14, the 2003 audit report.

⁸⁴ Page 21, the 2003 audit report.

⁸⁵ Page 24, the 2003 audit report.

⁸⁶ Page 17, the 2003 audit report.

⁸⁷ Page 18, the 2003 audit report.

⁸⁸ Page 28, the 2003 audit report.

⁸⁹ Page 28, the 2003 audit report.

⁹⁰ Page 29, the 2003 audit report.

⁹¹ Page 29, the 2003 audit report.

⁹² Page 26, the 2003 audit report.

- vi. it had difficulties with data acquisition from the DSE resulting in the coupe selection process being less objective; ⁹³ and
- vii. audits should be undertaken in active coupes, not just coupes that had already been logged. 94
- (u) The EPA made the following 15 recommendations in the 2003 audit report:
 - Improve the method and control of boundary track installation by DSE operators, in particular with the crossing of protected areas and filter strips and the quality of cross-drain construction.
 - ii. Amend the management prescriptions to clearly specify the appropriate reference point for measurement of rainforest extent viz. the canopy or bole of the trees and gaps between sections of canopy.
 - iii. Promulgate a consistent approach to and provide further training in rainforest identification.
 - iv. Ensure that all buffer and filter strips are clearly marked at the correct width on the coupe using tape colours consistent with the coupe plan.
 - v. Fully complete coupe plans and include the maximum slope on which harvesting operations may be conducted.
 - vi. Mark all roads on the coupe maps identified as being either temporary or permanent to facilitate planning and identification of road rehabilitation requirements.
 - vii. Mark the location of landings and roads on all coupe maps using a legend that is consistent for all FMAs.
 - viii. Provide allowance in coupe plans for consideration of prevailing soil types in setting buffer widths.
 - ix. Forest operations managers should be made accountable for code compliance through appropriate mechanisms.
 - x. Finalise and promulgate guidelines for use of cording and matting. Incorporate allowance for this process in snig track cross-draining requirements of the code.
 - xi. Better implement the selection, marking and protection of habitat trees.

⁹³ Page 30, the 2003 audit report.

Page 30, the 2003 audit report.

- xii. Provide consistent understanding of requirements for temporary road closure rehabilitation requirements.
- xiii. Bring cull trees to the ground in a manner that minimises soil disturbance.
- xiv. Provide for rehabilitation of convergent snig tracks to the same standard as required for log landings. This should be undertaken where areas of soil compaction have resulted from machinery traffic.
- xv. Develop a guideline for slash minimisation to assist forest officers with determining acceptable levels of slash in filter strips. 95
- (v) The 2003 audit report does not expressly admit that its findings constitute findings of unlawful conduct by the Victorian State government.

EPA audit 2004

- (a) The 2004 audit was undertaken by almost the same body and group of individuals as the 2003 audit. The only change was that Ms Jenni Davies replaced Ms Georgie Wettenhall as an EPA representative. 96
- (b) Following the audit, a report was produced titled "Timber Production on Public Land 2004: findings and recommendations" (the 2004 audit report).
- (c) As was the case in the 2003 audit, interested stakeholders were invited to attend coupe audits. ⁹⁷ Although the auditor is now required to consider and integrate "where appropriate" stakeholder comments, ⁹⁸ which was not the case in the 2003 audit, the 2004 audit report does not contain any stakeholder feedback. It does, however, state that stakeholder feedback was taken into account when determining which coupes in which FMAs should

⁹⁵ Page 32, the 2003 audit report.

⁹⁶ Page 16, the 2004 audit report.

⁹⁷ Page 11, the 2004 audit report.

⁹⁸ Appendix B, the 2004 audit report.

be audited 99 and any focus areas which were of particular concern to the stakeholders. 100

- (d) Liaison between the auditor and the DSE was through the EPA. Forestry Victoria was no longer stated as representing DSE as was the case in the 2003 audit. This is likely to be because VicForests now has responsibility for logging State forest in Victoria, which was not the case during the 2003 audit.
- (e) The audit examined 35 logging coupes throughout Victoria, representing about 8 per cent of the coupes logged during the 2003 to 2004 logging season. This comprised a 1% increase from the 2003 audit.
- (f) The coupes were selected from 5 FMAs rather than 4 FMAS as was the case in the 2003 audit, ¹⁰³ as conveyed in the *table 2*.

Table 2

Forest management areas in 2003 audit	Forest management areas in 2004 audit
East Gippsland	-
Central Gippsland	-
Central	Central
Portland	-
-	Otway
-	North East
-	Dandenong
-	Tambo

 $^{^{\}rm 99}$ Appendix E, the 2004 audit report.

Page 10, the 2004 audit report.

Appendix D, the 2004 audit.

Page 11, the 2004 audit report.

¹⁰³ Page 13, the 2004 audit report.

- (g) Given 418 coupes were logged in the 2003 to 2004 logging season¹⁰⁴ and that there were 15 FMAs at the time, the audit results from 35 coupes in 5 FMAs cannot be seen as representative of the level of code compliance in Victoria.
- (h) The 2004 audit report explains that a "numerical, risk based process was developed for coupe selection" and was applied in a similar way to how it was applied in the 2003 audit. Unfortunately, the 2004 audit report is again ambiguous as to how the audited coupes were selected.
- (i) As was the case in the 2003 audit, assessment of the selected coupes was undertaken by reference to a "coupe assessment workbook" prepared for each coupe, addressing only sections 2.3 and 2.4 of the 1996 Code, being "timber harvesting" and "roading for timber production". Compliance with the code in relation to "regeneration, regional forest planning and review of the content of the code were specifically excluded from the audit scope". 107
- (j) Again, the coupes were not assessed before they were logged nor well after they were logged. The coupes were assessed shortly after logging had completed. Most of the audited coupes had already been burnt at the time of audit, which is likely to have compromised the field assessment compared to if the assessment was carried out before the coupe burn.
- (k) In addition, and again, not all of sections 2.3 and 2.4 of the 1996 Code were audited. However, all elements relating to rainforest, some of which were omitted in the 2003 audit, were not omitted in the 2004 audit. 109

¹⁰⁴ Page 11, the 2004 audit report.

¹⁰⁵ Page 12, the 2004 audit report.

¹⁰⁶ Page 13, the 2004 audit report.

Page 11, the 2004 audit report.

Page 11, the 2004 audit report.

Page 15, the 2004 audit report.

¹⁰⁹ Page 14, the 2004 audit report.

- (l) Given the matters set out at paragraphs (i) to (k) inclusive above, compliance with only a small part of the 1996 Code was assessed in the 2004 audit.
- (m) The workbooks used in the 2004 audit included a scoring key by reference to a number of criteria including coupe plan, landscape values, log landing and dumps, boundary tracks, habitat trees, camp sites and litter removal in the same manner as per the 2003 audit.¹¹⁰
- (n) During attendance at each coupe, one person on the audit team would be responsible for completing the scoring for a section of the workbook allocated to that person. As a result, and as was the case with the 2003 audit, scoring was not peer reviewed or considered by other team members, which may have created inconsistency in the scoring process and undermined the integrity of the audit.
- (o) If DSE had itself sighted breaches of the 1996 Code before the EPA attended the coupe to conduct the audit, such instances were not included in the 2004 audit report, 112 as was the case with the 2003 audit report. As a result, the 2004 audit report remains an incomplete assessment of code compliance.
- (p) The 2004 audit report does not clearly state when notice was given of the coupes to be audited. The report provides that "EPA would advise with about two weeks notice of intended date to start process", where the start of the process involved information gathering and the subject coupe would be audited many weeks later. It is not clear whether any or all of the coupes had already been logged when notice was given. If notice was given before any or all of the subject coupes were logged, the integrity of the audit process would have been undermined.

¹¹⁰ Page 14, the 2004 audit report.

¹¹¹ Page 15, the 2004 audit report.

¹¹² Page 14, the 2004 audit report.

¹¹³ Schedule 2, the 2004 audit.

- (q) The scores for each coupe arising from each workbook were totaled and a compliance percentage calculated. Initially, the 2004 audit report published an overall average coupe score of 92%. It was later found to be an error. The corrected overall average coupe score was 90%, being 5% higher than the overall average coupe score in the 2003 audit.¹¹⁴
- (r) The lowest scoring coupe was in the Otway FMA and scored 70% (the coupe is named C35 in the 2004 audit report). This was a 19% improvement on the lowest scoring coupe in 2003 audit report. The highest scoring coupe was in the North East FMA and scored 99% (the coupe is named C10 in the 2004 audit report). This was a 3% improvement on the highest scoring coupe in the 2004 audit.
- (s) In coupe C35, no habitat trees had been retained despite the forest coupe plan identifying the habitat trees that were required to have been retained. This resulted in 0% compliance on the workbook criterion. In addition, ponding was observed on two log landings, only 79% of filters were intact and inadequate cross-drain spacing was identified on about half of the roading.¹¹⁷
- (t) Coupe C10 was not specifically addressed in the body of the audit report.

 The coupe assessment scores reveal it fell short in respect of the coupe plan criteria. 118
- (u) The 2004 audit included audit of an active coupe, ¹¹⁹ which had been recommended by the EPA in the 2003 audit report. No active coupes were audited in the 2003 audit and so this was an improvement in the forest audit program.

¹¹⁴ Page 3, the 2004 audit report.

Page 19, the 2004 audit report.

¹¹⁶ *Ibid*.

¹¹⁷ Page 24, the 2004 audit report.

¹¹⁸ Appendix K, the 2004 audit report.

¹¹⁹ Page 55, the 2004 audit report.

(v) The EPA found that:

- subsequent audits should include a greater proportion of active coupes;
- ii. there had been more persistent non-compliance in respect of elements of coupe planning, particularly marking of areas that were not to be logged due to, for example, the presence of threatened species;
- iii. further persistent non-compliance arose in respect of log landing and log dump rehabilitation, habitat tree marking and protection, reserved area protection, rainforest protection, snig and forwarding track rehabilitation, and silviculture and regeneration;
- iv. retention of habitat trees was a persistent issue mostly in respect of the Central forest management area;
- v. protection of rainforest was only compliant at half of the coupes identified by the DSE before the logging took place as having contained rainforest; and
- vi. training may overcome these issues, which was also a finding in the 2003 audit. 120
- (w) In the 2003 audit report, the EPA made 15 recommendations. In the 2004 audit report, the EPA made 9 recommendations, as follows:
 - i. Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs.
 - ii. Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.
 - iii. Develop and promulgate more specific requirements for boundary track and fire trail construction to confine impacts of construction to within the coupe boundary.
 - iv. Examine fertiliser application practices during coupe regeneration with the aim of minimising the potential for fertiliser to be carried into waterways.

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¹²⁰ Page 55, the 2004 audit report.

- v. Provide field staff with further awareness of DSE procedures for identification and management of ecological vegetation communities identified for protection in legislation, FMPs or policy, such as Montane Riparian Thicket.
- vi. Provide field staff with further awareness of code and Utilisation Procedures restrictions on falling of trees into and across filter strips and the minimisation of soil disturbance during their removal.
- vii. Ensure, in areas where there are no existing habitat trees that retention of potential habitat trees occurs and that these are recorded on coupe plans.
- viii. Include a greater proportion of active coupes in future audit programs to enable assessment of operations with code compliance during.
- (x) A comparative analysis of any repetition in the recommendations in the 2003 audit report and those in the 2004 audit report is set out in *table 3*. It is evident that a number of recommendations in the 2004 audit report impinge on recommendations already made in the previous audit year.

Table 3

Recommendations in the 2003 audit report ¹²¹	Recommendations in the 2004 audit report ¹²²
Improve the method and control of boundary track installation by DSE operators, in particular with the crossing of protected areas and filter strips and the quality of cross-drain construction.	Develop and promulgate more specific requirements for boundary track and fire trail construction to confine impacts of construction to within the coupe boundary.
Amend the management prescriptions to clearly specify the appropriate reference point for measurement of rainforest extent viz. the canopy or bole of the trees and gaps between sections of canopy.	-
Promulgate a consistent approach to and provide further training in rainforest identification.	Provide field staff with further awareness of DSE procedures for identification and management of ecological vegetation communities identified for protection in legislation, FMPs or policy, such as Montane

¹²¹ Page 32, the 2003 audit report.

Page 56, the 2004 audit report.

	Riparian Thicket.
Ensure that all buffer and filter strips are clearly marked at the correct width on the coupe using tape colours consistent with the coupe plan.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs. Ensure, in areas where there are no existing habitat trees that retention of potential habitat trees occurs and that these are recorded on coupe plans.
Fully complete coupe plans and include the maximum slope on which harvesting operations may be conducted.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs.
Mark all roads on the coupe maps and identified as being either temporary or permanent to facilitate planning and identification of road rehabilitation requirements.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs. Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.
Mark the location of landings and roads on all coupe maps using a legend that is consistent for all FMAs.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs.
Provide allowance in coupe plans for consideration of prevailing soil types in setting buffer widths.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.
Forest operations managers should be made accountable for code compliance through appropriate mechanisms.	-
Finalise and promulgate guidelines for use of cording and matting. Incorporate allowance for this process in snig track cross-draining requirements of the code.	-
Better implement the selection, marking and protection of habitat trees.	Ensure, in areas where there are no existing habitat trees that retention of potential habitat trees occurs and that these are recorded on coupe plans.
Provide consistent understanding of requirements for temporary road closure rehabilitation requirements.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.
Bring cull trees to the ground in a manner that minimises soil disturbance.	Provide field staff with further awareness of code and Utilisation Procedures restrictions on falling of trees into and across filter strips and the minimisation of soil disturbance during

	their removal.
Provide for rehabilitation of convergent snig tracks to the same standard as required for log landings. This should be undertaken where areas of soil compaction have resulted from machinery traffic.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.
Develop a guideline for slash minimisation to assist forest officers with determining acceptable levels of slash in filter strips.	Provide field staff with further awareness of code and Utilisation Procedures restrictions on falling of trees into and across filter strips and the minimisation of soil disturbance during their removal.
-	Examine fertiliser application practices during coupe regeneration with the aim of minimising the potential for fertiliser to be carried into waterways.
-	Include a greater proportion of active coupes in future audit programs to enable assessment of operations with code compliance during different stages of the coupe harvesting process.
-	Develop a robust process for rezoning of SPZs to ensure that the attributes recorded in the zoning scheme register are, in fact, absent from that area.

(y) The 2004 audit report provides an account on the recommendations made in the 2003 audit report, ¹²³ as conveyed in *table 4*.

Table 4

No.	Recommendation in 2003 audit report	Whether EPA considers addressed
1	Improve the method and control of boundary track installation by DSE operators, in particular with the crossing of protected areas and filter strips and the quality of cross-drain construction	Not addressed
2	Amend the management prescriptions to clearly specify the appropriate reference point for measurement of rainforest extent viz. the canopy or bole of the trees and gaps between sections of canopy	Addressed
3	Promulgate a consistent approach to and provide further training in rainforest identification	Partially addressed

Page 51, the 2004 audit report.

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4	Ensure that all buffer and filter strips are clearly marked at the correct width on the coupe using tape colours consistent with the coupe plan	Addressed
5	Fully complete coupe plans and include the maximum slope on which harvesting operations may be conducted	Addressed
6	Mark all roads on the coupe maps and identified as being either temporary or permanent to facilitate planning and identification of road rehabilitation requirements	Addressed
7	Mark the location of landings and roads on all coupe maps using a legend that is consistent for all FMAs	Not addressed
8	Provide allowance in coupe plans for consideration of prevailing soil types in setting buffer widths	Addressed.
9	Forest operations managers should be made accountable for code compliance through appropriate mechanisms	Partially addressed
10	Finalise and promulgate guidelines for use of cording and matting. Incorporate allowance for this process in snig track cross-draining requirements of the code	Addressed
11	Better implement the selection, marking and protection of habitat trees	Partially addressed
12	Provide consistent understanding of requirements for temporary road closure rehabilitation requirements	Partially addressed
13	Bring cull trees to the ground in a manner that minimises soil disturbance	Partially addressed
14	Provide for rehabilitation of convergent snig tracks to the same standard as required for log landings. This should be undertaken where areas of soil compaction have resulted from machinery traffic	Addressed
15	Develop a guideline for slash minimisation to assist forest officers with determining acceptable levels of slash in filter strips	Partially addressed

(z) It is difficult to understand how recommendations 4, 5, 8 and 14 can be considered addressed given the findings in *table 3*, which reveal that recommendations in the 2004 audit are repetitive with those previous-year recommendations.

(aa) As was the case with the 2003 audit report, the 2004 audit report does not expressly admit that its findings constitute findings of unlawful conduct by the Victorian State government.

EPA audit 2005

- (a) In 2005, two audits were undertaken and two reports produced. One audit was of the kind undertaken in 2003 and 2004 (the 2005 audit). The other was undertaken as a result of the Minister for Environment asking the EPA to undertake an additional special audit into a number of logging incidents and breaches of the 1996 Code (the 2005 special audit).
- (b) Only one person from the team that undertook both the 2003 and 2004 audits remained on the 2005 audit team, that being Adam Beaumont. However, Mr Beaumont was now employed by the EPA and was the single EPA representative during the audits. During the previous audits, Mr Beaumont was employed by GHD Pty Ltd. This may give rise to concern about the independence of the audit. The appointment of URS Australia Pty Ltd was now commissioned to perform the audit, in place of GHD Pty Ltd, which may go some way towards alleviating such concern.
- (c) The 2005 audit team comprised of the following people:
 - i. Geoff Byrne, auditor (URS Australia Pty Ltd);
 - ii. Andrew Morton (Vice President, URS Australia Pty Ltd, Forestry);
 - iii. Phil Mason, Senior Forester (URS Australia Pty Ltd);
 - iv. Andrew Hill, Ecologist (Ecology Partners, formerly on the team in 2003 as being a member of Biosis Research Pty Ltd);
 - v. Joelle McKay, Environmental Scientist (URS Australia Pty Ltd);
 - vi. Harry Grynberg, Environmental Auditor (URS Australia Pty Ltd);
 - vii. Thomas Duff, Forestry Resource Analyst (URS Australia Pty Ltd);
 - viii. Peter Tange of the EPA;
 - ix. Paul Moritz of the EPA; and

- x. Adam Beaumont now EPA. 124
- (d) Following the 2005 audit, a report was produced titled "Timber Production on Public Land 2005: findings and recommendations" (the 2005 audit report).
- (e) As was the case in previous audits, interested stakeholders were invited to attend coupe audits. The 2005 audit report provides that "independent auditing needs to be conducted in a manner that is cognisant of the views and interests of... stakeholders". Included in the scope of work in performing the 2005 audit is participating "as required in stakeholder consultation managed by EPA". The 2005 audit report states that the "EPA held meetings with representatives of these groups to outline the findings of the 2004 forest audit report and seek comment on the draft audit scope as part of the 2005 forest audit programme" and that the "EPA used these meetings and other feedback to develop the community interest rankings used by the auditor as a variable in the selection of FMAs for audit". 128
- (f) Although the 2005 audit report refers to having taken into account stakeholder feedback, the report does not indicate what the feedback actually entailed or which stakeholder provided what feedback.
- (g) The audit examined 31 completed coupes, 10 active coupes and 4 roadline coupes that were logged during the 2004 to 2005 logging season. This comprised 15 more coupes than that audited in 2003 and 10 more coupes than that audited in 2004.

¹²⁴ Page 13, the 2005 audit report.

Page 3, the 2005 audit report.

Page 9, the 2005 audit report.

¹²⁷ Page 10, the 2005 audit report.

Page 10, the 2005 audit report.

Page 14, the 2005 audit report.

¹²⁹ Page 3, the 2005 audit report.

(h) The coupes were selected from 4 FMAs¹³⁰ as was the case in the 2003 audit, whereas coupes were selected from 5 FMAs in the 2004 audit as conveyed in the *table 5*.

Table 5

Forest management areas in	Forest management areas in	Forest management areas in
2003 audit	2004 audit	2005 audit
East Gippsland	-	East Gippsland
Central Gippsland	-	Central Gippsland
Central	Central	Central
Portland	-	-
-	Otway	-
-	North East	-
-	Dandenong	-
-	Tambo	-
-	-	Bendigo

- (i) Only 9% of coupes harvested in the 2004 to 2005 logging season were audited. This is a 1% increase in the percentage of coupes audited in 2004 and a 2% increase of those audited in 2003.
- (j) The 2005 audit report explains that coupes were selected through a risk analysis and a percentage of coupes in each risk category were chosen. ¹³¹ It is evident that coupe selection followed selection of the 4 FMAs. It is unclear whether all coupes within each FMA were included in the risk analysis. It is also unclear who or what organisation assigned the risk analysis criteria to the coupes and what information was relied on. It is clear that DSE and VicForests played a role in this process, ¹³² which might have put them on notice as to what coupes would be audited in advance of the audit. This would have undermined the integrity and independence of the audit process.

¹³⁰ Page 3, the 2005 audit report.

Appendix D, the 2005 audit report.

¹³² Appendix D, the 2005 audit report.

- (k) As was the case in the 2003 and 2004 audits:
 - i. assessment of the selected coupes was undertaken by reference to a "coupe assessment workbook" prepared for each coupe. The 2005 audit report provides that "the 2004 workbook was reviewed in the light of the experience gained in the past two audits and comments received from stakeholders and EPA";¹³³ and
 - ii. only sections 2.3 and 2.4 of the 1996 Code, being "timber harvesting" and "roading for timber production" were addressed. As a result, the selected coupes were not audited in respect of planning or regeneration. Again, the coupes were not assessed before they were logged nor well after they were logged. The coupes were only assessed during or shortly after logging had completed.
- (l) Conversely to the 2003 and 2004 audits, the 2005 audit report states that all of sections 2.3 and 2.4 of the 1996 Code were audited. Still, compliance with only a small part of the 1996 Code was assessed in the 2004 audit.
- (m) A similar workbook was used during assessment of the subject coupes as was used in the 2003 and 2004 audits.¹³⁶
- (n) If a forest officer had sighted breaches of the 1996 Code before the EPA attended the coupe to conduct the audit, such instances were not included in the 2005 audit report.¹³⁷ The following criteria were adopted to define non-compliance:
 - i. any breach not documented in the coupe diary;
 - ii. any breach, even if documented in the coupe diary, that had little or no remediation activity and had an EIA rating of moderate, major or severe. 138

¹³³ Page 16, the 2005 audit report.

Page 3, the 2005 audit report.

¹³⁵ Page 16, the 2005 audit report.

¹³⁶ Ibid.

 $^{^{137}}$ Page 20, the 2005 audit report.

¹³⁸ Ibid.

As a result, the 2005 audit report is not a full assessment of code compliance.

- The overall average coupe score for the 2005 audit was 91 per cent, being (o) 1% higher than the 2004 audit and 4% higher than the 2003 audit. 139
- The lowest scoring coupe was 74% in the Central forest management area (p) (the coupe is named C12 in the 2005 audit report). This was a 4% improvement on the lowest scoring coupe in the 2004 audit and a 23% improvement on the lowest scoring coupe in the 2003 audit.
- The highest scoring coupe was 100% in the Bendigo forest management (q) area (the coupe is named C38 in the 2005 audit report). This was a 1% improvement on the highest scoring coupe in the 2004 audit and a 4% improvement of the highest scoring coupe in the 2003 audit.
- In coupe C12, there was a poorly located road and landing which led to (r) erosion of a stream crossing, which had not been able to be rectified. 140 Better road planning would have avoided this issue. 141 Recommendations were made in the 2003 audit report and 2004 audit report that, if followed, should have avoided this breach of the Code and subsequent irreparable environmental damage.
- (s) The EPA found, among other things, that:
 - i. general harvesting practices varied between forest management areas;
 - ii. the amount of detail in coupe diaries varied among contractors and forest officers; and
 - logging was not entirely compliant with the code. 142 iii.

 $^{^{\}rm 139}$ Page 21, the 2005 audit report.

Page 22, the 2005 audit report.

¹⁴² Page 20, the 2005 audit report.

- (t) In the 2003 audit report, the EPA made 15 recommendations. In the 2004 audit report, the EPA made 9 recommendations. In the 2005 audit report, the EPA made 26 recommendations as follows:
 - i. Syndicates should not be responsible for approval of the harvesting completion report.
 - ii. Coupe plan maps should be consistent and detailed.
 - iii. Implement a process for topsoil stockpiling.
 - iv. Improve fuel/oil storage.
 - v. Improve habitat tree documentation.
 - vi. Optimise coupe burning.
 - vii. Ensure the integrity of the reserved area is maintained during track location operations.
 - viii. Clarify filter measurements.
 - ix. Continue with high level of rainforest awareness.
 - x. Reduce intensity of snig tracks.
 - xi. Improve method and control of boundary track installation by DSE operators.
 - xii. Improve location and design of temporary roads.
 - xiii. Better forward planning for temporary road construction.
 - xiv. Implement procedures for approving design of permanent roads.
 - xv. Ensure that soil assessments are carried out for each coupe as part of coupe planning.
 - xvi. Ensure that soil assessments are carried out for each coupe as part of coupe planning.
 - xvii. Highlight 'High' and 'Very High' soil erosion hazard (SEH) assessments.
 - xviii. Improve filter strip management in Bendigo FMA.
 - xix. Consolidate planning systems documentation.
 - xx. Develop and implement training programmes relating to harvesting and roading.
 - xxi. Aim for proportion of active coupes to be 25 per cent of total audited coupes.
 - xxii. The EIA tool should be formally reviewed.
 - xxiii. Improve and implement regeneration assessment.

- xxiv. Implement and document any necessary remedial action.
- xxv. Develop and implement standards for recording regeneration operations.
- xxvi. Reduce harvest rates in the Tarago catchment. 143
- A comparative analysis of repetition in the recommendations in the 2003, (u) 2004 and 2005 audit reports is set out in table 6.

Table 6

Recommendations in the 2003 audit report ¹⁴⁴	Recommendations in the 2004 audit report ¹⁴⁵	Recommendations in the 2005 audit report ¹⁴⁶
Improve the method and control of boundary track installation by DSE operators, in particular with the crossing	Develop and promulgate more specific requirements for boundary track and fire trail construction to confine	Ensure the integrity of the reserved area is maintained during track location operations.
of protected areas and filter strips and the quality of cross- drain construction.	impacts of construction to within the coupe boundary.	Reduce intensity of snig tracks.
		Improve method and control of boundary track installation by DSE operators.
		Improve location and design of temporary roads.
		Better forward planning for temporary road construction.
		Implement procedures for approving design of permanent roads.
Amend the management prescriptions to clearly specify the appropriate reference point for measurement of rainforest extent viz. the canopy or bole of the trees and gaps between sections of canopy.	-	Continue with high level of rainforest awareness.
Promulgate a consistent approach to and provide further training in rainforest identification.	Provide field staff with further awareness of DSE procedures for identification and management of ecological vegetation communities	Continue with high level of rainforest awareness. Develop and implement training programmes relating

Page 59, the 2005 audit report.

Page 33, the 2003 audit report.

Page 56, the 2004 audit report.

Page 56, the 2004 audit report.

Page 59, the 2005 audit report.

	identified for protection in legislation, FMPs or policy, such as Montane Riparian Thicket.	to harvesting and roading.
Ensure that all buffer and filter strips are clearly marked at the correct width on the coupe using tape colours consistent with the coupe plan.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs. Ensure, in areas where there are no existing habitat trees that retention of potential habitat trees occurs and that these are recorded on coupe plans.	Coupe plan maps should be consistent and detailed. Ensure the integrity of the reserved area is maintained during track location operations. Clarify filter measurements. Improve filter strip management in Bendigo FMA.
Fully complete coupe plans and include the maximum slope on which harvesting operations may be conducted.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs.	Coupe plan maps should be consistent and detailed.
Mark all roads on the coupe maps and identified as being either temporary or permanent to facilitate planning and identification of road rehabilitation requirements.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs. Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.	Coupe plan maps should be consistent and detailed. Ensure the integrity of the reserved area is maintained during track location operations. Reduce intensity of snig tracks. Improve location and design of temporary roads. Better forward planning for temporary road construction. Implement procedures for approving design of permanent roads. Improve and implement regeneration assessment. Develop and implement standards for recording regeneration operations.
Mark the location of landings and roads on all coupe maps using a legend that is consistent for all FMAs.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs.	Coupe plan maps should be consistent and detailed. Reduce intensity of snig tracks.
Provide allowance in coupe plans for consideration of prevailing soil types in setting buffer widths.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration	Ensure that soil assessments are carried out for each coupe as part of coupe planning. Highlight 'High' and 'Very

	conditions.	High' SEH assessments.
Forest operations managers should be made accountable for code compliance through appropriate mechanisms.	-	-
Finalise and promulgate guidelines for use of cording and matting. Incorporate allowance for this process in snig track cross-draining requirements of the code.	-	Reduce intensity of snig tracks.
Better implement the selection, marking and protection of habitat trees.	Ensure, in areas where there are no existing habitat trees that retention of potential habitat trees occurs and that these are recorded on coupe plans.	Improve habitat tree documentation. Ensure the integrity of the reserved area is maintained during track location operations.
Provide consistent understanding of requirements for temporary road closure rehabilitation requirements.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.	Better forward planning for temporary road construction. Improve and implement regeneration assessment. Develop and implement standards for recording regeneration operations.
Bring cull trees to the ground in a manner that minimises soil disturbance.	Provide field staff with further awareness of code and Utilisation Procedures restrictions on falling of trees into and across filter strips and the minimisation of soil disturbance during their removal.	Implement a process for topsoil stockpiling. Ensure the integrity of the reserved area is maintained during track location operations. Reduce intensity of snig tracks. Ensure that soil assessments are carried out for each coupe as part of coupe planning. Highlight 'High' and 'Very High' SEH assessments.
Provide for rehabilitation of convergent snig tracks to the same standard as required for log landings. This should be undertaken where areas of soil compaction have resulted from machinery traffic.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.	Reduce intensity of snig tracks. Improve location and design of temporary roads. Implement procedures for approving design of permanent roads. Improve and implement regeneration assessment.

		Develop and implement standards for recording regeneration operations.
Develop a guideline for slash minimisation to assist forest officers with determining acceptable levels of slash in filter strips.	Provide field staff with further awareness of code and Utilisation Procedures restrictions on falling of trees into and across filter strips and the minimisation of soil disturbance during their removal.	Ensure the integrity of the reserved area is maintained during track location operations. Improve filter strip management in Bendigo FMA.
-	Examine fertiliser application practices during coupe regeneration with the aim of minimising the potential for fertiliser to be carried into waterways.	Develop and implement standards for recording regeneration operations.
-	Include a greater proportion of active coupes in future audit programs to enable assessment of operations with code compliance during different stages of the coupe harvesting process.	Aim for proportion of active coupes to be 25 per cent of total audited coupes.
-	Develop a robust process for rezoning of SPZs to ensure that the attributes recorded in the zoning scheme register are, in fact, absent from that area.	Ensure the integrity of the reserved area is maintained during track location operations.
-	-	Syndicates should not be responsible for approval of the harvesting completion report.
-	-	Improve fuel/oil storage.
-	-	Optimise coupe burning.
-	-	Consolidate planning systems documentation.
-	-	The EIA tool should be formally reviewed.
-	-	Implement and document any necessary remedial action.
-	-	Reduce harvest rates in the Tarago catchment.

- (v) The 2005 audit report draws conclusions as to the recommendations made in the 2003 audit report. It states that all recommendations made in the 2003 audit report were satisfactorily addressed except for 5 of them, being:
 - i. Improve the method and control of boundary track installation by DSE operators.
 - ii. Forest Operations Managers (FOM) should be made accountable for code compliance through appropriate mechanisms.
 - iii. Bring cull trees to the ground in a manner that minimises soil disturbance.
 - iv. Provide for rehabilitation of convergent snig tracks to the same standard as that required for log landings.
 - v. Develop a guideline for slash minimisation to assist forest officers with determining acceptable levels of slash in filter strips. 147
- (w) It is difficult to understand how the 2005 audit report found that only 5 of the 2003 recommendations remain unaddressed given the given the findings in *table 6*. *Table 6* indicates only one 2003 recommendation was not in some way duplicated in 2005.
- (x) In respect of the 2004 audit report, the 2005 audit report does not conclude whether any or all of the recommendations have been satisfied. It merely includes comment from DSE as to the recommendations. 148
- (y) The 2005 audit report does not clearly state when notice was given of the coupes to be audited. It does appear that notice was given at least in advance of audit of the coupes during logging. As a result, the integrity of the audit process would have been undermined.
- (z) As was the case with the 2003 and 2004 audit reports, the 2005 audit report does not expressly admit that its findings constitute findings of unlawful conduct by the Victorian State government. This is despite judgment in the

¹⁴⁷ Pages 48 to 50, the 2005 audit report.

¹⁴⁸ Page 50 to 55, the 2005 audit report.

Hastings case, where it was found that a breach of the code constitutes a breach of the law.

EPA special audit 2005

- (a) Following the 2005 special audit, a report was produced titled "2005 Special Forest Audit" (the 2005 special audit report).
- (b) The 2005 special audit was conducted by a team of individuals from URS Australia Pty Ltd as follows:
 - i. Daan Oranje, Senior Resource Analyst (URS Australia Pty Ltd), who had not before been involved in any audit under the code;
 - ii. Peter Boyle, Associate (URS Australia Pty Ltd), who also had not before been involved in any audit under the code; and
 - iii. Andrew Morton, Vice President, URS Forestry (URS Australia Pty Ltd), who had been involved in one other audit under the code, being the 2005 audit. 149
- (c) Peter Tange represented the EPA at 2 of the coupe assessments in the 2005 special audit. The auditor was Geoff Byrne of URS Australia Pty Ltd, who was the auditor under the 2005 audit. The smaller team and lack of previous experience in auditing under the code of half of the team members may have undermined the performance and outcomes of the 2005 special audit.
- (d) The 2005 special audit reports on 4 "recent logging incidents" that occurred during logging operations in either 2004 or 2005. ¹⁵⁰ 3 of the coupes were at East Gippsland and 1 of the coupes was at Barmah. The 2005 special audit report does not explain how or why the "incidents" were brought to the attention of the EPA.

¹⁴⁹ Page 10, the 2005 special audit report.

¹⁵⁰ Executive Summary, the 2005 special audit report.

- (e) The 2005 special audit report found that:
 - a section of Errinundra National Park in East Gippsland had been logged when the law prohibited such logging taking place;
 - ii. logging extended beyond the coupe boundaries at 2 of the East Gippsland coupes and at the Barmah coupe; and
 - iii. a "substantial portion" of a Superb Parrot special protection zone at East Gippsland had been logged. ¹⁵¹
- (f) The 2005 special audit report found that the causes of the incidents were:
 - i. "assumption by VicForests and DSE staff that features depicted and information contained in the Coupe Information System (CIS) are accurate and complete (all coupes);
 - ii. "inadequacies in the forest coupe plan documentation regarding: definition of boundaries for protected areas (1 coupe at East Gippsland and the Barmah coupe); physical features defining coupe boundaries (all coupes); gross and net coupe area (1 coupe at East Gippsland);
 - iii. "insufficient ground confirmation of boundaries (2 coupes at East Gippsland and the coupe at Barmah)
 - iv. "failure to document and obtain approval for coupe boundary modifications (1 coupe at East Gippsland and the coupe at Barmah)
 - v. "assumption by VicForests and DSE staff that nominated coupe boundaries can be changed without further cross-functional review (1 coupe at East Gippsland and the coupe at Barmah); and
 - vi. "breakdown in the system for agency crossfunctional harvesting review, resulting in relevant information not being considered in coupe marking (1 coupe at East Gippsland and the coupe at Barmah)". 152
- (g) These findings indicate that recommendations in previous audit years, including recommendations that EPA had previously reported as having been addressed, had not been or had not been properly addressed. This is

¹⁵¹ Executive Summary, the 2005 special audit report.

¹⁵² Executive Summary, the 2005 special audit report.

consistent with findings in this document including those set out in *table 3* and *table 6*.

- (h) The 2005 special audit report makes 20 recommendations, as follows:
 - Implement as soon as possible the proposed environmental management systems in DSE and VicForests that will address critical functions, aspects/impacts, document control and review/monitoring procedures.
 - ii. Management systems should include procedures to ensure that staff are made aware of data relevant to the coupe that are not included or accessible in CIS.
 - iii. Identify responsibility for, and include where appropriate, all relevant spatial and notational data into CIS that may influence forest management activities that are normally considered during TRP or WUP reconnaissance activities, such as superb parrot SPZs, carpet python SPZs and indigenous sites.
 - iv. Accurately define, describe and document the coupe boundary in the Forest Coupe Plan. This should include a notation in the Forest Coupe Plan that formally defines the coupe boundary, such as a physical feature, a line on a map that can be confirmed by GPS readings or other aspects to be defined in the field (such as a watershed). Develop formal points in both the WUP and TRP processes where these boundaries are described.
 - v. Develop and implement a coupe planning checklist, similar to a checklist already implemented by VicForests in Cann River, which describes critical coupe planning steps and that also includes formal sign-off by senior staff that confirms appropriate coupe marking has been carried out.
 - vi. Include a notation of both the gross and net coupe areas (where applicable) in the Forest Coupe Plan and on coupe maps.
 - vii. Corporate services supporting District Planning staff should formalise a hierarchy for GIS mapping layers used to develop the coupe map, with coupes to be shown as a transparent area such that no layers accidentally hide other information.

- viii. Include on coupe maps the date of production, or other unique identifier, and maintain a revision list in the coupe file or other central register. Mark as 'Old' revised coupe maps and retain on file.
- ix. Include in the WUP guidelines the roles and accountabilities of external stakeholders, such as Aboriginal Affairs Victoria and Parks Victoria, for coupe endorsement in the TRP process, in a similar manner to that described for WUP endorsement.
- x. Clarify, either in the WUP guidelines or another document, the process that VicForests, DSE and Parks Victoria must follow to formally define a national park boundary, or other sensitive land management boundary, in relation to endorsement of proposed adjacent or nearby coupe boundaries.
- xi. Formalise a minimum notification period that gives responsible staff sufficient time to undertake pre-operational cross-functional checks.
- xii. Extend the use of the existing paper-based coupe diary system to record all coupe-related activities from the time of coupe marking to final regeneration survey.
- xiii. Forest officers should note in the coupe diary if the coupe was marked as planned or if boundary modifications were made.
- xiv. Section 2.4.2 of the Management Procedures should be amended so that it is explicit that they also apply to coupe boundary modifications.
- xv. Ensure that coupe boundary modifications are entered into CIS.
- xvi. Where a the location indicated by a GPS does not appear to match the expected location, the operator should take several waypoints and confirm the location in the office using the GIS system, aerial photo overlays or other checking methods before undertaking any coupe boundary marking.
- xvii. Record and update in the coupe diary who is responsible for the regulation or monitoring of a coupe.
- xviii. VicForests or DSE to notify Parks Victoria of impending harvesting operations next to a National Park and Parks Victoria to inspect associated coupe boundaries following coupe marking and prior to the commencement of harvesting.

- xix. Formalise a procedure that describes the level of notification and required actions in the event that the managing authority identifies a breach of the coupe plan boundary.
- xx. Develop a human resources plan, including: a process that can adequately identify and respond to district staff resourcing issues; identification of staff competency requirements and responsibility levels through formalisation of training records and recognition of training needs, particularly in the areas of coupe planning, use of CIS and application of GPS units. 153
- (i) Given the findings and recommendations in the 2005 special audit report, it is evident that non-compliance with the 1996 Code is prevalent and has as its foundation significant management, planning, operational and training deficiencies. This is exacerbated by the fact that the recommendations in the 2005 special audit report do not include issues already addressed by the DSE and VicForests following the breaches of the 1996 Code and identification of the causes of them.¹⁵⁴
- (j) The 2005 special audit report confirms that there is significant non-compliance with the law supported by failures entrenched in the government bodies responsible for logging.

EPA audit 2006

- (a) The 2006 audit was undertaken by the following people:
 - i. Geoff Byrne, auditor (URS Australia Pty Ltd, auditor under the 2004 and 2005 audits);
 - ii. Andrew Morton (Vice President URS Australia Pty Ltd, Forestry, on the 2005 audit team);

¹⁵³ Page 45 to 47, the 2005 special audit report.

¹⁵⁴ Page 45, the 2005 special audit report.

- iii. Andrew Hill, Ecologist (Ecology Partners, formerly on the team in 2003 as being a member of Biosis Research Pty Ltd and on the 2005 audit team on behalf of Ecology Partners);
- iv. Thomas Duff, Forestry Resource Analyst (URS Australia Pty Ltd, on the 2005 audit team);
- v. Jodie Mason, Senior Forester (URS Australia Pty Ltd, first time on the audit team);
- vi. Andrew Hamer, Ecologist (Ecology Partners, first time on the audit team);
- vii. Michael Enscoe, Forester (URS Australia Pty Ltd, first time on the audit team);
- viii. Daan Oranje, Senior Forester (URS Australia Pty Ltd, previously on the 2005 special audit team); and
- ix. Adam Beaumont (EPA). 155
- (b) Following the 2006 audit, a report was produced titled "Timber Production on Public Land 2006: findings and recommendations" (**the 2006 audit report**).
- (c) As was the case in previous audits, interested stakeholders were invited to attend coupe audits. The 2006 audit report outlines ways in which stakeholders were engaged, but again falls short in that it does not indicate what the stakeholder feedback was or who conveyed it. As a result, it is not known what, if any, stakeholder input was acted upon or what stakeholder category such feedback was from.
- (d) The 2006 audit report reveals that the 2006 audit was substantially similar to that conducted and reported on in the 2005 audit report, including in respect of the workbook used and the sections of the 1996 Code that the coupes were audited against. 158

 $^{^{\}rm 155}$ Page 11, the 2006 audit report.

¹⁵⁶ Page 3, the 2006 audit report.

¹⁵⁷ Page 12, the 2006 audit report.

¹⁵⁸ Page 3, the 2006 audit report.

- (e) 45 coupes logged in the 2005 to 2006 logging season were audited.¹⁵⁹ This is the same number of coupes as audited in 2005, 10 more than that audited in 2004 and 15 more than that audited in 2003.
- (f) Of the 45 coupes, logging had concluded in 33 of them, 9 of them were active and 3 were roadline coupes. 160
- (g) The 33 completed coupes were selected using the same risk analysis as that used in the 2005 audit. The selection was undertaken before any field visit and without direct input from operational staff. Without regard to any deficiencies in the risk analysis, the absence of a field visit and operational staff input before coupe selection contributes to the integrity of the audit. The active coupes were selected "through discussion with operational staff taking into account the stage of harvesting, whether the harvest area was representative and the potential disruption to contractors". These factors do not appear conducive to a reliable coupe selection.
- (h) The coupes were selected from 5 FMAs¹⁶⁴ as was the case in the 2004 audit, whereas coupes were selected from 4 FMAs in the 2003 and 2005 audits as conveyed in *table* 7.

Table 7

Forest management areas in 2003 audit	Forest management areas in 2004 audit	Forest management areas in 2005 audit	Forest management areas in 2006 audit
East Gippsland	-	East Gippsland	-
Central Gippsland	-	Central Gippsland	-
Central	Central	Central	-

¹⁵⁹ Page 13, the 2006 audit report.

¹⁶⁰ Page 13, the 2006 audit report.

¹⁶¹ Page 13 and Appendix D, the 2006 audit report.

¹⁶² Page 13, the 2006 audit report.

¹⁶³ Page 13, the 2006 audit report.

¹⁶⁴ Page 12, the 2006 audit report.

Portland	-	-	-
-	Otway	-	Otway
-	North East	-	-
-	Dandenong	-	-
-	Tambo	-	Tambo
-	-	Bendigo	-
-	-	-	Mid-Murray (east and west)
-	-	-	North
-	-	-	Latrobe

- (i) Unlike all previous audit reports, the 2006 audit report does not specify the percentage of coupes audited in respect of the total number of coupes logged in the relevant logging season. Based on this statistic in previous audit years, it is likely that less than 10% of all logged coupes were the subject of audit and so, once again, the audit results cannot be seen as representative of the level of code compliance in Victoria.
- (j) The 2006 audit report identified breaches of the 1996 Code. As was the case in the 2005 audit, if a forest officer had sighted breaches of the 1996 Code before the EPA attended the coupe to conduct the audit, such instances were not included in the 2006 audit report. The following criteria were adopted to define non-compliance:
 - i. any breach not documented in the coupe diary;
 - ii. any breach, even if documented in the coupe diary, that had little or no remediation activity and had an EIA rating of moderate, major or severe. 166

As a result, the 2006 audit report is not a full assessment of code compliance.

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¹⁶⁵ Page 16, the 2005 audit report.

¹⁶⁶ Page 16, the 2005 audit report.

- (k) The overall average coupe score for the 2006 audit was 93 per cent, being 2% higher than the 2005 audit, 3% higher than the 2004 audit and 6% higher than the 2003 audit. 167
- (1) The lowest scoring coupe was 80% in the Central forest management area (the coupe is named C2 in the 2006 audit report). This was a 6% improvement on the lowest scoring coupe in the 2005 audit, a 10% improvement on the lowest scoring coupe in the 2004 audit and a 29% improvement on the lowest scoring coupe in the 2003 audit.
- The highest scoring coupe was 100% in the Latrobe forest management area (the coupe is named C25 in the 2006 audit report). 168 This was equal to the highest scoring coupe in the 2005 audit, a 1% improvement on the highest scoring coupe in the 2004 audit and a 4% improvement on the highest scoring coupe in the 2003 audit.
- (n) In coupe C2, insufficient draining had been installed in a road and so water had pooled on the road. 169 In addition, the actual coupe area was greater than that allowed under the TRP without the required prior approval from the DSE. 170 Also, there was insufficient spreading of bark piles including over the landing pad which is adverse to rehabilitation.¹⁷¹
- The 2006 audit report found, among other things, that: (o)
 - logging was not entirely compliant with the code; 172
 - the most common area of non-compliance related to log landings and ii. dumps;¹⁷³ and
 - the most common area of non-compliance relating to coupe planning iii. was the failure to properly identify soil erosion hazard. 174

¹⁶⁷ Page 16, the 2006 audit report.

Page 17, the 2006 audit report.

¹⁶⁹ Page 19, the 2006 audit report.

¹⁷⁰ Page 21, the 2006 audit report.

¹⁷¹ Page 23, the 2006 audit report.

Page 16, the 2006 audit report.

¹⁷³ Page 17, the 2006 audit report.

¹⁷⁴ Page 20, the 2006 audit report.

- (p) It is noteworthy that soil issues have been identified in all previous audit reports, with the EPA recommending steps be taken to overcome these issues every audit year.
- (q) In the 2003 audit report, the EPA made 15 recommendations. In the 2004 audit report, the EPA made 9 recommendations. In the 2005 audit report, the EPA made 26 recommendations. In the 2006 audit report, the EPA made 8 recommendations as follows:
 - i. Clarify management procedures regarding coupe marking.
 - ii. Document operating procedures for inter- and intra-departmental checks reviews.
 - iii. Review coupe burn planning and burning practices.
 - iv. Ensure drainage structures are effective and spaced appropriately.
 - v. Evaluate alternatives to steep cuts in high SEH soils.
 - vi. Implement operating procedures for boundary track construction.
 - vii. Justify departures from the Management Procedures road design criteria.
 - viii. Improve coupe planning and documentation management in Mid-Murray FMA. 175
- (r) A comparative analysis of repetition in the recommendations in the 2003, 2004, 2005 and 2006 audit reports is set out in *table* 7.

Table 7

Recommendations Recommendations Recommendations Recommendations in the 2003 audit in the 2004 audit in the 2005 audit in the 2006 audit report¹⁷⁶ report¹⁷⁷ $report^{178}$ report179 Develop and Improve the method Ensure the integrity Ensure drainage and control of promulgate more of the reserved area is structures are boundary track specific requirements maintained during effective and spaced

¹⁷⁵ Page 53, the 2006 audit report.

¹⁷⁶ Page 32, the 2003 audit report.

¹⁷⁷ Page 56, the 2004 audit report.

Page 56, the 2004 audit report.

Page 59, the 2005 audit report.

¹⁷⁹ Page 53, the 2006 audit report.

installation by DSE operators, in particular with the crossing of protected areas and filter strips and the quality of cross-drain construction.	for boundary track and fire trail construction to confine impacts of construction to within the coupe boundary.	track location operations. Reduce intensity of snig tracks. Improve method and control of boundary track installation by DSE operators. Improve location and design of temporary roads. Better forward planning for temporary road construction. Implement procedures for approving design of permanent roads.	appropriately. Implement operating procedures for boundary track construction. Justify departures from the Management Procedures road design criteria.
Amend the management prescriptions to clearly specify the appropriate reference point for measurement of rainforest extent viz. the canopy or bole of the trees and gaps between sections of canopy.	-	Continue with high level of rainforest awareness.	Clarify management procedures regarding coupe marking.
Promulgate a consistent approach to and provide further training in rainforest identification.	Provide field staff with further awareness of DSE procedures for identification and management of ecological vegetation communities identified for protection in legislation, FMPs or policy, such as Montane Riparian Thicket.	Continue with high level of rainforest awareness. Develop and implement training programmes relating to harvesting and roading.	-
Ensure that all buffer and filter strips are clearly marked at the correct width on the coupe using tape colours consistent with the coupe plan.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs. Ensure, in areas where there are no	Coupe plan maps should be consistent and detailed. Ensure the integrity of the reserved area is maintained during track location operations.	Clarify management procedures regarding coupe marking. Implement operating procedures for boundary track construction. Improve coupe

	existing habitat trees that retention of potential habitat trees occurs and that these are recorded on coupe plans.	Clarify filter measurements. Improve filter strip management in Bendigo FMA.	planning and documentation management in Mid- Murray FMA.
Fully complete coupe plans and include the maximum slope on which harvesting operations may be conducted.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs.	Coupe plan maps should be consistent and detailed.	Improve coupe planning and documentation management in Mid-Murray FMA.
Mark all roads on the coupe maps and identified as being either temporary or permanent to facilitate planning and identification of road rehabilitation requirements.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs. Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.	Coupe plan maps should be consistent and detailed. Ensure the integrity of the reserved area is maintained during track location operations. Reduce intensity of snig tracks. Improve location and design of temporary roads. Better forward planning for temporary road construction. Implement procedures for approving design of permanent roads. Improve and implement regeneration assessment. Develop and implement standards for recording regeneration operations.	Clarify management procedures regarding coupe marking. Justify departures from the Management Procedures road design criteria.
Mark the location of landings and roads on all coupe maps using a legend that is consistent for all FMAs.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs.	Coupe plan maps should be consistent and detailed. Reduce intensity of snig tracks.	Clarify management procedures regarding coupe marking.
Provide allowance in coupe plans for	Assess the efficacy of different log landing	Ensure that soil assessments are	Evaluate alternatives to steep cuts in high

consideration of prevailing soil types in setting buffer widths.	rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.	carried out for each coupe as part of coupe planning. Highlight 'High' and 'Very High' SEH assessments.	SEH soils.
Forest operations managers should be made accountable for code compliance through appropriate mechanisms.	-	-	-
Finalise and promulgate guidelines for use of cording and matting. Incorporate allowance for this process in snig track cross-draining requirements of the code.	-	Reduce intensity of snig tracks.	Ensure drainage structures are effective and spaced appropriately.
Better implement the selection, marking and protection of habitat trees.	Ensure, in areas where there are no existing habitat trees that retention of potential habitat trees occurs and that these are recorded on coupe plans.	Improve habitat tree documentation. Ensure the integrity of the reserved area is maintained during track location operations.	-
Provide consistent understanding of requirements for temporary road closure rehabilitation requirements.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.	Better forward planning for temporary road construction. Improve and implement regeneration assessment. Develop and implement standards for recording regeneration operations.	Justify departures from the Management Procedures road design criteria.
Bring cull trees to the ground in a manner that minimises soil disturbance.	Provide field staff with further awareness of code and Utilisation Procedures restrictions on falling of trees into and across filter strips and the minimisation of soil disturbance	Implement a process for topsoil stockpiling. Ensure the integrity of the reserved area is maintained during track location operations. Reduce intensity of	Evaluate alternatives to steep cuts in high SEH soils.

	during their removal.	snig tracks.	
	during their removal.	Ensure that soil assessments are carried out for each coupe as part of coupe planning. Highlight 'High' and 'Very High' SEH assessments.	
Provide for rehabilitation of convergent snig tracks to the same standard as required for log landings. This should be undertaken where areas of soil compaction have resulted from machinery traffic.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.	Reduce intensity of snig tracks. Improve location and design of temporary roads. Implement procedures for approving design of permanent roads. Improve and implement regeneration assessment. Develop and implement standards for recording regeneration operations.	Justify departures from the Management Procedures road design criteria.
Develop a guideline for slash minimisation to assist forest officers with determining acceptable levels of slash in filter strips.	Provide field staff with further awareness of code and Utilisation Procedures restrictions on falling of trees into and across filter strips and the minimisation of soil disturbance during their removal.	Ensure the integrity of the reserved area is maintained during track location operations. Improve filter strip management in Bendigo FMA.	Justify departures from the Management Procedures road design criteria.
-	Examine fertiliser application practices during coupe regeneration with the aim of minimising the potential for fertiliser to be carried into waterways.	Develop and implement standards for recording regeneration operations.	-
-	Include a greater proportion of active coupes in future audit programs to enable assessment of operations with code compliance during	Aim for proportion of active coupes to be 25 per cent of total audited coupes.	-

	different stages of the coupe harvesting process.		
-	Develop a robust process for rezoning of SPZs to ensure that the attributes recorded in the zoning scheme register are, in fact, absent from that area.	Ensure the integrity of the reserved area is maintained during track location operations.	-
-	-	Syndicates should not be responsible for approval of the harvesting completion report.	-
-	-	Improve fuel/oil storage.	-
-	-	Optimise coupe burning.	Review coupe burn planning and burning practices.
-	-	Consolidate planning systems documentation.	-
-	-	The EIA tool should be formally reviewed.	-
-		Implement and document any necessary remedial action.	Document operating procedures for interand intradepartmental checks reviews.
-	-	Reduce harvest rates in the Tarago catchment.	-

The 2006 audit report refers to the 2005 audit report having found that only (s) 2 of the recommendations made under the 2003 audit report remained outstanding. The 2006 audit report finds that one of those items is superseded by a recommendation in the 2006 audit report and that the other had been addressed, 180 effectively bringing to a close the 2003 audit report recommendations. The recommendation considered addressed is that "forest operations managers should be made accountable for code

¹⁸⁰ Page 37, the 2006 audit report.

compliance". It was considered addressed by the EPA as forest operations managers no longer exist within the VicForests management hierarchy. As a result, the recommendation was not closed because accountability was introduced, suggesting an unsatisfactory outcome.

- (t) The 2006 audit report refers to the 2005 audit report having found that only 2 of the recommendations made under the 2004 audit report remained outstanding. Similarly to the 2 suggested as being outstanding under the 2003 audit, the 2006 audit report finds one recommendation addressed and the other superseded by a recommendation made under the 2006 audit report, thereby closing the recommendations made under the 2004 audit report.
- (u) The 2006 audit report sets out the recommendations made under the 2005 audit report that are considered outstanding, ¹⁸² as conveyed in *table 8*.

Table 8

No	Recommendation in 2005 audit report	Whether EPA considers addressed
1	Syndicates should not be responsible for approval of the harvesting completion report	Addressed
2	Coupe plan maps should be consistent and detailed	To be addressed
3	Implement a process for topsoil stockpiling	Partially addressed
4	Improve fuel/oil storage	Addressed
	Improve habitat tree documentation	Addressed
5	Optimise coupe burning	Superseded by recommendation 3 in 2006 audit report
6	Ensure the integrity of the reserved area is maintained during track location operations	Superseded by recommendation 6 in 2006 audit report
7	Clarify filter measurements	Addressed

¹⁸¹ Page 37, the 2006 audit report.

¹⁸² Page 38 to 46, the 2006 audit report.

8	Continue with high level of rainforest awareness	Addressed
9	Reduce intensity of snig tracks	To be addressed
10	Improve method and control of boundary track installation by DSE operators	Superseded by recommendation 6 in 2006 audit report
11	Improve location and design of temporary roads	To be addressed
12	Implement procedures for approving design of permanent roads	Addressed
13	Ensure that soil assessments are carried out for each coupe as part of coupe planning	To be addressed
14	Highlight 'High' and 'Very High' SEH Assessments	To be addressed
15	Improve filter strip management in Bendigo FMA	To be addressed
16	Consolidate planning systems Documentation	To be addressed
17	Develop and implement training programmes relating to harvesting and roading	To be addressed
18	Aim for proportion of active coupes to be 25% of total audited coupes	Addressed
19	The EIA tool should be formally reviewed	Addressed
20	Improve and implement regeneration assessment	To be addressed
21	Implement and document any necessary remedial action	Addressed
22	Develop and implement standards for recording regeneration operations	Addressed
23	Reduce harvest rates in the Tarago Catchment	Addressed

- (v) Given the findings in *table 7*, item numbers 7, 8, 12, 21 and 22 in *table 8* found to be addressed by the EPA have not in fact been addressed, or have not been properly addressed.
- (w) As was the case with previous audit reports, the 2006 audit report does not clearly state when notice was given of the coupes to be audited.
- (x) Once again, the 2006 audit report does not expressly admit that its findings constitute findings of unlawful conduct by the Victorian State government.

1. Audit review 2007

- (a) In 2007, the Victorian government retained Sinclair Knight Merz (**SKM**) to review the forest audit program. A report titled "Forest Audit Program Review" was produced in July 2008 (**the Review Report**). Although the report indicates that its purpose was to review the audit program, ¹⁸³ it does not otherwise explain why the review was sought or undertaken.
- (b) There is some emphasis on stakeholder consultation. The Review report provides that:
 - i. "Stakeholder consultation was initiated through the circulation of a two page summary of the Issues Paper.
 - ii. "Stakeholders were invited to express interest in participating in one of multiple focus group discussions that were to be held in Melbourne and some regional locations.
 - iii. "Due to the limited initial response, direct contact was made with representatives of several stakeholder organisations to organise focus group discussions or individual interviews. Discussions were held with: groups from VicForests, the Department of Sustainability and Environment (DSE), the Victorian timber industry; representatives of some environmental NGOs and EPA and the two lead auditors of previous Forest Audits.
 - iv. "Seven focus group discussions were held and a small number of stakeholders were individually interviewed.
 - v. "Notes were taken from each of the workshops and a Consultation Paper was prepared and circulated to participants for comment.
 - vi. "A draft final report was prepared from the Issues Paper, the
 Consultation Paper and stakeholder feedback. Options for the future
 of the Forest Audit program and a broader regime of audit for timber
 production in State forests were developed from a review of Victorian
 and interstate approaches, stakeholder comment and a workshop with
 some key public sector stakeholders.

¹⁸³ Page 1, the Review Report.

- vii. "A Stakeholder summary paper, focussing on options for the future of the Forest Audit program, was prepared and circulated to stakeholders for comment. This final report was prepared following receipt of comments on the proposed and recommended Audit program options." 184
- (c) The stakeholder summary paper is included with the Review Report. This is an improvement in respect of stakeholder reporting in the audit reports, however the Review Report continues to be silent on specific stakeholder views and who the feedback came from.
- (d) The Review Report concludes in respect of the forest audit program that:
 - i. "adequate resources were deployed;
 - ii. "activities were generally conducted effectively;
 - iii. "participation by a wide variety of stakeholders was encouraged and achieved;
 - iv. "reactions of stakeholders and participants has been mixed. The responses of the auditees and forest industry generally have been positive, reflecting their perspective that a high level of Code compliance has been demonstrated. Those opposed to timber production in State forests have generally reacted negatively, reflecting their perspective that native forest harvesting operations do not generally fully comply with the Code and are damaging the environment;
 - v. "knowledge and skills of forest operators have been improved as the result of the audits and VicForests' SFMS process;
 - vi. "practices have improved to some extent, although the less than acceptable (<85%) Code compliance on worst performing coupes needs to be addressed; and
 - vii. "social, environmental and economic outcomes have not been measured directly, although it is anticipated that the audits have

¹⁸⁴ Page 1 and 2, the Review Report.

¹⁸⁵ Appendix , the Review Report.

contribute to better social and environmental outcomes from timber production in State forests." ¹⁸⁶

(e) Aside from the further comment that the forest audit program has "achieved some, but not all of its objectives," the conclusions surprisingly lack criticism bringing into question the reliability of the Review Report.

EPA audit 2007

- (a) The 2007 audit was undertaken by the following people:
 - Geoff Byrne, auditor (URS Australia Pty Ltd, auditor under the 2004, 2005 and 2006 audits);
 - Andrew Morton (Vice President URS Australia Pty Ltd, Forestry, on the 2005 and 2006 audit teams);
 - iii. Andrew Hill, Ecologist (Ecology Partners, formerly on the team in 2003 as being a member of Biosis Research Pty Ltd and on the 2005 and 2006 audit teams on behalf of Ecology Partners);
 - iv. Jodie Mason, Senior Forester (URS Australia Pty Ltd, on the 2006 audit team);
 - v. Adam Beaumont (project Director, EPA, on all previous audit teams);
 - vi. Joanna Prendergast (Project manager, EPA, first time on audit team); and
 - vii. Chris McAuley (Manager Environmental Audit, EPA, first time on audit team). 188
- (b) Following the 2007 audit, a report was produced titled "Timber Production on Public Land 2007: findings and recommendations" (the 2007 audit report).

 $^{^{\}rm 186}$ Page 30, the Review Report.

Page 30, the Review Report.

¹⁸⁸ Page 12, the 2007 audit report.

- (c) Stakeholders attended field audits in 4 of the 6 FMAs in which audits took place. 189 Otherwise, it appears that stakeholders were engaged in the same manner as previous audits. 190
- (d) The 2007 audit was undertaken in substantially the same manner as the 2005 and 2006 audits, including in respect of the workbooks used. 191
- (e) 45 coupes logged in the 2006 to 2007 logging season were audited. This is the same as the number of coupes audited in the 2005 and 2006 audit years, 10 more than that audited in 2004 and 15 more than that audited in 2003.
- (f) Of the 45 coupes, logging had concluded in 29 of them, 12 of them were active, 3 were roadline coupes, 2 were from Melbourne's water supply catchments and 2 were domestic firewood coupes. Two of the coupes were not ultimately subject to a field assessment, one of which was a roadline coupe, due to severe weather conditions. ¹⁹³
- (g) The coupes were selected from 6 FMAs, ¹⁹⁴ being 1 more than in the 2004 and 2006 audits, and 2 more than the 2003 and 2005 audits as conveyed in *table 9*.

Table 9

FMAs in 2003	FMAs in 2004	FMAs in 2005	FMAs in 2006	FMAs in the
audit	audit	audit	audit	2007 audit
East Gippsland	-	East Gippsland	-	-
Central	-	Central	-	-
Gippsland		Gippsland		
Central	Central	Central	-	Central

 $^{^{\}rm 189}$ Page 3, the 2007 audit report.

¹⁹⁰ Page 13, the 2007 audit report.

¹⁹¹ Page 14, the 2007 audit report.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Page 3, the 2007 audit report.

Portland	-	-	-	-
-	Otway	-	Otway	-
-	North East	-	-	-
-	Dandenong	-	-	-
-	Tambo	-	Tambo	-
-	-	Bendigo	-	-
-	-	-	Mid-Murray	-
			(east and west)	
-	-	-	North	-
-	-	-	Latrobe	Latrobe
-	-	-	-	Cann River
-	-	-	-	Snowy
-	-	-	-	Midlands
-	-	-	-	Horsham

- (h) As was the case in the 2006 audit and unlike the audits preceding 2006, the 2007 audit report does not specify the percentage of coupes audited in respect of the total number of coupes logged in the relevant logging season. Based on this statistic in previous audit years and as concluded in respect of the 2006 audit, it is likely that less than 10% of all logged coupes were the subject of audit and so, one again, the audit results cannot be seen as representative of the level of code compliance in Victoria.
- (i) The 2007 audit report identified breaches of the 1996 Code as was the case in all previous audit reports. Consistent with the 2005 and 2006 audits, if a forest officer had sighted breaches of the 1996 Code before the EPA attended the coupe to conduct the audit, such instances were not included in the 2007 audit report. The following criteria were adopted to define noncompliance:
 - i. any breach not documented in the coupe diary;
 - ii. any breach, even if documented in the coupe diary, that had little or no remediation activity and had an EIA rating of moderate, major or severe. 195

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¹⁹⁵ Page 18, the 2007 audit report.

As a result, the 2007 audit report is not a full assessment of code compliance.

- The overall average coupe score for the 2007 audit was 94%, being 1% (j) higher than the 2006 audit, 3% higher than the 2005 audit, 4% higher than the 2004 audit and 7% higher than the 2003 audit. 196
- The lowest scoring coupe was 72% in the Midlands forest management area (k) (the coupe is named C42 in the 2007 audit report). This was 8% less than the lowest scoring coupe in the 2006 audit report, 2% less than the lowest scoring coupe in the 2005 audit, a 2% improvement on the lowest scoring coupe in the 2004 audit and a 21% improvement on the lowest scoring coupe in the 2003 audit.
- A number of coupes scored 100%, being 4 in the Central forest (1) management area, 1 in the Snowy forest management area and 1 in the Horsham forest management area. 198 This was equal to the highest scoring coupe in the 2005 audit, a 1% improvement on the highest scoring coupe in the 2004 audit and a 4% improvement on the highest scoring coupe in the 2003 audit.
- In coupe C42, the campsite had bunding of inadequate height and integrity for the storage of oil and diesel, litter associated with harvesting activities was found in the coupe including oil drums scattered throughout the coupe, there was failure to identify on the coupe plan an established exclusion area for flora and fauna values, ¹⁹⁹ there was machinery entry at other than agreed crossing points, there were inadequate marking of filters on the field and in the coupe plan²⁰⁰ and the soil permeability was assessed as high compared to the DSE assessment of low permeability. 201 Given the extent of issues

¹⁹⁶ Page 18, the 2007 audit report.

¹⁹⁷ Page 19, the 2007 audit report.

¹⁹⁸ Page 19, the 2007 audit report.

¹⁹⁹ Page 25, the 2007 audit report.

²⁰⁰ Page 26, the 2007 audit report.

²⁰¹ Page 30, the 2007 audit report.

identified in respect of this coupe having regard to scoring of coupes in previous audits and the issues associated with them, it is difficult to understand why this coupe did not score significantly lower than 72%.

- Of the 12 coupes chosen for the desktop review of regeneration, (n) regeneration processes were found to be 81% compliant with the 1996 Code.²⁰²
- The 2007 audit report found, among other things, that: (o)
 - logging was not entirely compliant with the code;²⁰³ and i.
 - logging had taken place through rainforest in circumstances where ii. VicForests had determined the area has not been rainforest.²⁰⁴
- In the 2003 audit report, the EPA made 15 recommendations. In the 2004 (p) audit report, the EPA made 9 recommendations. In the 2005 audit report, the EPA made 26 recommendations. In the 2006 audit report, the EPA made 8 recommendations. In the 2007 audit report the EPA made just 3 recommendations as follows:
 - Revise all relevant management documents to include all forms of i. rainforest.
 - DSE should formally adopt the Code of Forest Practice and relevant ii. Management Procedures as the environmental and operational standards for the planning of domestic firewood coupes under its control.
 - iii. Revise regeneration procedures to ensure reconciliation of the regenerated species with pre-harvest species composition and spatial distribution across the coupe.²⁰⁵
- A comparative analysis of repetition in the recommendations in the 2003, (q) 2004, 2005, 2006 and 2007 audit reports is set out in table 10.

²⁰² Page 4, the 2007 audit report.

Page 18, the 2007 audit report.

Page 20, the 2007 audit report.

²⁰⁵ Page 59, the 2007 audit report.

Table 10

Recommendations in the 2003 audit report ²⁰⁶	Recommendations in the 2004 audit report ²⁰⁷	Recommendations in the 2005 audit report ²⁰⁸	Recommendations in the 2006 audit report ²⁰⁹	Recommendations in the 2007 audit report ²¹⁰
Improve the method and control of boundary track installation by DSE operators, in particular with the crossing of protected areas and filter strips and the quality of cross-drain construction.	Develop and promulgate more specific requirements for boundary track and fire trail construction to confine impacts of construction to within the coupe boundary.	Ensure the integrity of the reserved area is maintained during track location operations. Reduce intensity of snig tracks. Improve method and control of boundary track installation by DSE operators. Improve location and design of temporary roads. Better forward planning for temporary road construction. Implement procedures for approving design of permanent roads.	Ensure drainage structures are effective and spaced appropriately. Implement operating procedures for boundary track construction. Justify departures from the Management Procedures road design criteria.	
Amend the management prescriptions to clearly specify the appropriate reference point for measurement of rainforest extent viz. the canopy or bole of the trees and gaps between sections of canopy.	-	Continue with high level of rainforest awareness.	Clarify management procedures regarding coupe marking.	Revise all relevant management documents to include all forms of rainforest.

Page 32, the 2003 audit report.
Page 56, the 2004 audit report.
Page 59, the 2005 audit report.
Page 53, the 2006 audit report.
Page 59, the 2007 audit report.

Promulgate a consistent approach to and provide further training in rainforest identification.	Provide field staff with further awareness of DSE procedures for identification and management of ecological vegetation communities identified for protection in legislation, FMPs or policy, such as Montane Riparian Thicket.	Continue with high level of rainforest awareness. Develop and implement training programmes relating to harvesting and roading.	-	Revise all relevant management documents to include all forms of rainforest.
Ensure that all buffer and filter strips are clearly marked at the correct width on the coupe using tape colours consistent with the coupe plan.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs. Ensure, in areas where there are no existing habitat trees that retention of potential habitat trees occurs and that these are recorded on coupe plans.	Coupe plan maps should be consistent and detailed. Ensure the integrity of the reserved area is maintained during track location operations. Clarify filter measurements. Improve filter strip management in Bendigo FMA.	Clarify management procedures regarding coupe marking. Implement operating procedures for boundary track construction. Improve coupe planning and documentation management in Mid-Murray FMA.	
Fully complete coupe plans and include the maximum slope on which harvesting operations may be conducted.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs.	Coupe plan maps should be consistent and detailed.	Improve coupe planning and documentation management in Mid-Murray FMA.	-
Mark all roads on the coupe maps and identified as being either temporary or permanent to facilitate planning and identification of	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across	Coupe plan maps should be consistent and detailed. Ensure the integrity of the reserved area is maintained during track	Clarify management procedures regarding coupe marking. Justify departures from the Management Procedures road	Revise regeneration procedures to ensure reconciliation of the regenerated species with preharvest species composition and spatial

road rehabilitation requirements.	all FMAs. Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to	location operations. Reduce intensity of snig tracks. Improve location and design of temporary roads. Better forward	design criteria.	distribution across the coupe.
	provide optimal regeneration conditions.	planning for temporary road construction. Implement procedures for approving design of permanent		
		roads. Improve and implement regeneration assessment.		
		Develop and implement standards for recording regeneration operations.		
Mark the location of landings and roads on all coupe maps using a legend that is consistent for all FMAs.	Ensure that all coupe plans contain coupe maps with annotation that complies with the code and are consistently applied across all FMAs.	Coupe plan maps should be consistent and detailed. Reduce intensity of snig tracks.	Clarify management procedures regarding coupe marking.	-
Provide allowance in coupe plans for consideration of prevailing soil types in setting buffer widths.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.	Ensure that soil assessments are carried out for each coupe as part of coupe planning. Highlight 'High' and 'Very High' SEH assessments.	Evaluate alternatives to steep cuts in high SEH soils.	-
Forest operations managers should be made accountable for code compliance through appropriate	-	-	-	-

mechanisms.				
Finalise and promulgate guidelines for use of cording and matting. Incorporate allowance for this process in snig track crossdraining requirements of the code.	-	Reduce intensity of snig tracks.	Ensure drainage structures are effective and spaced appropriately.	-
Better implement the selection, marking and protection of habitat trees.	Ensure, in areas where there are no existing habitat trees that retention of potential habitat trees occurs and that these are recorded on coupe plans.	Improve habitat tree documentation. Ensure the integrity of the reserved area is maintained during track location operations.	-	-
Provide consistent understanding of requirements for temporary road closure rehabilitation requirements.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.	Better forward planning for temporary road construction. Improve and implement regeneration assessment. Develop and implement standards for recording regeneration operations.	Justify departures from the Management Procedures road design criteria.	Revise regeneration procedures to ensure reconciliation of the regenerated species with pre-harvest species composition and spatial distribution across the coupe.
Bring cull trees to the ground in a manner that minimises soil disturbance.	Provide field staff with further awareness of code and Utilisation Procedures restrictions on falling of trees into and across filter strips and the minimisation of soil disturbance during their removal.	Implement a process for topsoil stockpiling. Ensure the integrity of the reserved area is maintained during track location operations. Reduce intensity of snig tracks. Ensure that soil	Evaluate alternatives to steep cuts in high SEH soils.	-

Provide for rehabilitation of convergent snig tracks to the same standard as required for log landings. This should be undertaken where areas of soil compaction have resulted from machinery traffic.	Assess the efficacy of different log landing rehabilitation processes in the various forest and soil types to provide optimal regeneration conditions.	assessments are carried out for each coupe as part of coupe planning. Highlight 'High' and 'Very High' SEH assessments. Reduce intensity of snig tracks. Improve location and design of temporary roads. Implement procedures for approving design of permanent roads. Improve and implement regeneration assessment. Develop and implement standards for recording regeneration	Justify departures from the Management Procedures road design criteria.	Revise regeneration procedures to ensure reconciliation of the regenerated species with pre-harvest species composition and spatial distribution across the coupe.
Develop a guideline for slash minimisation to assist forest officers with determining acceptable levels of slash in filter strips.	Provide field staff with further awareness of code and Utilisation Procedures restrictions on falling of trees into and across filter strips and the minimisation of soil disturbance during their removal.	Ensure the integrity of the reserved area is maintained during track location operations. Improve filter strip management in Bendigo FMA.	Justify departures from the Management Procedures road design criteria.	-
-	Examine fertiliser application practices during coupe regeneration with the aim of minimising the potential for fertiliser to be	Develop and implement standards for recording regeneration operations.	-	Revise regeneration procedures to ensure reconciliation of the regenerated species with pre- harvest species composition and spatial

	carried into waterways.			distribution across the coupe.
-	Include a greater proportion of active coupes in future audit programs to enable assessment of operations with code compliance during different stages of the coupe harvesting process.	Aim for proportion of active coupes to be 25 per cent of total audited coupes.	-	-
-	Develop a robust process for rezoning of SPZs to ensure that the attributes recorded in the zoning scheme register are, in fact, absent from that area.	Ensure the integrity of the reserved area is maintained during track location operations.	-	-
-	-	Syndicates should not be responsible for approval of the harvesting completion report.	-	-
-	-	Improve fuel/oil storage.	-	-
-	-	Optimise coupe burning.	Review coupe burn planning and burning practices.	
-	-	Consolidate planning systems documentation.	-	-
-	-	The EIA tool should be formally reviewed.	-	-
-	-	Implement and document any necessary remedial action.	Document operating procedures for inter- and intra- departmental	-

			checks reviews.	
-	-	Reduce harvest rates in the Tarago catchment.	-	-
-	-	-	-	DSE should formally adopt the Code of Forest Practice and relevant Management Procedures as the environmental and operational standards for the planning of domestic firewood coupes under its control.

(r) As indicated in *table 8*, the 2006 audit report found 10 recommendations in the 2005 audit report remained unaddressed. The 2007 audit report visited those 10 items, ²¹¹ as set out in *table 11*.

Table 11

No	Recommendation in 2005 audit report	Whether EPA considers addressed
1	Coupe plan maps should be consistent and detailed	To be addressed
2	Reduce intensity of snig tracks	Addressed
3	Improve location and design of temporary roads	Addressed
4	Ensure that soil assessments are carried out for each coupe as part of coupe planning	To be addressed
5	Highlight 'High' and 'Very High' SEH Assessments	To be addressed
6	Improve filter strip management in Bendigo FMA	To be addressed
7	Consolidate planning systems Documentation	Addressed
8	Develop and implement training programmes relating to harvesting and roading	To be addressed

²¹¹ Page 41 to 47, the 2007 audit report.

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9	Improve and implement regeneration assessment	To be addressed
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- (s) Given the findings in *table 10*, item numbers 2 and 3 in *table 11* found to be addressed by the EPA have not in fact been addressed, or have not been properly addressed.
- (t) As was the case with previous audit reports, the 2007 audit report does not clearly state when notice was given of the coupes to be audited, the notice period of which could undermine the audit process.
- (u) Once again, the 2007 audit report does not expressly admit that its findings constitute findings of unlawful conduct by the Victorian State government.

D CRITICAL ANALYSIS OF THE AUDIT PROCESS

- (a) The audits undertaken from 2003 to 2007 may have been compromised or inadequate in a number of ways, as identified when each audit is addressed in this document.
- (b) The number of coupes selected comparative to the total number of coupes logged in Victoria in each audit year cannot be seen as properly representative of the level of code compliance in Victoria at any time. Further to this, code compliance is not properly assessed due to the subject coupe not being attended at all stages of the logging process.
- (c) The presence of ambiguity in respect of coupe selection and notice given to the DSE and VicForests as to the selected coupes calls into question the integrity of the audit process and level at which the findings can be relied on.
- (d) Not all of the relevant part of the code was assessed, resulting in the audit reports providing an incomplete picture as to the level of code compliance. This is also the case due to breaches of the code not being included in the audit reports if DSE had itself sighted the breaches before attendance at the coupe to conduct the audit.
- (e) The simplicity with which stakeholder involvement is addressed in the audit reports in circumstances where stakeholder input was to play a significant role in the conduct of the audits does not give an adequate account of which stakeholder's feedback was relied upon. This calls into question the transparency and integrity of the process.
- (f) The recommendations made in each audit report were not sufficiently addressed, which undermines the core purpose of the audits being undertaken.
- (g) The audit reports indicate a lack of strength in response to non-compliance with the code.

E CONCLUSIONS AND RECOMMENDATIONS

- 1. A higher number of coupes should be audited each year.
- 2. Coupes across all FMAs should be audited each year.
- 3. All coupes to be audited should be audited before logging commences and after the coupe has been marked, whilst logging is undertaken, after logging is completed and before the coupe is burned, and after the coupe is burned. The same coupe should later be audited from a regeneration perspective.
- 4. No notice should be given the DSE or VicForests as to what coupes are to be logged, specifically before logging is undertaken in the subject coupe.
- 5. The audits should be undertaken in respect of all of the relevant part of the code, that being all of Chapter 2 of the 2007 Code.
- 6. Breaches of the code identified by DSE or VicForests before the audit is undertaken should be included in the audit reports.
- 7. Stakeholder input should be detailed in audit reports by reference to specific stakeholder or general industry that stakeholder represents, whether the input was acted upon and if not, why.
- 8. It should be mandatory for recommendations to be addressed within a specified time following the audit report.
- 9. There should be clear and action accountability for non-compliance with the code.

Evaluation of the success of the Regional Forestry Agreements in Victoria, Australia

This report is authored by Marina Lou. Special thanks is extended to Vanessa Bleyer, Hui-Chi Goh and Errol Lloyd for their assistance and support in the preparation of this report.

A INTRODUCTION

- (a) The system by which Victorian forests are managed remain one of the most complex in Australia, and the development of Regional Forestry Agreements (RFAs) is best understood within the framework of Australia's environmental protection legislation and policies.
- (b) At a state level, there are six major legislative instruments relevant to the forest environment:
 - i. Forests Act 1958;²¹²
 - ii. Environment Protection Act; 213
 - iii. National Parks Act 1975;²¹⁴
 - iv. Crown Land (Reserves) Act 1978;²¹⁵
 - v. Conservation, Forests and Land Act 1987;²¹⁶
 - vi. Flora and Fauna Guarantee Act 1988²¹⁷ (the FFG Act);
- (c) These Acts are overseen by the Department of Sustainability and Environment (**DSE**) which "manages Victoria's State forests and provides policy guidance for forested parks and reserves, including National Parks." However, three other state bodies also have a role in forest management:
 - i. Parks Victoria is responsible for the State-wide parks and reserve system including National Parks.
 - ii. The Department of Primary Industries works with private forestry actors in developing strategies and plans. However, they have little regulatory role in the scheme of forestry management.
 - iii. VicForests, the state-owned commercial forestry business operating in Victoria, is responsible for the harvesting and commercial sale of timber in the forests of eastern Victoria.

²¹³ Environment Protection Act 1970 (Vic).

²¹² Forests Act 1958 (Vic).

²¹⁴ National Parks Act 1975 (Vic).

²¹⁵ Crown Land (Reserves) Act 1978 (Vic).

²¹⁶ Conservation, Forests and Lands Act 1987 (Vic).

²¹⁷ Flora and Fauna Guarantee Act 1988 (Vic).

²¹⁸ Department of Sustainability and Environment < http://www.dse.vic.gov.au/DSE/nrenfor.nsf/childdocs/-342CE95A3265012FCA256F0300224AAA-3B9E509CE2E590C0CA25747B000BC9DF?open> accessed at March 2011.

- (d) At a Commonwealth level, several legislative instruments also oversee environmental protection, including:
 - i. Environmental Protection and Biodiversity Conservation Act 1999 (the EPBC Act);²¹⁹
 - ii. Australian Heritage Commissions Act 1975;²²⁰
 - iii. World Heritage Properties Conservation Act 1983;²²¹
 - iv. Endangered Species Protection Act 1992. 222
- (e) Therefore, the management of Australian forests require coordination and cooperation between the Commonwealth and State governments.
- (f) In 1992, the Commonwealth, State and Territory Governments agreed and entered into a National Forestry Policy Statement (NFPS)²²³ outlining agreed objectives and policies for Australia's public and private forests. They set out broad national forestry conservation and sustainable management goals that were to be pursued at a regional level.
- (g) From this policy statement arose the creation of RFAs²²⁴ between the Commonwealth, State and Territory governments. Since 1997, ten RFAs have been entered into in Australia (see Image 1, where each coloured area is subject to an RFA). The Victorian Government currently has five RFAs with the Commonwealth Government (see Table 1).

Image 1

²¹⁹ Environmental Protection and Biodiversity Conservation Act 1999 (Cth).
²²⁰ Australian Heritage Commissions Act 1975 (Cth).

²²¹ World Heritage Properties Conservation Act 1983(Cth).

²²² Endangered Species Protection Act 1992 (Cth).

²²³ Commonwealth of Australia, *National Forest Policy Statement: A New Focus for Australia's Forests*December 1992 (2nd Ed 1995) < http://www.daff.gov.au/_data/assets/pdf_file/0019/37612/nat_nfps.pdf> accessed at March 2011.

²²⁴ East Gippsland Regional Forest Agreement between the Commonwealth and Victorian Government (1997); Central Highlands Regional Forest Agreement between the Commonwealth and Victorian Government (1998); North East Regional Forest Agreement between the Commonwealth and Victorian Government (1999); West Victoria Regional Forest Agreement between the Commonwealth and Victorian Government (2000); Gippsland Regional Forest Agreement between the Commonwealth and Victorian Government (2000).



Table 1

RFA Region	Date of Agreement
East Gippsland ('EG')	3 February 1997
Central Highlands ('CH')	27 March 1998
North East ('NE')	9 August 1999
West Victoria ('W')	31 March 2000
Gippsland ('G')	31 March 2000

- (h) RFAs are twenty year agreements between the Commonwealth and State Government that set out the economic and environmental obligations, as well as long term management and protection of forest values in particular regions. The main objectives of the RFAs were to:
 - i. identify a Comprehensive, Adequate and Representative (CAR) reserve system and provide for conservation of those areas;
 - ii. provide for the ecologically sustainable management and use of forests in each RFA region; and
 - iii. provide for the ecologically sustainable management and use of forest.²²⁵
- (i) Five years after the first RFA was entered into, the *Regional Forests Agreement* $Act\ 2002^{226}$ (the RFA Act) was enacted to consolidate the enforcement of RFAs.
- (j) Under section 38 of the EPBC Act, forestry operations that are undertaken in accordance with an RFA are exempt from Part 3 of the Act. Part 3 addresses the

Regional Forests Agreement Act 2002 (Cth).

Department of Agriculture, Fisheries and Forestry, About RFA (2011)

http://www.daff.gov.au/rfa/about/process/introduction#2 accessed at March 2011.

requirements of environmental approvals by the Commonwealth relating to matters of national environmental significance.²²⁷

(k) Therefore RFAs are one of the most important instruments in the control, management, and conservation of forests in Victoria.

 $^{^{227}}$ Environmental Protection and Biodiversity Conservation Act 1999 (Cth) Part 3.

B OVERVIEW OF THE RFA'S LEGAL FRAMEWORK

National Forestry Policy Statement²²⁸

- (a) The NFPS of 1992 was a policy document that very broadly set out agreed objectives and policies for Australia's public and private forests. It was supposed to allow cooperative action for the sustainable management of Australia's forests.
- (b) It created the platform upon which RFAs were formed between the Commonwealth and States.
- (c) The NFPS defined the role of each tier of government as set out below:
 - i. The Commonwealth Government is responsible for coordinating a national approach to both environmental and industry-development issues, it also has an interest in achieving the efficient and effective management of the nation's resources, including a national approach to forest issues. Therefore, the now-named federal Department of Sustainability, Environment, Water, Population and Communities is responsible for matters relating to the EPBC Act, including overseeing the threatened species protection and management of national and world heritage values, occurring throughout Australia. The Department of Agriculture, Fisheries and Forestry (DAFF) works with state governments in managing forests at a federal level.
 - ii. State and Territory Governments are responsible for forest management, in recognition of the constitutional responsibility of the state for land use decision and their ownership of large areas of forest. The DSE has the responsibility to oversee and administrate the RFAs in Victoria.
 - iii. Local governments have the responsibility for local land use planning and rating systems, which may affect public and private forest management and use.²²⁹

²²⁸ Above n 1.

- (d) Broad national objectives were set out in the NFPS, including for:
 - nature conservation and wilderness reserves. The NFPS states it is important that Australia has a comprehensive, adequate and representative network of dedicated and secure nature conservation reserves for forests and reserves for protecting wilderness;
 - ii. a strategy to protect old growth forests and wilderness. The NFPS states that:
 - A. there should be agreed criteria for old growth forests and wilderness determined through a working group process;
 - B. using those criteria, the relevant state agencies are to, as a matter of high priority, undertake assessment of forests for conservation values, including old growth values, and forested land for wilderness values;
 - C. until the assessments are completed, forest management agencies will avoid activities that may significantly affect those areas of old growth forest or wilderness that are likely to have high conservation value;
 - D. forested wilderness areas will be protected by means of reserves; and
 - E. the relevant management agencies will develop management plans to appropriately protect old growth forests and wilderness values;
 - iii. ecologically sustainable forest management (**ESFM**)and codes of practice. The NFPS states that ESFM will be given effect through the continued development of integrated planning processes, through codes of practice and environmental prescriptions and through management plans that incorporate sustainable yield harvest practices.²³⁰
- (e) Whilst these policy goals are important, in effect the creation and maintenance of RFAs means that the Commonwealth Government has withdrawn from

²²⁹ Dr Alan Hawke, 'Final Report (October 2009)' Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Department of the Environment, Water, Heritage and the Arts.*²³⁰ Above n 1.

involvement in forest management, leaving the State Government to manage its forest without Commonwealth Government intervention.

Victorian Regional Forestry Agreements

- (a) Since 1992, Victoria has entered into five forestry agreements with the Commonwealth of Australia for the regions East Gippsland, Central Highlands, North East, West Victoria and Gippsland.
- (b) The East Gippsland RFA, as the inaugural RFA and one of the first to be ever entered into in Australia, has a format and contains terms that are slightly different to the ones to follow.
- (c) The Central Highlands RFA was the second RFA to be entered into in Victoria, and it is generally similar to the terms of the East Gippsland RFA, though its structure and format was refined. The Central Highlands RFA was the model upon which all other RFAs in Victoria are drafted, and their terms are essentially identical to one another.
- (d) The RFAs commonly set out:
 - i. in part 1, introduction to the RFA;
 - ii. in part 2, non legally enforceable objectives of ESFM, functions of a CAR reserve system and protection of indigenous heritage;
 - iii. In part 3, legal enforceable obligations of forest management, terms of compensation, funding and termination.
- (e) In terms of conservation and sustainable use of forests in Victoria, the RFAs seek to protect native forests through:
 - i. the Comprehensive Regional Assessment (**CRA**), which involves a synthesis of assessments on biodiversity, old growth forest, wilderness, national estate, world heritage, social, resources and economics;
 - CAR reserve systems, which are systems designed to achieve ESFM in forests used for timber harvesting and a 20 year commitment to the outcomes of the RFA process; and

- iii. developing and implementing ESFM.²³¹
- (f) The CRA process is initiated and controlled by the relevant state government, where the state government can invite the Commonwealth to participate. The CRA provides information on which governments can reach agreement on their respective obligations for a particular region. The CRA is intended to provide a uniform, national approach to forest management, and discharges the Commonwealth from its responsibility as a coordinator of forest management.
- (g) CAR reserve systems are based on the "Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and Representative Reserve System for Forests in Australia" (the JANIS criteria). 232
- (h) The NFPS recognised the importance of Australia having a comprehensive, adequate and representative network of forest reserves. The JANIS criteria requires that the following should be protected in conservation reserves:
 - i. about 15% of the pre-1750 distribution of each forest ecosystem;
 - ii. at least 60% of the vulnerable forest ecosystems, and all the viable stands of rare or endangered forest ecosystems;
 - iii. at least 60% of old growth forest within each ecological vegetation class (as defined by Woodgate (1994)); and
 - iv. at least 90 % of high quality wilderness. 233
- (i) Not only are the JANIS criteria applicable to all states and territories, they are applicable to all forest types, and associated woodlands. The JANIS criteria allows a system of forest reserves identified as worthy of protection based on certain criteria. Other forests were generally identified as suitable for logging.

Leanne Wallace, 'Final Report (May 2010)' Independent Review on the Progress with Implementation of the Victorian Regional Forest Agreements (RFAs), Department of Environment and Sustainability http://www.dse.vic.gov.au/CA256F310024B628/0/9859A99E9841F791CA2577AC0081B7F0/\$File/Independe

ntReviewRFAs.pdf> access at March 2011.

232 Australian and New Zealand Environment and Conservation Council and Ministerial Council on Forestry,
Fisheries and Aquaculture, Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and
Representative Reserve System for Forests in Australia 1997

< http://www.daff.gov.au/ data/assets/pdf file/0011/49493/nat nac.pdf > accessed at March 2011. 233 lbid. 6.1.2 Criteria.

- (j) Under all five RFAs, the Victorian government agreed to implement what can be described as an ESFM system. The ESFM systems comprise three components: an integrated forest planning system; the state forest resource inventory; and sustainability indicators. The Victorian Government also agreed to implement the ESFM system components by specific dates (milestone dates). Although the state government has made various statements promising to implement the ESFM system or parts of it, it has not been put in place.
- (k) For state forests within an RFA area, the Commonwealth Government agreed to remove export controls and not require Environmental Impact Assessments (EIA) for logging operations. Accordingly, they are exempt from the EPBC Act for logging activities as referred to above.
- (l) Whilst commitments to conservation were made in an aspirational manner and not legally binding (see discussion below), the RFAs have resulted in concrete assurance of state government control of logging activities, including:
 - i. the accreditation of Victoria's existing rules of forest management practices, with only slight changes to the zoning of the forest management plan; and
 - ii. removal of controls on export woodchipping licences and withdrawal of Commonwealth participation in the woodchip debate.²³⁴

Regional Forests Agreement Act 2002 (Cth)

(a) Following the introduction of two Victorian RFAs in 1998 and 1999, the legal basis of the RFAs and its mechanism for enforcement became questioned.²³⁵ For example, in the East Gippsland RFA, clause 9 states that it is not intended to be a legally enforceable document.²³⁶ Therefore, the RFA was not a legal contract but

²³⁴ Jan McDonald, 'Regional Forest (Dis)Agreements: The RFA Process and Sustainable Forest Management' (1999) 11 Bond Law Review.

²³⁵ See Juliet Forsyth, 'Anarchy in the Forests: a Plethora of Rules, and Absence of Enforceability' (1998) 15 Environmental and Planning Law Journal 338; Jane Tribe 'The Law of the Jungles: Regional Forest Agreements' (1998) 15 Environmental and Planning Law Journal 136; Tony Bartlett, 'Regional Forest Agreements – a Policy, Legislative and Planning Framework to Achieve the Sustainable Forest Management in Australia' (1999) 16 Environmental and Planning Law Journal 328.

²³⁶ East Gippsland Regional Forest Agreement between the Commonwealth and Victorian Government (1997) Clause 9 states:

an agreement in which both parties have given clear undertakings and have declared their intention to abide by them.²³⁷

(b) In 2002, the RFA Act was introduced by the Commonwealth Government to provide legislative commitment and support for the outcomes of the RFAs.²³⁸ The RFA Act bound the Commonwealth government to their obligations and undertakings to state governments for terms of the RFAs which are explicitly legally enforceable. The terms of the RFAs which are explicitly deemed legally unenforceable remain an agreement between the parties with intention to abide.

'This Agreement and its provisions are not intended to give rise to legally enforceable rights or obligations between the parties. This Agreement cannot impose on either party or a third party any obligation that is inconsistent with Australia's international obligations, or a law of the Commonwealth of Victoria'.

Journal 136, 141.

²³⁸ Explanatory Memorandum, Regional Forests Agreement Bill 2001 (Cth).

C THE REVIEW FINDINGS

- (a) The findings of this review if the RFA are set out in the table below. The first column sets out the obligations or milestones relevant to each RFA. The second column indicates the clause number in each relevant RFA by region, as applicable, as listed in table 1 above. The third column sets out the summary of progress in respect of each obligation or milestone.
- (b) The summary of progress was collated from determinations by the independent review of the Victorian RFAs, ²³⁹ submissions to the independent review of the Victoria RFA, ²⁴⁰ submissions to the Hawke Review, ²⁴¹ the determinations of the Hawke Review²⁴² and various journal articles. ²⁴³ A hyphen in the summary of progress indicates the obligation was not intended to be legally enforceable and its aspirational nature makes the progress difficult to gauge.

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Department of the Environment, Water, Heritage and the Arts; Leanne Wallace, 'Final Report (May 2010)' Independent Review on the Progress with Implementation of the Victorian Regional Forest Agreements (RFAs), Department of Environment and Sustainability

http://www.dse.vic.gov.au/CA256F310024B628/0/9859A99E9841F791CA2577AC0081B7F0/\$File/IndependentReviewRFAs.pdf access at March 2011.

²⁴¹ Mr Tom Baxter, *Interim Report Comment 97*; Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden, *Interim Report Comment 92*; The Green Institute, *Interim Report Comment 36*.

²⁴² Dr Alan Hawke, 'Final Report (October 2009)' Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Department of the Environment, Water, Heritage and the Arts*; Dr Alan Hawke, 'Interim Report (June 2009)' Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Department of the Environment, Water, Heritage and the Arts*.

²⁴³ For example, see Lee Godden and Jacqueline Peel, 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): Dark Sides of Virtue (2007) 31 *Melbourne University Law Review* 109.

Obligations/Milestones	Clause Numbers	Summary of Progress
Parties will manage their respective responsibilities with regard to the National Estate in accordance with the Provisions of this Agreement as detailed in the RFA Attachment	EG - 12 CH - 21 NE - 21 W - 21 G - 21	This commitment has been overtaken by events. In 2003, the Commonwealth repealed the Australian Heritage Commission Act 1975 (Cth) and amended the Environment Protection and Biodiversity Conservation Act 1999 (Cth) to provide for a National Heritage List to replace the Register of the National Estate. In Appendix 3 of the report it is noted that a commitment to prepare a set of statewide guidelines for the cultural heritage management of the rests, parks and reserves of Victoria has not been met.
The Cth notes that its obligation to promote endangered species protection will involve ongoing cooperative work with Victorian Agencies concerning the RFA region	EG – 15 CH – 25 NE – 25 W – 25 G – 25	-
The Commonwealth undertakes to use its best endeavours to secure the enactment of legislation which amends the EPBC 1999 by inserting definitions of 'Forestry Operations', 'RFA Forestry Operations' and 'RFA or Regional Forest Agreements Bill' and introduce such legislation into the Parliament of the Commonwealth by 30 June 2000. The purpose of these amendments is to give effect to the Commonwealth Government's intention that Forestry Operations in RFA regions may be undertaken without approval under the EPBC Act.	W – 26 G - 26	
Parties agree to investigate and participate in World Heritage assessment of Australiawide Eucalyptus theme, including any potential contribution from the RFA region	EG – 16 CH – 26 NE – 26 W – 27 G -27	-
Parties note that in order to progress work and then proceed to World Heritage nomination, the agreement of all relevant governments will be required.	EG- 17 CH – 27 NE – 27 W -28 G -28	-
Parties agree that any potential nomination for World Heritage involving areas in the RFA region could be achieved from within the CAR reserve system	EG – 18 CH -28 NE -28 W – 29 G – 29	-
The Commonwealth agrees that it will give full consideration to the potential social-economic consequences of any World Heritage nomination of places in the RFA region and that any such nomination will only occur after the fullest consultation and with agreement of the State.	CH - 29 NE - 29 W - 31 G -31	-

	1	
The parties agree that before any World	CH – 30	-
Heritage nomination is made:	NE – 30	
 All necessary management 	W – 31	
arrangements, including joint policy	G - 31	
coordination arrangements will be		
agreed; and		
 All related funding issues will be 		
=		
resolved to the satisfaction of both		
Parties.		
The Commonwealth will, subject to the	EG - 20	Achieved in 1997.
passage of amendments to the relevant		
regulations under the Export Controls Act		
1982, ensure that no controls under that Act		
will apply to the export of hardwood		
woodchips or unprocessed wood sourced		
from the East Gippsland region while this		
Agreement is in place. The Commonwealth		
will seek passage of the relevant		
amendments by 30 June 1997.		
Parties note that no controls under the	CH – 32	These ongoing commitments were met in
Export Control Act 1982 will apply to	NE – 32	Periods 1 and 2.
hardwood woodchip or unprocessed wood	W – 33	Terious I and 2.
	G – 33	
sourced from the RFA region while this	G = 33	
Agreement is in place. The Commonwealth notes Victoria's	EG – 21	The second secon
		These ongoing commitments were met in
intention to separate more clearly its	CH - 33	Periods 1 and 2.
commercial forestry activities within native	NE – 33	
State forests from the broader policy,	W – 34	
strategic planning and regulatory functions	G - 34	
associated with the management of these		
forests, Victoria also confirms its		
commitment to the ongoing implementation		
of its plans, codes and prescriptions relevant		
to the achievement of Ecologically		
Sustainable Forest Management (ESFM).		
This agreement establishes milestones and	EG – 25	Victorian RFA Annual Reports were produced
Parties will report annually on their	CH - 35	and agreed between the State of Victoria and
achievement for the first five years, and then	NE – 35	the Commonwealth of Australia each year from
as they fall due and as part of the 5 yearly	W – 36	1998 to 2002, and reported on the achievement
review, using an appropriate public reporting	G – 36	of milestones in RFAs.
mechanism.		
incondination.		But no report has been issued since 2003. This
		combined with the lack of the first five yearly
		review has meant that there has been no public
		·
		reporting on the RFA over 5 years.
		Margovar the applied reports do not sive and
		Moreover, the annual reports do not give any
		data or information as to how it was conducted,
		but merely a summary of what has and has not
		been achieved in table form. It is of no critical
		value.
Within each five year period, a review of the	EG – 30	To date, no 5 yearly reviews have been
performance of the Agreement will be	CH – 36	undertaken.
undertaken. The purpose of the five yearly	NE – 36	
review is to provide an assessment of	W – 37	
progress of the Agreement against the	G - 37	
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established milestones, and will include: • The extent to which milestones and obligations have been met including management of the National Estate; • The results of monitoring of sustainability indicators; and • Invited public comment on the performance of the agreement Each review will be scheduled concurrent with the five yearly reviews required for the East Gippsland RFA While the review process will not open up the Agreement to re-negotiation, both parties may agree to some minor modification to incorporate the results of the review. The outcomes of the review will be made	CH - 36 EG - 31 CH - 37 NE - 37 W - 38 G - 38 EG - 32	As above As above
public. The mechanism for the review will be determined by both parties before the end of the five year period and the review will be completed within three months. Victoria will report on the results of	CH - 38 NE - 38 W - 39 G - 39 EG - 26	This ongoing commitment was met during
monitoring of sustainability indicators	CH - 41 NE - 41 W - 42 G - 42	Period 1 and 2. However, the quality and workability of the monitoring indicators attracted strong criticism. Over two thirds of the sustainability indicators have no data available. There were also amendments to the reporting process in 2009 to the State of the Forests Report issued in 2009.
Comprehensive Regional Assessments and the development of this Agreement have provided extensive opportunities for public participation and reporting. Parties recognise that the public reporting activities and ongoing opportunities for public participation associated with existing Victorian and Commonwealth processes and instruments will continue. These processes are listed in the RFA attachment	EG - 27 CH - 42 NE - 42 W - 43 G - 43	This commitment was met in Period 1 and 2. However, from the overwhelming response from communities indicate that there is a lack of public consultation. There is a lack of broad confidence in the RFAs. There has been no public review and consultation on the State of the Forests Report, forest management planning including Timber Release Plans. There has been a lack of independent code
to publish future reports of internal audits of compliance with Code of Forest Practices for Timber Production. Supporting documents will also be publicly available.	EG – 28 CH – 43 NE – 43 W – 44 G - 44	audits for 3 years, ignoring Expert Independent Advisory Panel (EIAP) recommendations.
Victoria will further develop the transparency and accountability of its forest management processes through the implementation of an ongoing quality assurance program. The program will be implemented, within three years, utilising expertise external to the forest agency in the department of natural resources and	EG – 29 CH – 44 NE - 44	Following the failure of independent reports and five yearly reviews, the transparency and accountability of its forest management processes have been highly criticised by locals and environmental groups. To date, there is no indication that a quality assurance program has been successfully and

environment for its equivalent.		effectively implemented in Victoria.
Parties note that to develop the	W – 45	As above.
transparency and accountability of its forest	G - 45	
management processes, Victoria is		
implementing an ongoing quality assurance		
program utilising, as appropriate, expertise		
external to the forest agency in Department		
of Natural Resources and Environment or its		
equivalent.		
Victoria undertakes to	EG – 34	Achieved in period 1.
Complete and publish regional	CH – 45(a)	
prescriptions for timber production		
by the end of 1997 (EG) / 1998 (CH) Victoria undertakes to	EG – 34	Achieved in Period 1.
Use its best endeavours to	CH – 45(b)	Achieved in Period 1.
complete and publish management	C11 - 45(b)	
plans for all National and State		
Parks by the end of 1998		
Victoria undertakes to	EG – 34	This ongoing commitment was achieved in
Continue to management the	CH – 45(c)	Periods 1 and 2.
Dedicated Reserves within the CAR	NE – 45(a)	
reserve system in accordance with	W – 46(a)	
the relevant government approved	G – 46(a)	
recommendations of the Land		
Conservation Council or		
Environment Conservation Council		
Victoria undertakes to	EG - 34	While this was guidelines were published for the
 Manage cultural values, both 		East Gippsland in 1997, these are now more
Aboriginal and non-Aboriginal, in		than 13 years old. Given the litigation in EG and
East Gippsland, based on the		overwhelming submission from environmental
Guidelines for the Management of		and local groups, this commitment does not
Cultural Heritage Values in Forests, Parks and Reserve in East Gippsland		seem to have been adequately met.
which will be jointly agreed;		
Victoria undertakes to	CH – 45(d)	This commitment has never been met.
Manage cultural values both	NE – 45(b)	Statewide guidelines for the management of
Aboriginal and non-Aboriginal, in	W - 46(b)	cultural heritage values in forests, parks and
the RFA region, based on the	G – 46(b)	reserves have not been developed in Victoria.
Guidelines for the Management of		
Cultural Heritage Values in Forests,		
Parks and Reserve in East Gippsland		
which will be jointly agreed;		
Victoria undertakes to	EG – 34	This was achieved in all RFA regions except the
 Implement the Integrated Forest 	Similar	West Victoria RFA region.
Planning System and the Statewide	provisions	
Forest Resource Inventory in East	in	
Gippsland in time for the next	CH – 45(e)	
review of sustainable yield due in	NE – 45(c)	
2001.	W – 46(c) G – 46(c)	
Parties agree that the current forest	EG – 37	Though a Sustainability Charter for Victoria's
management system could be enhanced by	CH – 48	State Forests has been adopted, the fact that
further developing appropriate mechanisms	NE – 48	after 13 years of the original RFAs, DSE has only
to monitor and review the sustainability of	W – 49	been able to report on one third of the
forest management practices. To ensure this	G - 49	indicators for sustainable forest management
occurs, Parties agree to establish an		has been highly criticised. There are data gaps
occurs, raities agree to establish all	1	nas been nigniy criticised. There are data gaps

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appropriate set of sustainability indicators to		for over two thirds of the indicators and there
monitor forest changes. Any indicators		has been no report on progress on the
established will be consistent with the		significance of the data gaps.
Montreal Process Criteria, the current form		
of which is specified in the RFA attachment,		Additionally, a number of Category A indicators
and will take into account the framework of		which are largely implementable, have not been
regional indicators developed by the		developed or implemented.
Montreal Process Implementation Group.		
Indicators will be practical, measurable, cost-		
effective and capable of being implemented		
at a regional level.		
Parties will assess the outcomes of the	EG – 38	As above.
Montreal Process Implementation Group		
Process by the end of 1997. After		
considering the extent to which the MIG		
process provides or is likely to provide		
relevant indicators, the process to be used in		
developing indicators for application in East		
Gippsland will be determined, Any process		
adopted will provide for appropriate public		
consultation and determine the frequency of		
reporting.		
In developing effective indicators, Parties	EG – 39	As above.
agree to take into account the results of the	CH – 49	
Forest and Wood Products Research and	NE – 49	
Development Corporation's pilot studies for	W – 50	
the development of effective regional	G – 50	
indicators.		
Development of indicators, and collection of	EG – 40	As above.
results for which indicators can be readily	CH - 50	
implemented, will be completed in time to	NE – 50	
enable assessment during the first review of	W - 51	
the agreement.	G-51	
The parties agree that the CAR reserve	W – 55	-
system, actions under the Flora and Fauna	G – 55	
Guarantee Act 1988 (Vic) and the		
Endangered Species Protection Act 1992		
(Cth), and the application of the strategies in		
the RFA attachment provide for the		
protection of rare or threatened flora and		
fauna species and ecological communities.		
These will guide the development of the		
range of management strategies to be		
included in future Forest Management Plans.		
Where threatened species, ecological	G – 43	The progress of preparing recovery plans for
communities and threatened processes	CH – 55	species listed under the EPBC and FFG Acts has
restricted to Victoria are listed under both	NE – 55	been slow:
the Flora and Fauna Guarantee Act 1988	W - 56	
	G - 56	,
and the Endangered Species Protection Act	G - 30	plans adopted (32%) and recovery
1992, any new or revised Action Statements		plans for a further 15 species are in
will be jointly prepared to meet the		preparation.
requirement of both acts. Where action		CH – 8 out of 23 species have recovery
statements meet the requirement of the		plans adopted (35%) and recovery
Endangered Species Protection Act 1992 the		plans for a further 15 species are in
commonwealth agrees to adopt Action		preparation.

Statements as Recovery Plans under section 46 of the Endangered Species Protection Act 1992.		 NE – 10 of 23 species have recovery plans adopted (43%) and recovery plans for a further 13 species are in preparation. WV – 22 of 41 species have had recovery plans adopted (54%) and recover plans for a further 19 species are in preparation. G – 11 out of 30 species have recovery plans adopted (37%) and recovery plans for a further 19 species are in preparation. The data collection and ongoing monitoring of special species has also been criticised, and most notably demonstrated in the EEG v VicForests²⁴⁴ case.
Parties will continue to consult on the priority for listing threatened species, ecological communities and threatening processes, and the preparation of action statements and Recovery Plans, recognising that priorities can change in light of new information. Currently agreed commitments for the next five years are outlined in the RFA Attachment.	EG – 45 CH – 57 NE – 57 W – 58 G – 58	As above.
Parties reaffirm their commitment that species in the RFA region for which Recovery Plans or Action Statements have already been prepared will have all recommended actions completed or significantly advanced in accordance with the timelines specified in the Recovery Plans or Action Statements.	CH – 58 NE – 58 W – 59 G - 59	As above.
Parties agree that within five years pest plant and pest animal control programs will be developed in accordance with the relevant Forest Management Plan.	EG – 46 CH – 59 NE – 59 Similar provisions in W – 60 G – 60	This has been implemented.
Victoria agrees to implement the CAR reserve system, including the required public land tenure changes, described in the Attachment and identified on the RFA Maps.	EG – 49 CH – 62 NE – 62 W – 64 G – 64	This has been implemented.
Parties agree that changes to that component of the CAR reserve system in State forest will only occur in accordance with this Agreement, will not lead to a net	EG – 50 CH – 63 NE – 63 W – 65	There has been lack of data to validate statements about the maintenance of CAR values. Additionally, CAR reserve system does not meet all of the JANIS criteria.

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²⁴⁴ Environment East Gippsland Inc v VicForests [2010] VSC 335.

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²⁴⁵ According to the 'Draft Report on Progress with Implementation of the Victorian Regional Forest Agreements (RFAs)' *Department of Sustainability and Environment* (2009).

Management Plan process and other		
relevant forest management issues. Victoria will, in accordance with East Gippsland Forest Management Area Plan, formalise a consultation, participation and negotiation mechanism with the relevant Aboriginal groups in East Gippsland to ensure the appropriate management, including the maintenance of traditional and historic uses and values, in East Gippsland.	EG - 54	The obligation has not been met to formalise a consultation, participation and negotiation mechanism with the relevant Aboriginal Groups in East Gippsland to ensure the appropriate management of Aboriginal heritage.
The Parties agree to develop a package of measure that will be implemented by Victoria to ensure the appropriate management of Aboriginal heritage including the maintenance of traditional historic uses and values, in the RFA region. These measures are the development of statewide guidelines for the management of cultural heritage values; provision for participation and consultation mechanisms with local aboriginal communities; modelling to establish priority areas for future surveys of Aboriginal sites; and training of staff. These measures are further outlined in the RFA attachment.	CH – 74 NE – 73 W – 78 W – Attachment 8 G – 78 G – Attachment	Parties have not yet developed statewide guidelines for the management cultural heritage values in parks, forests and reserves.
The results of the Comprehensive Regional Assessments of the forest values of the RFA region indicated a number of areas requiring further research. The Compendium of Victorian Forest Research (1998) provides a bibliography of research in progress as well as published and unpublished works Parties have outlined Statewide research priorities in the RFA attachment. Parties agree to make publicly available, wherever possible, research reports relevant to this agreement.	EG - 62 CH - 83 NE - 81 W - 89 G - 89 EG - 64 CH - 86 NE - 83 W - 91 G - 91	-
In addition, Victoria agrees to publish its rainforest research by December 1998.	EG - 64	The Rainforests and Cool Temperate Mixed Forests of Victoria report was completed in 1999, a year after the date due.

D CRITIQUE

Non-Compliance

- (a) As indicated above, there are significant failings of compliance with the terms of the RFAs.
- (b) Only 5 annual reports have been produced by the DAFF from 1998 to 2002. Since 2003, there have been no annual reports generated for the RFAs in Victoria for over five years.
- (c) Moreover, it must be noted that these annual reports give little data or information as to how it was conducted, are not independent and have little critical value.
- (d) There have been no five yearly reviews conducted since the implementation of the RFAs in Victoria.
- (e) Over two thirds of the sustainability targets and evaluation is missing data.
- (f) No guidelines have been created for the management of cultural heritage values in forests, parks and reserves. The only one that does exist for East Gippsland is now more than 13 years old.
- (g) The research, progress and preparation of recovery plans and action plans for species listed under the EPBC Act and the FFG Act have been inexcusably slow.

Lack of Enforcement

- (a) The exemption of EIA by the Commonwealth Government for any action within a RFA means that there is little enforcement of the terms of the RFAs and oversight as to state forestry actions.
- (b) While there are provision within the RFA that provide the terms for termination by the Commonwealth for failure to comply, the activism required on the Commonwealth Government's part make this an unlikely tool for enforcement.
- (c) Additionally, each RFA is divided between parts that are *not* legally enforceable and parts that are.
- (d) For parts of the RFAs that are termed not legally enforceable, their enforceability rely on the parties to the agreement to sue under common law for breach of

contract. This requires one of the parties to the agreement to take legal action. In reality, the likelihood of the Commonwealth taking action against States for breach of contract under the RFAs is highly unlikely given the aspirational terms of the agreement and the relationship between the states and federal government.

- (e) The parts of RFAs which are legally enforceable predominantly hold the state government and federal government to terms of forest management, which provide the terms of logging and timber production. The lack of conservation and sustainable development objectives under legally enforceable terms of RFAs also weaken its ability and effectiveness to oversee state forestry actions.
- (f) This is even further illustrated by the decision of the Full Court of the Federal Court of Australia in *Forestry Tasmania v Brown* [2007] FCAFC 186 involving an appeal by Forestry Tasmania from two declarations and an injunction granted by Marshall J (**the primary judge**) in *Brown v Forestry Tasmania* (*No 4*) [2006] FCA 172.
- (g) In Forestry Tasmania's case, the Full Court considered the question of whether the Tasmanian RFA entered into by the Commonwealth and State of Tasmania truly obligated the state of Tasmania to protect endangered species such as the Broad -toothed Stag Beetle, the Swift Parrot and the Tasmanian Wedge-tailed Eagle.
- (h) In their joint judgment, Sundberg, Finklestein and Dowsett JJ held that in areas covered by the RFA, it is presumed that the protective mechanisms envisaged by the RFA protect the relevant species, even in circumstances where they do not. There is no requirement to actually protect the species. The Full Court found that the RFA was a compromise between the forestry industry and conservation with no assurance that the environment, including the species, would not suffer as a result²⁴⁶ of forest operations.

²⁴⁶ Forestry Tasmania v Brown [2007] FCAFC 186, [64].

- (i) Their decision overturned the findings of the primary judge in 2006, who considered:
 - i. whether Forestry Tasmania was exempt from part 9 of the EPBC Act if the forestry operations undertaken were "undertaken in accordance with an RFA" and found that "provided forestry operations are undertaken in accordance with the RFA, s38 of the EPBC Act would apply to exempt Forestry Tasmania from Part 3 and/or part 9 of the EPBC Act";
 - ii. whether the operations had been carried out in accordance with an RFA.

 The primary judge:
 - A. found that the term "in accordance with an RFA" should be interpreted to mean that the relevant forestry operations need to be conducted in accordance with the requirements as set out in the RFA;²⁴⁷
 - B. considered clauses 68, 70 and 96 of the Tasmanian RFA. Clause 68 provides that "the state agrees to protect the priority species... through the CAR reserve system or by applying the relevant management prescriptions". Clause 70 provides that "the parties agree that management prescriptions or actions identified in jointly agreed recovery plans or threat abatement plans will be implemented as a matter of priority". Very broadly, Clause 96 required new or altered management prescriptions developed over the term of the RFA to be adequate to maintain the species, be soundly based scientifically, be endorsed by the Tasmanian threatened species scientific advisory committee (where relevant) and to take note of public comment;
 - iii. in determining whether the state of Tasmania had satisfied obligations in relation to the species, opined:
 - A. an agreement to "protect" means exactly what it says, it is not an attempt to protect, or to consider the possibility of protecting, a threatened species;²⁴⁸
 - B. in regard to the word "protect" the primary judge found that protection is not delivered if one merely assists a species to survive,

²⁴⁸ [246]

²⁴⁷ Brown v Forestry Tasmania, Commonwealth of Australia, Commonwealth of Australia and State of Tasmania (No 4) [2006] FCA 1729 [214].

protection is only effective if it not only helps a species survive, but aids in its recovery at a level at which it may no longer be considered threatened;

- iv. found that, as a matter of fact, the CAR reserve system did not and will not protect the relevant species, mainly due to the bulk of the species habitat existing outside the dedicated reserve systems;²⁴⁹
- v. found that the state of Tasmania's failure to comply with clause 70 meant that the management prescriptions were insufficient to protect the species.
- (j) Contrarily, the Full Court accepted the factual findings of the primary judge but determined that clauses 68 and 70 of the RFA did not obligate the state of Tasmania to protect the species. Instead, the Full Court concluded that clauses 68 and 70 should be interpreted as a confirmatory statement by the parties to the RFA that the establishment and the maintenance of the CAR reserve system and relevant management prescriptions protects the species. As the CAR reserve system and management prescriptions do not automatically and, in themselves, ensure species protection, the Full Court's interpretation of clause 68 and 70 in effect make them redundant.
- (k) It should also be noted that following Senator Brown's success at the Federal Court, the Tasmanian Government and the Commonwealth Government amended clause 68 without public consultation.²⁵⁰ The ease with which the governments were able to change RFAs also weakens its ability to be enforced through the Court system.
- (l) The original clause 68 stated "the state agrees to protect the priority species listed in Attachment 2 (Part A) through the CAR reserve system or by applying relevant management prescription". It was replaced with "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."

²⁴⁹ [260] **–** [270]

The Full Court stated "The amendment to cl 68 of the RFA, insofar as it relates to CAR, simply puts in clearer language what we regard as the true meaning of the original clause" therefore this change had little influence in their decision making. *Forestry Tasmania v Brown* [2007] FCAFC 186, [94].

(m) The Forestry Tasmania v Brown decision illustrates that where state laws or state agencies are incapable, unable or unwilling to enforce RFA terms, no legally enforceable mechanisms exist to ensure biodiversity protection.

Lack of Independent Review/Assessment

- Without compliance of the review requirements of RFAs, the exemption of EIA (a) under the EPBC Act leaves a vacuum of information in Victoria's biodiversity conservation.
- The rationale that CRA already constitute a form of assessment for RFAs and that (b) additional EIA would be inefficient has been criticised due to the wish to minimise costs, and to expedite decision making by using already available information has led to claims by conservation groups that the CRA is at best "a catalogue of selected and politically sanitised information". 251
- A not for profit non government organisation then named "Concerned Residents (c) of East Gippsland" (now named Environment East Gippsland Inc), said that "no matter how old patchy or wobbly the data is, to complete the CRA they simply have to heap altogether by bundling information into CRA reports and calling it an 'assessment'. The minister can then use his or her discretion to decide if it constitutes an environmental assessment. Therefore, the obligation under federal legislation to carry out a proper EIS (environmental impact statement) can be avoided. Indeed, the CRA seems to be tailed to meet this end as this outcome is predicted in more than one RFA document."252

²⁵¹ Leanne Wallace, 'Final Report (May 2010)' Independent Review on the Progress with Implementation of the Victorian Regional Forest Agreements (RFAs), Department of Environment and Sustainability http://www.dse.vic.gov.au/CA256F310024B628/0/9859A99E9841F791CA2577AC0081B7F0/\$File/Independe

ntReviewRFAs.pdf> access at March 2011.

252 Leanne Wallace, 'Final Report (May 2010)' Independent Review on the Progress with Implementation of the Victorian Regional Forest Agreements (RFAs), Department of Environment and Sustainability http://www.dse.vic.gov.au/CA256F310024B628/0/9859A99E9841F791CA2577AC0081B7F0/\$File/Independe ntReviewRFAs.pdf> access at March 2011.

Lack of public consultation

- (a) Through both the consultation taken for the Hawke Review of the EPBC Act and the Independent Review on the Progress with Implementation of the Victorian RFAs, it is evident that there is strong public distrust and disapproval for the DAFF and the DSE and how they have conducted their responsibilities under the RFAs.
- (b) It is frequently argued that the RFA provide little transparency, public consultation and community involvement in its collection of information and operation.

Lack of adaptive management

- (a) Whilst the NFPS calls for adaptive management principles to be applied to the management of forests, the Victorian RFAs have no system for adapting to new information, particularly in response to newly threatened species or the identification of new habitat for existing threatened species.
- (b) The Victorian RFAs do not impose any requirement for either the Commonwealth or State governments to add to the list of CAR reserves if a particular forest merits protection, to maintain and update a list of protected species, and can only be updated through political interference.
- (c) The need for adaptive management has been well established²⁵³ and is of particular importance in the age of climate change.

²⁵³ J Brian Nyberg, 'Statistics and the Practice of Adaptive Management' in Vera Sit and Branda Taylor (eds) *Statistical Methods for Adaptive Management Studies* 1998.

E RECOMMENDATIONS

Suspend the Operation of RFAs

- Given the flagrant and blatant non-compliance of terms of the RFAs since their inception in 1997 and the inherent weakness in their enforceability, it is strongly recommended that the exemption it receives from Commonwealth EIA should be revoked immediately.
- 2. A thorough review of the RFAs should take place.
- 3. New RFAs should be created and provide clear evidence of:
 - a. a transparent, systematic and credible process for investigating alleged breaches of forest practice systems and the RFAs;
 - b. a regular independent performance auditing program that is applied to forest plans and their environmental outcomes and is capable of demonstrating compliance with management arrangements and of providing a public feedback loop for best practice management;
 - c. ESFM framework that is sufficiently flexible to adapt to emerging threats to forest values and changes in public values;
 - d. a CAR reserve system that is being adequately maintained and managed.;
 - e. the Commonwealth forestry minister should be responsible for ensuring the RFA reviews are completed in a timely fashion;
 - f. where there is a lack of data, the precautionary principle should be enforced;
 - g. there should be stronger mechanisms for public consultation.
- 4. The Commonwealth should have the power and the responsibility to monitor and audit compliance with RFAs.

Cultural Heritage

- 1. The Guidelines for the Management of Cultural Heritage Values in Forests, Parks and Reserves in East Gippsland (1997) should be amended to incorporate recent changes in legislation and agencies, along with DSE management policies and codes.
- 2. Guidelines should be prepared and implemented for all RFA regions.
- 3. The complex regulatory system for Victorian Aboriginal Heritage, including *Aboriginal Heritage Act 2006* (Vic) and the *Aboriginal Heritage Regulation 2007* (Vic) should be complemented by preparation of state-wide guidelines that cover parks, reserves and forests.

Sustainability Indicators

- 1. The Sustainability Charter of Victoria's State Forests should be reviewed and DSE should undertake the obligation to report on all indicators, and/or provide a report on the lack of data.
- 2. The Commonwealth and States should agree on sustainability indicators.
- 3. Sustainability indicators should integrate an adaptive management system that consists of enforceable mechanisms to assess and promote its effectiveness, and to create a process for public input.

Evaluation of the Success of the Flora and Fauna Guarantee Act

This report is authored by Sophie Bird and Marina Lou. Special thanks is extended to Vanessa Bleyer, Alexandria Jones, Andrew Walker and Errol Lloyd for their assistance and support in the preparation of this report.

A INTRODUCTION

- a) Biodiversity conservation is one of the most important pillars for an ecologically sustainable environment. The most effective method of protecting biodiversity is to preserve species of flora and fauna in their natural habitat.
- b) The Flora and Fauna Guarantee Act 1988 (Vic) (**FFG Act**) is Victoria's principle legislation regulating the protection of the State's threatened species and ecological communities, and the only legislation relied upon to fulfil Victoria's commitment to the National Strategy for the Conservation of Biodiversity.²⁵⁴ Therefore the health of Victoria's biodiversity hinges upon the success and implementation of the FFG Act.
- c) This report will evaluate the operation and efficacy of the FFG Act, taking into account the assessment undertaken by the Victorian Auditor General in its 2009 review of the operation and implementation of the FFG Act.²⁵⁵
- d) This report will show that the FFG Act currently provides inadequate protection for Victoria's biodiversity due to the fragmentation of the conservation legislative framework, and its procedural ineffectiveness. The ongoing barriers to public engagement will also be canvassed, with an eye to the recent public interest case of Environment East Gippsland v VicForests (the Brown Mountain Case).²⁵⁶
- e) The report will conclude with recommendations that should be implemented so as to ensure better conservation outcomes for Victoria's flora and fauna.

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²⁵⁴ Department of Sustainability and Environment, 'Victoria's Biodiversity Strategy',

http://www.dse.vic.gov.au/conservation-and-environment/biodiversity/victorias-biodiversity-strategy access at 1 July 2011. The National Strategy for the Conservation of Biodiversity is Australia's first national biodiversity strategy, the National Strategy for the Conservation of Australia's Biological Diversity, was prepared by the Australian and New Zealand Environment and Conservation Council (ANZECC) and endorsed by the Council of Australian Governments in 1996. See Department of Sustainability, Environment, Water, Population and Communities, 'National Strategy for the Conservation of Australia's Biological Diversity', http://www.environment.gov.au/biodiversity/publications/strategy/index.html access at 1 July 2011.

The report titled "Administration of the Flora and Fauna Guarantee Act 1988" (the AG Report), recognised that there are fundamental and systemic issues that inhibit the FFG Act's efficacy in protecting Victoria's ecosystems and biodiversity. See Victorian Auditor-General's Office, 'Administration of the Flora and Fauna Guarantee Act 1988',

http://www.audit.vic.gov.au/reports_publications/reports_by_year/2009/20090401_flora_fauna.aspx accessed at 1 July 2011.

Environment East Gippsland Inc v VicForests [2010] VSC 416.

B HISTORY OF THE FLORA AND FAUNA GUARANTEE ACT

- a) The FFG Act is the "key piece of Victorian legislation for the conservation of threatened species and communities and for the management of potentially threatening processes."257 The idea of having a principal piece of environment protection legislation was proposed by the conservation movement in the 1970s, ²⁵⁸ and adopted by the first Minister for Conservation in the Cain Government, the Honourable Evan Walker, MLC, who prompted detailed discussion of the guarantee proposal commencing in 1984.²⁵⁹
- b) On 26 May 1986, the Government released a discussion paper on the prospect of the FFG Act. Around 6000 papers were disseminated, a regional and urban based consultation meeting took place and 270 submissions were received in response to the discussion paper.²⁶⁰ Most submissions supported the adoption of the legislation. Following the initial consultation process, in July 1987, the government released 3000 copies of the draft legislative proposal and held Victoria-wide briefing meetings. The proposal was then modified so as to be in line with proposed amendments.
- c) The FFG Act was heralded as one of Victoria's most important conservation initiatives. 261 During its second reading, it was said that the FFG Act was borne out of the recognition that in the short interlude of two lifetimes, the face of Victoria's landscape had changed so that a land of forests and woodlands, wetlands, heaths and grasslands teeming with wildlife, had been transformed.²⁶² It was recognised that at least 700 native species were threatened at that time. Further, it was stated that about one in five of all native vertebrate animals and vascular plants still living in Victoria were facing the prospect of extinction. ²⁶³
- d) In introducing the FFG Act, the Government acknowledged that the conservation of Victoria's native species was a task requiring a cooperative effort by both the government and the community, being simply too great to be shouldered by either

²⁵⁷ Department of Sustainability and Environment, 'Flora & Fauna Guarantee Act',

 accessed at 1 July 2011. 258 Ibid.

²⁵⁹ Ibid.

²⁶⁰ *Ibid*.

²⁶¹ Mr Cathie, (Minister for the Arts), Second Reading Speech, 24 March 1988, p 898.

²⁶² Ibid.

²⁶³ Ibid.

alone.²⁶⁴ Further, it was recognised that the elements of an effective flora and fauna protection program should involve high quality management of public lands and waters by government agencies, and cooperative programs within the community involving education, extension, encouragement, initiatives and assistance. 265

²⁶⁴ Ibid.

²⁶⁵ *Ibid*.

\mathbf{C} OBJECTIVES AND FUNCTION OF THE FFG ACT

- a) The purpose of the FFG Act is
 - ...to establish a legal and administrative structure to enable and promote the (i) conservation of Victoria's native flora and fauna and to provide for a choice of procedures which can be used for the conservation, management or control of flora and fauna and the management of potentially threatening processes.²⁶⁶
- b) Section 4 of the FFG Act sets out broad objectives for the conservation of flora and fauna. They include:
 - (i) to guarantee that all taxa of Victoria's flora and fauna (other than the taxa in the Excluded List) can survive, flourish and retain their potential for evolutionary development in the wild;
 - (ii) to conserve Victoria's communities of flora and fauna;
 - (iii) to manage potentially threatening processes;
 - (iv) to ensure that any use of flora and fauna by humans is suitable;
 - (v) to ensure that the genetic diversity of flora and fauna is maintained;
 - (vi) to provide programs of community education in the conservation of flora and fauna;
 - (vii) to encourage co-operative management of flora and fauna through, amongst other things, the entering into of land management co-operative agreements under the Conservation Forests and Land Act 1987 (Vic);
 - (viii) to assist and give incentive to people, including land holders, to enable flora and fauna to be conserved; and
 - (ix) to encourage the conserving of flora and fauna thorough co-operative endeavours. 267

²⁶⁶ Fauna and Flora Guarantee Act 1988, s 1.

²⁶⁷ Flora and Fauna Guarantee Act 1988 (Vic), s 4.

- c) To achieve these objectives, the FFG Act established a suite of management processes and conservation and control options. Such mechanisms include:
 - (i) Establishing a Scientific Advisory Committee under section 8 of the Act:
 - The Committee's task is to advise the Minister on the technical questions as to whether the species or community of flora and fauna is threatened and whether a particular process is an actual threat.²⁶⁸
 - The members of the Committee include three senior government scientific officers appointed by the Minister, two scientists on the staff of any of the Victorian education institutions, appointed by the Minister and two scientists appointed by the Minister who are not employed by the Government.²⁶⁹

d) Action Statements:

- (i) Action statements form an integral part of the flora and fauna guarantee program.
- (ii) Action Statements are brief management plans for the conservation of individual flora or fauna species. They provide background information on the species, including its description, distribution, habitat, life history, the reasons for its decline and the threats which affect it. They also state what has been and will be done to conserve the species. Action Statements are designed to apply for three to five years, after which time they are be reviewed and updated.
- (iii) As soon as possible after a species is listed as threatened under the FFG Act, an action statement is required to be prepared outlining the action to be taken to protect the taxon or community or to manage the potentially threatening process.²⁷⁰
 - In some cases, DSE has prepared a single Action Statement for a group of species or communities.

²⁶⁸ Flora and Fauna Guarantee Act 1998 (Vic), s 8(2).

²⁶⁹ Flora and Fauna Guarantee Act 1998 (Vic), s 8(3).

²⁷⁰ Flora and Fauna Guarantee Act 1998 (Vic), s 19(1).

- (iv) Flora and Fauna Management Plans: the purpose of the plans is to designate the roles of land holders and water managers and actions in protecting flora and fauna.²⁷¹
- (v) Public Authority Management Agreements: the agreements assign roles to the authorities in order to facilitate the effective management of listed items.²⁷²
- (vi) Critical Habitat Determination (**CHD**): the purpose being to declare an area which is essential to the survival of a threatened flora or fauna habitat as protected.²⁷³
- (vii) Flora and Fauna Guarantee Strategy: required in order to provide an overview of how the objectives of the FFG Act will be implemented by the Secretary. 274
- (viii) Interim Conservation Order (**ICO**): designed to give "immediate and comprehensive protection" so that where there is an identified need to provide long term protection to an area, that area can be immediately protected while a long term strategy is established. It was identified in the second reading speech that this would be a last resort after other avenues are exhausted. The ICO may override existing use rights where the exercise of those rights would jeopardise a listed taxon or community.²⁷⁵
- e) The Department of Sustainability and Environment (**DSE**, previously the Department of Natural Resources and Environment) is responsible for the implementation and administration of the FFG Act. Since FFG Act's inception, DSE has initiated several other conservation strategies, including:
 - (i) Environmental Management System (EMS): In 2006, an EMS was developed for Victoria's state forests. The aim of the EMS was to provide a systematic framework aimed at assisting the identification and management of significant environmental impacts that may occur as a result of the DSE's activities.

²⁷¹ Victorian Auditor General's Report, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009, 2008-09:1, p12; *Flora and Fauna Guarantee Act 1998* (Vic), ss 214.

²⁷² Mr Cathie, (Minister for the Arts), Second Reading Speech, 24 March 1988, p 901; *Flora and Fauna Guarantee Act 1998* (Vic), s 25.

²⁷³ Victorian Auditor General's Report, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009, 2008-09:1, p 1; *Flora and Fauna Guarantee Act 1998* (Vic), s 20.

²⁷⁴Mr Cathie, (Minister for the Arts), Second Reading Speech, 24 March 1988, p 901; *Flora and Fauna Guarantee Act 1998* (Vic), ss 1718.

Mr Cathie, (Minister for the Arts), Second Reading Speech, 24 March 1988, p 899; Flora and Fauna Guarantee Act 1998 (Vic), pt 5, div 1.

- (ii) In May 2007, the DSE released an Environmental Policy for Victoria's State forests.
- (iii) The Environment Policy further commits the government to manage Victoria's forests in accordance with sustainability and to maintain and conserve biodiversity in state forests.²⁷⁶
- (iv) In June 2007, the DSE released the Criteria and Indicators for Sustainable Forest Management in Victoria (**the indicators**).
- (v) The indicators provide a framework for the department's state forest monitoring and information reporting activities, and were developed to meet the requirements of the *Sustainable Forests Timber Act (2004)* (Vic) (the SFT Act).
- (vi) The indicators aim to ensure that Government, forest management agencies, industry and the broader community have access to scientifically robust and credible information about Victoria's state forests. They also aim to complement sustainability initiatives operating at various scales within Victoria and Australia. For example they are set out in the Sustainability Charter for Victoria's State Forests (2006), and they support the Growing Victoria Together initiative and the Our Environment Our Future The Environmental Sustainability Framework initiative.²⁷⁷
- (vii) The indicators are consistent with the internationally recognised Montreal Process. Australia is one of the 12 member countries in the Montreal Process, which spans five continents and accounts for 60 per cent of the world's forests.²⁷⁸
- (viii) In 2004, the DSE established the Actions for Biodiversity Conversation (ABC).

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Department of Sustainability and Environment, 'Environmental Police for Victoria's State Forests', <http://www.dse.vic.gov.au/ data/assets/pdf file/0009/102114/Environmental Policy.pdf> accessed at 1 July 2011.

Department of Sustainability and Environment, Annual Report, 2006, p. 19.

²⁷⁸ *Ibid.* The Montreal Process, criteria and indicators are designed to reflect the ecological, economic and social component of sustainable forest management. They provide a common framework for describing assessing and evaluating progress towards sustainable forest management.

- The ABC is an "information system that has been designed and built by DSE to store information on the management of threatened species communities and threatening processes in Victoria."279
- The ABC is the primary means by which the DSE accumulates knowledge about threatened species and communities in Victoria. 280 It is designed to track the progress of management actions documented under the FFG Act.
- The DSE states that to date, the ABC contains information on approximately 400 species and communities at 2000 locations across Victoria. The ABC identifies what has to be done where and by whom, in order to conserve a species or community.

²⁷⁹Department of Sustainability and Environment, Actions for Biodiversity Conservation Conserving Threatened Species in Victoria, accessed at:

http://www.dpi.vic.gov.au/CA256F310024B628/0/46C0B9A5DA4D1A1ACA2575C300265BF6/\$File/20090227+ ABC+factsheet.pdf, date accessed, 16 December 2010.

280 Department of Sustainability and Environment, Actions for Biodiversity Conservation (ABC): Managing our

Threatening Species and Communities, accessed at:

http://www.dse.vic.gov.au/DSE/nrenpa.nsf/LinkView/487AAFDF542DDAC6CA25703F001C16FEB44D7EEB86E4 BDFDCA257115001408B8, date accessed 16 December 2010.

D CRITIQUE OF THE FLORA AND FAUNA GUARANTEE PROGRAM

- a) Though the formulation and introduction of the FFG Act in 1988 was ground-breaking for its time, over the years two key failings have plagued the FFG Act, hindering its ability to achieve optimal outcomes in conserving Victoria's endangered species. Broadly speaking, the FFG Act suffers from:
 - (i) DSE's inaction and lack of commitment to carry out the FFG program; and
 - (ii) the regulatory fragmentation in conservation legislation and policy.

DSE's Lack of Political Will

Outstanding Action Statements

- a) Under Section 19 of the FFG Act, the Secretary of the DSE must prepare an Action Statement as soon as possible after a taxon, community or threatening process is listed.
- b) There has been a limited investment in the drafting of and revision of Action Statements. Both the 2005 and the 2008 DSE annual reports state that the DSE prepared 50 new or revised Action Statements in those periods.
- c) As at March 2002, 231 plant species, 214 animal species and 35 ecological communities were on the list of threatened taxa communities under the FFG Act, and 30 processes were on the list of potentially threatening processes. For these 510 listings, only 112 Action Statements had been completed.
- d) As at 21 October 2010, 350 plant species, 251 animal species and 37 ecological communities are on the list of threatened taxa communities under the FFG Act.
- e) As at July 2009, 38 processes were on the list of potential threatening processes.
- f) As at December 2010, 560 action statements have been produced.
- g) This is a marked increase from the status as at 2001; however, there is a gap of 116 action statements that still need to be produced. Although there has been the

production of a number of action statements since the 2001 report, evidence of the implementation of the action statements does not exist.

Lack of Implementation of Action Statements

- a) In addition to the deficiencies in the actual production of Action Statements, the lack of enforcement and of monitoring the effectiveness of the Action Statements has meant that there is no evidence to suggest that the listing process is an effective or efficient means of protecting threatened species or their habitat.
- b) The failure of the Action Statements to be implemented reflects an inherent failure of the FFG Act to mandate a timeframe in which Action Statements must be prepared. On average, it has taken over 4 years from the listing of a threatened species or community to the production of an Action Statement. It was found that should the current timeframes for the implementation of Action Statements be maintained, it would take 22 years to implement the remaining Action Statements.²⁸¹

Process of Listing Species

- a) It has been found that the process of listing species is inexcusably slow, especially given the listing is duplicating the same process at the Commonwealth level. ²⁸²
- b) DSE has specified an internal benchmark of 31 weeks for listing threatened species and the FFG Act specifies a timeline of three years. While it has been recognised that the DSE has met its obligations under the FFG Act, in most instances it has failed to meet its internal benchmark.²⁸³
- c) Criticisms have been made of the DSE's "advisory list" which is a list of over 2,200 threatened flora and fauna. While most of the species were seen to satisfy the criteria of 'threatened' under the FFG Act, they were still only part of the advisory list. ²⁸⁴
- d) A lack of stakeholder engagement and a lack of up to date scientific data has been identified in the listing as threatening the outcomes of the listing process.

²⁸¹ Victorian Auditor General's Report, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009, 2008-09:1, p.2.

²⁸² Victorian Auditor General's Report, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009.

²⁸³ Victorian Auditor General's Report, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009, 2008-09:1, p.2.

²⁸⁴ Victorian Auditor General's Report, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009, 2008-09:1, p.2.

Lack of Utilisation of Conservation Powers

a) It has been deduced that instead of implementing the tools available to it under the FFG Act, the DSE defers to using "other environmental legislation, strategies, policies and plans to conserve and protect flora and fauna." ²⁸⁵

Lack of enforcement by DSE

- a) There is no requirement in the FFG Act that the Action Statements in Action Forest Management Plans (FMPs) be implemented. As such, DSE has not revised Action Statements on a regular basis and there is no system in place.
- b) DSE is the only body able to take enforcement action under the FFG Act. This also excludes the public from contributing to the revision or implementation of FMPs.
- c) Third parties are also unable to bring an action under the FFG Act, which furthers DSE's lack of accountability for adhering to the requirements for making and implementing Action Statements.

Limited Role of CHDs and ICOs

- a) For the FFG Act to be consistent with its objectives, it is essential that the DSE utilise tools provided in the FFG Act to achieve such objectives, such as the CHDs and ICOs.
- b) Only one CHD has ever been made. The determination was subsequently withdrawn by the Department as there was a land use conflict which was resolved by negotiation. The Department stated, in 2009, that it does not utilise CHDs as:
 - (i) determining whether a CHD ought to be implemented would be resource intensive and would pose a challenge scientifically;
 - (ii) information on what would be considered critical habitat is not readily available;
 - (iii) there would be complexities in setting boundaries for the habitat;
 - (iv) the CHD has the potential to cause public disagreement as to how land and water ought to be used and developed and has the potential for legal challenge from property developers and others.²⁸⁶

²⁸⁵ Ibid.

- c) Despite recognising the potential barriers that may exist in the implementation of the CHDs, the Department has failed to implement procedures to overcome the challenges it has identified. As a result, the potential barriers identified by the Department have stalled any meaningful implementation of the CHDs since the enactment of the FFG Act. Until the Department overcomes the state of paralysis in respect of CHDs, their existence is meaningless.²⁸⁷
- d) A substantial portion of the FFG Act is dedicated to the provision of ICOs. The purpose of ICOS is to, among other things, provide a means for the Department to compel landholders and authorities to amend their behaviour and practices in order to ensure that plants and animals remain protected. An ICO applies only after there has been a CHD. The Department has sighted that there are problems with ICOs in their current form.
- e) Further, the FFG Act does not allow for the public to make nominations for Critical Habitat. Lack of CHDs also means that no ICOs have been made, as these rely on the declaration of Critical Habitat. The ICO mechanism itself is also flawed for a number of reasons, one of which is its temporary nature.
- f) The Department's failure to utilize the ICOs and CHDs demonstrates the systemic failure of the Act to reach its objectives. Until the Department overcomes the deficiencies and problems facing the use of ICOs and CHDs, the Act will not reach its objectives.

Fragmentation within the Conservation Legislative Framework

Lack of EIA

a) Environmental Impact Assessment (EIA) is not required for activities which may affect listed species or communities, or before threatening processes are undertaken. More particularly, EIA is not required before logging is undertaken, so the effects of logging on endangered species are not accurately known before logging occurs.

²⁸⁶ Victorian Auditor General's Report, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009, 2008-09:1, p34.

²⁸⁷ Ibid.

Application of the FFG act do not need to be considered by public decision makers

- a) Application of the FFG Act the FFG Act and the instruments under that Act do not need to be considered by other public decision makers or decision making bodies. Subject to two limited exceptions, offences created by the FFG Act for the protection of listed flora do not apply to the owners or lessees of private land. Also, offences relating to the protection of threatened flora generally do not apply to those undertaking logging operations or road works on State Forest or Crown Land, subject to certain conditions. Those conditions are grossly inadequate to ensure protections of listed flora.
- b) Content of Action Plans and Management Plans there are examples of action plans that contain management actions that are perceived to be ineffective in halting the continuing and recognised decline of the species they are supposed to protect.

Separation from other legislative regimes

- a) The FFG Act fits within a complex regulatory scheme at both a State and Commonwealth level.
- b) At a state level, together with the FFG Act, the Victoria legislative regime protects biodiversity or seeks to do so through the following legislative instruments: Catchment and Land Protection Act 1994; the P&E Act; the Wildlife Act; National Parks Act 1975; Environment Effects Act 1978; Victorian Environmental Assessment Council Act 2001; the Forests Act; Conservation Forests and Land Act 1987; and, the SFT Act.
- c) In respect of timber harvesting, the legislation also fits within the following mechanisms: *Code of Practice for Timber Production 2001;* and, FMPs.
- d) Further, the following Commonwealth documents govern the protection of biodiversity in Australia: the *EPBC Act*; *Regional Forests Agreement Act 2002;* and, Regional Forest Agreements.
- e) There has not been an attempt by the Government to integrate the FFG Act with other legislation. Rather, it appears that the DSE is attempting to use the fragmentation of the legal framework as a means of refuting its obligations under the FFG Act. A failure by the legislature to integrate the FFG Act within a clear and comprehensible

legislative framework will continue to inhibit the effective operation of the FFG Act. For example:

- f) Offences for the protection of fauna there are no provisions for the protection of listed fauna. Offences in relation to fauna are contained in a separate piece of legislation, namely, the *Wildlife Act 1975* (Vic).
- g) There should also be greater integration between the FFG Act and the planning scheme process. There should be a requirement to identify any impact on listed species amendment applications. Further the FFG Act should be a mandatory consideration in decisions made under the P&E Act.

E PUBLIC PARTICIPATION AND THE FFG ACT

Lack of Access to data systems

- a) The capture, collection and updating of data is fundamental to ensure that the efforts to conserve threatened species are identifiable. Although the DSE has implemented an electronic system, ABC, the information remains fragmented.²⁸⁸
- b) Through the ABC program, the DSE has invested in an information modelling system that is aimed at educating government institutions on existing data, seeking to ensure that investment in projects and future resources are directed in an efficient manner.
- c) The DSE also collects and retains data via the native vegetation tracking system, regional site registers of fauna and flora information, databases such as the Atlas of Victorian Wildlife, Victorian Flora Information System, Aquatic Fauna Database and the Victorian Rare or threatened plant population database which maintain electronic records of wildlife distribution in Victoria.
- d) Without integration on the information which exists in respect of threatened fauna and flora there will be a failure to determine the population status and trends of Victoria's native flora and fauna, whether flora and fauna populations have reached unsustainable levels and a lack of identification of threatening processes.²⁸⁹
- e) The DSE attributes the ABC system as having enabled the number of actions that have been partially completed and completed as having increased from around 240 completed actions and around 100 partially completed actions in the 2003-2004 period to over 3000 completed actions and over 1500 partially completed actions in the 2005-2006 period.
- f) The DSE does not elucidate on what actions have been completed or partially completed and to what ends these actions seek for the protection of threatened species. Without coherent information on what the ABC has achieved and how it has sought to implement protection for the environment, it is difficult to assess the

²⁸⁹ Victorian Auditor General's Report, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009, 2008-09:1, p 14.

²⁸⁸ Victorian Auditor General's Report, *Administration of the Flora and Fauna Guarantee Act 1988*, April 2009, 2008-09:1, p14.

- positive impacts the ABC system is having, and how, if at all, it has integrated into the current legislative framework of environment protection.
- g) Furthermore, without public access to the data systems that have been created by ABC or an understanding of the practical implications of the ABC system, it is unclear what the benefits of the ABC program are.

Developments in Case Law

- a) In this section of the report, the role public interest litigation has played and has the potential of playing in the efficacy of the application of the FFG Act is identified.
- b) The Brown Mountain case is a landmark decision which has played in integral role in interpreting the scope and application of the FFG Act. Furthermore, the Brown Mountain case plays a central role in allowing public participation under the FFG Act, which otherwise has not been engaged under the FFG Act.
- c) The Brown Mountain case, which was brought by a small environment non-government organisation based in East Gippsland, heralds a novel way in which the public can bring about the application of the FFG Act in the absence of the DSE enforcing the obligations which arise under the FFG Act.
- d) The Plaintiff in the case, Environment East Gippsland (**EEG**), is an association incorporated in Victoria. EEG is a small community-based, non-profit association run by volunteers. EEG was active as an unincorporated association since 1982 under the name of CROEG (Concerned Residents of East Gippsland). EEG's objects and purposes are as follows:
 - (i) promote conservation values and environmental awareness about East Gippsland;
 - (ii) promote sustainability in environmental, economic and social terms;
 - (iii) make representation to Government regarding land use and management;
 - (iv) undertake research relevant to the above;
 - (v) adhere to and promote principles of non-violence; and

- (vi) cooperate with other groups having similar objectives.²⁹⁰
- e) The presiding Judge, His Honour Justice Osborn, determined that EEG had standing to bring the litigation against the Defendant, VicForests, including for the following reason:
 - (i) The unincorporated predecessor of EEG was engaged in the consultative process undertaken in the formulation of the East Gippsland FMP and has since played an integral role in the formulation of the FMP, specifically in respect of the conservation of endangered species
 - (ii) EEG has been and continues to be an actual user of the proposed coupes at Brown Mountain comprising "The Walk", which has meant the public has facilitated public engagement with Brown Mountain.
 - (iii) EEG made submissions to the DSE in respect of imposing a moratorium on the proposed coupes. The case, in a sense was requesting the Court to extend such a moratorium.
 - (iv) The Government has acknowledged EEG's status as a body representing a particular sector of the public interest by financial grant and by honouring it with the Parks Victoria Environment Sustainability Award in 2008.²⁹¹
- f) The Defendant to the proceedings, VicForests, was, as has been outlined above, founded by Section 14 of the *State Owned Enterprises Act 1992* by an order of the Governor in Council gazetted on 28 October 2003.²⁹²
- g) EEG sought to restrain VicForests from logging four proposed coupes of old growth forest located in the valley of Brown Mountain Creek.²⁹³ EEG claimed that the proposed logging would breach the conditions to which VicForests was subject in respect of the protection of threatened species.
- h) Logging of Brown Mountain had been a contentious issue since the 1980s. In the 1980s, the Brown Mountain area was assessed and listed as part of an old growth

²⁹⁰ Environment East Gippsland v VicForests [2010] VSC 335 at [20].

Environment East Gippsland v VicForests [2010] VSC 335 at [80].

²⁹² Environment East Gippsland v VicForests [2010] VSC 335 at [24].

²⁹³ Environment East Gippsland v VicForests [2010] VSC 335 at [2].

forest National Estate Area by the Commonwealth Heritage Commission.²⁹⁴ In 2006, the State Government committed itself to the amplification of conservation parks and reserves within the broader area, as part of the Labor electoral policy. Following the decision by the Minister to increase conservation parks and reserves in the vicinity of Brown Mountain a substantial new reserve was created. Brown Mountain was not contained in this reserve area. It was stated by the DSE that the area did not meet the criteria for old growth forest.

- i) The underlying dispute between the parties can be characterised as one of whether the conservation measures that have been implemented in respect of the Brown Mountain coupes and the surrounding area are adequate to meet the requirements of the regulatory system governing timber harvesting.
- i) In respect of the FFG Act, EEG submitted that the statutory authority, VicForests, was not complying with the very objectives of the FFG Act. Namely, that it was not being administered in a way that has regard to the first of the objectives of the FFG Act being to guarantee that all taxa of Victoria's flora and fauna other than the taxa listed in the Excluded List can survive, flourish and retain their potential for evolutionary development in the wild.²⁹⁵
- k) EEG adduced evidence in respect of a number of species listed as threatened under the FFG Act to support its contention that VicForests was not administered in a way which was in compliance with the FFG Act.
- 1) EEG also asserted that the Action Statements were not being complied with. Further, it was asserted that the loss of hollowing bearing trees, which is listed as a potentially threatening process under the FFG Act, was not being complied with by VicForests.
- m) His Honour Osborn J stated that the relevant Action Statements are picked up by the Code of Practice for Timber Production as "mandatory actions". 296 Further, the FMP guidelines refer to the need for specific Action Statements.²⁹⁷
- n) The parties in the case had different views as to the how the balance between competing interests ought to be struck. On the one hand, VicForests posited that the legislative process contemplated a planning process which struck a final balance

²⁹⁴ Environment East Gippsland v VicForests [2010] VSC 335 at [30].

²⁹⁵ Flora and Fauna Guarantee Act, s 4(1)(a).

²⁹⁶ Environment East Gippsland v *VicForests* [2010] VSC 335 at [232].

²⁹⁷ Environment East Gippsland v VicForests [2010] VSC 335 at [233].

between conservation on the one hand and timber harvesting on the other.²⁹⁸ Further, VicForests contended that the FMP, the precautionary approach, or Section 4(1) of the FFG Act did not create actionable obligations at law. ²⁹⁹

- o) EEG on the other hand stated that the planning process requires a refinement on a site by site basis. It was accepted by His Honour Osborn J that EEG's synopsis of the legislative framework was one that ought to be accepted. Specifically, it was stated by His Honour that the balance struck by the framework is one that recognises that the planning of logging must be made in reference to a range of competing considerations, including the ongoing application of the precautionary principle and the obligations to be determined for each specific species.
- p) EEG adduced evidence in respect of the following species:
 - (i) Long-footed Potoroo;
 - (ii) Spot-tailed Quoll;
 - (iii) Orbost-Spiny Crayfish;
 - (iv) Sooty Owl;
 - (v) Powerful Owl;
 - (vi) Giant Burrowing Frog; and
 - (vii) Hollowing bearing trees.³⁰⁰
- q) VicForests did not adduce evidence to refute the evidence EEG lead in respect of threatened species. In the case, His Honour Justice Osborn was required to consider the nature and scope of the obligations under the FFG Act, including whether Section 4 of the FFG Act and the Action Statements that are prepared pursuant to the FFG Act were actionable at law. The Court held that unless VicForests complied with the requirements of the Action Statements, with the Allocation Order, and the Timber Release Plane, the logging at Brown Mountain would be unlawful, agreeing with EEG's submissions that an injunction ought to be granted at Brown Mountain.

²⁹⁸ Environment East Gippsland v VicForests [2010] VSC 335 at [297].

²⁹⁹ Environment East Gippsland v VicForests [2010] VSC 335 at [305].

³⁰⁰ Environment East Gippsland v VicForests [2010] VSC 335 at [316].

r) The findings in the case demonstrate that despite the DSE's and VicForests' failing to implement the FFG Act and the Action Statements, both of these instruments create binding obligations at law. The failure by the DSE to enforce both the FFG Act and the Action Statements means that environment non-government organisations are forced to monitor the compliance with the FFG Act by the DSE and statutory authorities such as VicForests.

F RECOMMENDATIONS

- a) The DSE should
 - (i) prepare outstanding Action Statement for listed species, ecological communities and key threatening processes
 - (ii) review existing Action Statements and update where required;
 - (iii) employ staff to monitor the implementation of the Action Statements "on-the ground", possibly as part of implementing integrated catchment management plans;
 - (iv) require FMPs, Wood Utilisation Plans (WUPs) and Forest Coupe Plans(FCPs) to adequately assess impacts on listed species, ecological communities and key threatening processes;
 - (v) require FMPs, WUPs, FCPs to adequately assess the impacts on listed species, ecological communities and key threatening processes;
 - (vi) require FMPs, WUPs and FCPs to fully implement Action Statements, and update FMPs, WUPs and FCPs as required; and
 - (vii) conduct an education campaign in schools and local communities about the requirements of the FFG Act, the rights of the community to nominate species and communities for listing, and other third party rights under the Act.
 - (viii) required to give reasons for the decisions it makes under the FFG Act. DSE should also be required to report on its achievements in fulfilling the objectives of and meeting its requirements under the FFG Act. Integration with other legislation: It should be mandatory for the principles and mechanisms under the FFG Act to be taken into account in decision making in particular in EIA management plans and when EIA is not applicable, in planning decisions made under the Planning and Environment Act 1987 (Vic) (P&E Act);
- b) Environmental impact assessment legislation:

- (i) EIA should be more widely required and mandatory in certain circumstances. LFF recommended that whilst old growth and high conservation value forest continues to be logged, Victorian EIA legislation should be linked to other legislation so that:
 - a mandatory trigger for EIA is introduced for highly hazardous activities, and activities which have a significant effect on a threatened or endangered species, including logging in old growth or high conservation value forests outside the Comprehensive, Adequate and Representative Reserve (CAR Reserve) system;
 - activities in CAR Reserves should trigger EIA, including activities in Special Protection Zones or Special Management Zones in FMPs;
 - new FMPs and significant changes to FMPs and approval of WUP's should trigger EIA;
 - third parties should have the right to enforce the EIA requirements;
 - the provisions and the objectives of the FFG Act should be required to be taken into account when making a decision as to whether or not to approve an action subject to EIA;
- c) To address the problem of fragmentation:
 - (i) The Wildlife Act: The Wildlife Act and the FFG Act should be at least partially amalgamated so that the FFG Act includes prohibitions on taking or destroying all listed flora and fauna. There should be some limitations on the ability to obtain a license under the Wildlife Act to take threatened species that are listed under the FFG Act.
 - (ii) Forests Legislation: FMPs should fully implement Action Statements and management plans. They should also be reviewed as new Action Statements and management plans are approved or updated.

d) In general:

- (i) The FFG Act should contain an obligation on decision makers to take, at a minimum, the following into consideration when making decisions under the P&E Act and other legislation applicable to land use or development:
 - the listing of a species, communities or threatening process;
 - the provision of any Action Statements or management plans; and
 - the Victorian Flora and Fauna Guarantee Strategy.
- (ii) Expansion of offences: The offences in the FFG Act should apply to all listed species, not just flora and fish. The defence available to owners and lessees of private land should be removed. The FFG Act should also prohibit the harmful alteration, disruption or destruction of habitat or listed species. At the very least, the FFG Act should prohibit the destruction of the "residence" of a listed species (e.g. the hollow, nest, or other dwelling place) similar to the Canadian legislation, the *Species at Risk Act 2002*. In addition to broadening the ambit of the offence, it was contended in the LFF Report that penalties should be markedly increased to at least equate to those in the Commonwealth environment protection legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). Generally, maximum penalties in the EPBC Act for offences similar to those in the FFG Act were \$110,000 and two years imprisonment, whereas comparable offences in the FFG Act have lower maximum penalties, then in the order of around \$6,000.
- (iii) Third party rights: Third parties should have the right to appeal the following decisions made under the FFG Act:
 - the decision of the Minister (of the then DNRE and now DSE) to list or not to list endangered species, communities of flora or fauna and threatening processes;
 - the decision of the Secretary (of the then DNRE and now DSE) to prepare or decide not to prepare management plans;

- the decision of the Secretary (of the then DNRE and now DSE) to declare or decide not to declare Critical Habitat (subject to the proviso that a definition of Critical Habitat should also be inserted in the FFG Act);
- the decision of the Minister (of the then DNRE and now DSE) to make or determine not to make an ICO; and
- the decision of the Minister (of the then DNRE and now DSE) to approve or determine not to approve an Action Statement.
- (iv) The right of third parties to nominate species for listing, or to nominate certain matters for action, should be expanded. The right to nominate should be expanded to allow third parties:
 - to nominate threatening processes or endangered communities of flora and fauna as meriting the preparation of a management plan;
 - to nominate Critical Habitat (a definition of Critical Habitat should also be inserted in the FFG Act); and
 - to nominate threatened Critical Habitat as meriting the approval of an ICO.
- (v) Third parties should have a right to seek an enforcement order in relation to a breach of the FFG Act, an Action Statement, a management Plan or an ICO. Third parties should also have the ability to enforce the offence provisions of the FFG Act.
- (vi) Expansion of the role of CHDs and ICOs:
 - Definition and determination of Critical Habitat: A definition of Critical Habitat should be inserted which concentrates on preservation of habitat critical to the ongoing evolution and development of the species in the wild rather than concentrating upon how Critical Habitat should be specified in the FFG Act. There should also be requirement for the Minister or Secretary (of the then DNRE and now DSE) to make a CHD or an ICO (or consider making a CHD or ICO) if habitat

meets the Critical Habitat criteria. Furthermore, the CHD process should be overseen by the Scientific Advisory Committee, in much the same way as the listing process currently is.

- Rights to compensation: The FFG Act should be amended to list the compensation provisions in Section 43 of the FFG Act. Compensation should only be payable in circumstances where financial loss or damage is suffered due to the ICO interfering with an existing use right (such as the right to develop land in accordance with an existing planning permit) or requiring action to be taken (e.g. re-vegetation).
- Other matters: ICOs should not be of an interim nature and should be in force until revoked.
- (vii) Precautionary principle: the FFG Act should be subject to the Precautionary Principle, in that if threats of serious or irreversible environmental damage exist, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

G CONCLUSION

- a) Whilst it is clear that the FFG Act does contain a raft of tools to ensure that the objects of the Act are achieved, the lack of utilisation of those tools means that the FFG Act remains redundant.
- b) With a continued lack of investment and a lack of political will for the enforcement of the Act, the Act will not fulfil its objectives.



Front Cover Pic: Brown Mountain
Photo by Jude Deland and Environment East Gippsland Inc.