



24 July 2008

Project Director
Land and Biodiversity White Paper
Department of Sustainability and Environment
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Dear Sir/Madam

**SUBMISSION BY LAWYERS FOR FORESTS
LAND AND BIODIVERSITY AT A TIME OF CLIMATE CHANGE - GREEN
PAPER**

Introduction

This Submission, regarding the 'Land and Biodiversity at a Time of Climate Change Green Paper', Department of Sustainability and Environment (**DSE**), April 2008 (**the Green Paper**) is made by Lawyers for Forests Incorporated (**LFF**).

LFF is a non-politically aligned association of legal professionals working to promote the conservation and better management of Victoria's native forests. LFF believes there should be no logging of, or other activities that detrimentally effect, old growth and high conservation value forests. Whilst such logging and other activities continues to occur, LFF's main focus is on the legal mechanisms in place to conserve and manage Victoria's native forests and the species of flora and fauna that live in those forests. However, LFF is also interested in the protection of biodiversity more generally and is concerned by the alarming reduction in all forms of natural habitat and the Loss of biodiversity is one of Australia's (and Victoria's) most pressing environmental issues.

In Victoria, we have lost 19 of the 91 species of non-marine mammals known to have inhabited the State since European settlement. More than 900 species of Victorian plants are rare or threatened and the numbers are growing. Satellite maps graphically illustrate the loss of some ecological communities, with 30% of the State's broad vegetation types having been reduced by 80%.

While extinction can occur naturally, the vast majority of extinction of species in modern times is caused by human activities. These activities are varied and include habitat destruction and degradation (e.g. logging of high conservation value and old growth forests), incompatible land use and development, resource exploitation and toxic pollution. Of these, the single greatest human threat to threatened species is habitat loss.

FFG Act and Logging Exemption

In November 2002, LFF reviewed the FFG Act 1988 (**the FFG Act**), Victoria's principal biodiversity protection legislation: see http://lawyersforforests.asn.au/pdf/FFG_review.pdf (**the LFF FFG Act Review**).

In undertaking the LFF FFG Act Review, LFF focused on a major and critical source of biodiversity - Victoria's old growth and high conservation value native forests. In ascertaining whether the FFG Act operated effectively, LFF looked at the protection afforded to three listed species; the Leadbeater's Possum, the Powerful Owl and the Tiger Quoll; a threatened community; cool temperate rainforest; and a threatening process, myrtle wilt.

LFF made a number of findings regarding the deficiencies of the FFG Act. These, and LFF's conclusions, are outlined in Appendix 1 to this Submission.

These findings and conclusions are still valid, notwithstanding the creation of VicForests, DSE and the passing of the Sustainable Forests (Timber) Act 2004 (**the SFT Act**) since November 2002.

In particular, the SFT Act has simply authorised a 'business as usual approach' whereby:

- Areas to be logged are still based on Forest Management Plans **FMPs** prepared before the SFT Act was passed, and the Allocation Order (as amended in 2007) made under section 13 of the SFT Act. However, the FMPs and Allocation Order are not guided by ecologically sustainable forest management practices, the State Forest Resource Inventory or the Sustainability Indicators developed under the SFT Act.
- The SFT Act does not ensure that proper pre-logging environmental impact assessment is undertaken, and logging operations are effectively exempt from the operation of the FFG Act and the Environment Protection (Biodiversity Conservation) Act 1999 (Cth) (**the EPBC Act**). This means the effect of logging on species listed as threatened under the FFG Act or endangered under the EPBC Act is not properly taken into account.
- Public participation in decision making processes undertaken by Vic Forests and DSE under the SFT Act is limited. In fact the SFT Act reduced public participation processes, by removing the requirement that Codes of Practice be referred to an independent panel for review.

The deficiencies in the SFT Act were highlighted by LFF at the time the Sustainable Forests (Timber) Bill 2004 was introduced to the Legislative Council. A copy of LFF's submission regarding what the Bill should achieve and its deficiencies is attached as Appendix 2. However, the SFT Bill was passed without changes, notwithstanding the deficiencies identified by LFF.

The 'Land and Biodiversity at the Time of Climate Change - White Paper - Call for Submissions', DSE 2007 (**the White Paper**) stated that the White Paper and Green Paper would not cover commercial forestry operations because they have been or are being considered by existing policy processes. However, the impact of logging operations within old growth and high

conservation value forests on Victoria's biodiversity is not properly taken into account under existing forest management practices in Victoria. It is therefore inappropriate for commercial forestry to continue to be provided with special treatment, and in particular provided with exemptions from the operation of the FFG Act, the EPBC Act.

Logging of old growth and high conservation value forests does have a significant impact on biodiversity in Victoria, and in particular on listed threatened species under the FFG Act and EPBC Act. It impacts on pristine habitat for a number of Victoria's critically endangered and icon species, such as the Powerful Owl and Leadbeater's Possum. It is therefore nonsensical to provide logging operations with special treatment and ignore the effects of logging in developing the White Paper, the Green Paper, and the outcome of the White Paper and the Green Paper, the Final White Paper on Land and Biodiversity (**the Final White Paper**).

The contrast with the protection of native vegetation generally on private land and from other activities is striking. Although there are deficiencies in the application of Victoria's Native Vegetation Management - A Framework for Action (DNRE 2002) (**the Framework**) and clause 52.17 of Victorian Planning Schemes, both clause 52.17 and the Framework do afford protection to native vegetation on private land. The FFG Act and EPBC Act also apply to native vegetation on private land. Landowners and third parties also have effective participation in the decision making process, with notice generally given to third parties, and a right of appeal to VCAT.

There is no reason why logging activities in Victoria's public forests should be treated differently to any other activities which impact on native vegetation, and therefore the habitat essential for the conservation and enhancement of Victoria's biodiversity. Indeed, logging activities in Victoria's forests generally have a greater impact on biodiversity than other activities on private land.

Finally, the Green Paper acknowledges that 'Parks and Forests will provide some of our best opportunities to respond to the threats posed natural systems by climate change.'¹ However, the Government is minimising these opportunities if it fails to address the impacts of logging on biodiversity conservation in the Final White Paper.

Biodiversity generally

The balance of this submission focuses on biodiversity generally.

LFF has had the opportunity to review the submissions of the Environment Defenders Office (**EDO**) to the Green Paper, dated July 2008 (**the EDO Green Paper Submission**).

LFF supports the EDO Green Paper Submission. In particular, LFF supports the EDO's call to establish a legislative framework that consolidates the existing fragmented legislative framework and introduces new principles and mechanisms to manage biodiversity. However, the Final White Paper must go beyond reciting motherhood statements. It must commit the government to action, and set out meaningful targets and reporting mechanisms. Otherwise, history may judge it as mere greenwash.

¹ The Green Paper at page 50

LFF's main concerns with the existing natural resource management and biodiversity protection framework are:

- Lack of political will in implementing biodiversity protection legislation, such as the FFG Act.
- Lack of funding and resources provided to DSE, Catchment Management Authorities (**CMA**s) and local government to effectively implement biodiversity protection legislation.
- Lack of integration of biodiversity legislation with other legislation.
- The lack of accountability placed on the Government in decision making under, and the lack of enforceability of, biodiversity protection legislation.
- The failure by government to set meaningful targets.
- The fragmentation of responsibility for decision making.

LFF now turns to consider whether the Green Paper addresses these issues.

Lack of political will in implementing biodiversity protection legislation

The LFF FFG Act review outlined that, although the Government has a number of powers under the FFG Act, those powers have not been utilised. LFF is concerned that although the Green Paper does hint at legislative reform, it does not commit the Government to implementing the FFG Act and other biodiversity conservation legislation.

The Final White Paper should commit the Government to the effective implementation of biodiversity conservation legislation.

Lack of funding and resources provided to DSE CMAs and local government

LFF understands that a common statement in submissions on the White Paper was the lack of funding provided to DSE, CMA

s and local government to effectively implement biodiversity legislation.

Notwithstanding this, the Green Paper fails to outline the level of government investment and funding needed to address the issues. Instead, it refers to the finite nature of Government resources, budget constraints and 'overall priorities'.

LFF supports the submission made by the Victoria Naturally Alliance that the Government must commit to at least a ten fold increase in government funding to restore and protect wildlife habitat.

Lack of integration of biodiversity protection legislation with other legislation

FFG Act integration with other legislation²

The FFG Act should be integrated with other legislation. Currently it is not. It should be mandatory for the principles and mechanisms under the FFG Act to be taken into account in decision making, in particular in Environmental Impact Assessment (**EIA**), and when EIA is not required, in planning decisions made under the Planning & Environment Act 1987 (**P & E Act**).

EIA should be more widely required, and mandatory in certain circumstances in particular, for activities which may affect listed species or communities, or before threatening processes are undertaken.

Biodiversity conservation legislation generally

LFF supports the EDO's call for legislative reform to modernise legislative framework for biodiversity protection. LFF also supports the EDO's call for the introduction of an overarching Act (**the Principal Act**), to establish and clarify relationships between relevant decision makers and to guide decision making.

In particular, LFF believes the guiding principles outlined in the Green Paper³ with certain modification, should be incorporated in the Principal Act and guide decision making made under natural resource management and biodiversity conservation legislation.

Further, the Principal Act should give biodiversity conservation objectives priority, so that they are not the poor second cousin to economic objectives. This is particularly the case with respect to the decision making under the P & E Act.

Decision makers should also be required to undertake annual reporting, to demonstrate how they have implemented the objectives of the Principal Act.

The Green Paper only hints at legislative reform. The Final White Paper should commit to legislative reform, and to implementing the EDO and LFF recommendations. It should also set a timeline for the legislative reform to be implemented.

Lack of enforceability biodiversity legislation

LFF has previously outlined the lack of enforceability of the FFG Act.⁴ In particular:

- There is a lack of timeframes for making decisions and in implementing aspects of the FFG Act.

² Note - references to taking the FFG Act into account also include taking into account Action Statements, Management Plans, ICOs and Critical Habitat determinations and other actions taken and documents prepared under the FFG Act.

³ At pp37-39 of the Green Paper.

⁴ Refer to the LFF FFG Act Review.

- There is no third party standing to uphold provisions that can be enforced.
- There are no duties imposed on decision makers.
- There is a lack of reporting mechanisms.

Apart from the P & E Act (which does provide for third party review), this lack of enforceability applies to other natural resource management and biodiversity legislation.

LFF is concerned that the Green Paper does not identify these deficiencies, and as a result, does not commit to rectifying them.

The Final White Paper should identify and commit to rectifying these deficiencies.

Failure by government to set meaningful targets

The Green Paper does not set any meaningful biodiversity goals or targets. Instead it appears to anticipate failure, stating:

'Fundamental decisions need to be made about the level of resources that can be invested in this area and whether we want to continue to aim to protect all species.'

Anything less than a full commitment to protecting all species is unacceptable. Whilst we may not succeed in protecting all species, we have more chance of succeeding if we set a high and laudable goal in the Final White Paper, than anticipate defeat at the outset.

Finally, the White Paper and Green Paper fail to set any specific targets or goals. As a result, the White Paper and Green Paper contain a number of motherhood statements, with no specific goals or commitments. If the Final White Paper also fails to contain specific goals and commitments, then history may judge it as a public relations exercise rather than a genuine commitment to preserving Victoria's biodiversity.

Fragmentation of decision making

The introduction of the Principal Act would, in part, address the fragmentation of decision making.

In particular, the Principal Act could set out the process for developing State and regional biodiversity goals, such as the development of bioregions and creation of native vegetation corridors.

Of particular concern to LFF is the number of different natural resource management and biodiversity conservation agencies, and the lack of cohesion and communication between those agencies. Again, the Principal Act could address these issues by defining each agency's role in biodiversity protection and natural resource management decision making.

Further, Councils have a significant role to play in natural resource management and biodiversity conservation through decisions made under

the P & E Act. However, biodiversity conservation and natural resource management issues are not necessarily contained within municipal boundaries. So, the relevant State agency should set the regional framework within which the relevant Council operates, and effectively communicate that strategy to the relevant Council where there are regional biodiversity conservation or natural resource management issues. Councils should also be given the resources and tools to implement regional strategies. Relevant State agencies should also take a more active role in participating in planning scheme amendment processes to guide panels in implementing regional strategies. None of this is currently occurring.

Again, the Green Paper does not identify these issues, or commit to addressing the problems. The Final White Paper should do so.

Conclusion

LFF supports the development of the Final White Paper. The world, and Victoria, is facing a global biodiversity crisis. The Government must set major new directions to address this crisis. The time to act is now. However the Green Paper does not commit the Government to any specific actions, targets or goals. This Submission, and the EDO Green Paper Submission, make a number of recommendations in this regard. For instance, the Final White Paper should commit the Government to implementing biodiversity conservation legislation, and the Principal Act, requiring decision makers to consider biodiversity conservation issues front and centre in decision making. It should also commit the Government to increasing funding for biodiversity conservation and natural resource management, and to implementing biodiversity conservation and natural resource management legislation.

LLF is concerned that unless the Final White Paper contains such specific actions, targets and goals, then biodiversity protection will not be achieved in Victoria, and the alarming decline in Victoria's unique biodiversity will continue.



Andrew Walker
Convener - Law and Policy
Lawyers for Forests

Appendix 1

LFF findings and conclusions in the LLF FFG Act Review

Issues of concern

In carrying out its review, LFF identified a number of deficiencies in the FFG Act and its implementation. These problems appear to be due to the following factors:

- Lack of political will for the implementation of the FFG Act.
- Lack of funding and resources to allow the Department of Natural Resources and Environment ("NRE")⁵ to effectively implement the FFG Act.
- Objectives of the FFG Act being overridden by objectives and interests of bodies with conflicting agendas, such as the forestry industry.

A summary of the key areas of concern with the FFG Act and its implementation are set out below.

- (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. In addition, offences for the protection of listed 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 the protection of listed flora.
- (b) *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)* ("the Wildlife Act").
- (c) *Delays or lack of implementation of key documents required under the FFG Act* - the FFG Act lacks timeframes for making decisions and taking actions to implement the Act. As a result there have significant delays in the preparation of key documents under the FFG Act, including the Flora and Fauna Guarantee Statue and Action Statements prepared for listed species. In particular, Action Statements have not been prepared for 78% of species⁶, communities and threatening processes currently listed under the Act.

⁵ Now the DSE, unless otherwise stated.

⁶ There has been some progress in this regard. However, the rate at which Action Statements have been developed is still far from satisfactory.

- (d) *Lack of utilisation of key conservation powers provided by the FFG Act* - there has only been one instance of land being determined to be Critical Habitat and this determination was later withdrawn. Another issue of concern is that the FFG Act does not allow for the public to make nominations for Critical Habitat. Lack of Critical Habitat determinations also means that no Interim Conservation Orders ("**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.
- (e) *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.
- (g) *Review and Implementation of Action Statements and Management Plans* - there is no requirement to implement Action Statements in Forest Management Plans ("FMPs"). Action Statements are not revised on a regular basis and there is no system in place for the public to contribute to the revision or implementation of them.
- (f) *Lack of enforcement of the FFG Act* - NRE is the only body able to take enforcement action under the FFG Act. Third parties are unable to bring an action in relation to breaches of the offence provisions of the Act. Furthermore, there is a lack of accountability for adhering to the requirements for making and implementing Action Statements.
- (h) *Lack of Environmental Impact Assessment* - 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. Comprehensive Regional Assessments ("**CRAs**") of land in which commercial logging operations are undertaken and FMPs are not an adequate means to ensure the protection of listed flora and fauna.

Recommendations for Reform

LFF's review has revealed that the FFG Act does not meet its objectives and is in urgent need of reform. A summary of our recommendations for reform are as follows.

- (a) Greater resourcing

LFF strongly advocates substantially greater resources be provided to NRE to allow it to undertake the following tasks:

- prepare outstanding Action Statements for listed species, ecological communities and key threatener processed;
- review existing Action Statements and update where required;

- employ staff to monitor the implementation of the Action Statements "on-the ground", possibly as part of implementing integrated catchment management plans;
 - require FMPs, Wood Utilisation Plans ("WUPs") and Forest Coupe Plans ("FCPs") to adequately assess impacts on listed species, ecological communities and key threatening processes,
 - require FMPs, WUPs and FCPs to fully implement Action Statements, and update FMPs, WUPs and FCPs as required;
 - educate other statutory authorities with land management functions as to the requirements of the FFG Act; and
 - conduct an education campaign in schools and local communities about the requirements of the FFG Act, and the rights of the community to nominate species and communities for listing, and other third party rights under the Act.
- (b) Government Commitment to implementing the FFG Act and Greater Government transparency

NRE should be required to give reasons for the decisions it makes under the FFG Act. NRE should also be required to report on its achievements in fulfilling the objectives of and meeting its requirements under the FFG Act. Provided that appropriate funding is given, LFF believes the Commissioner for Ecologically Sustainable Development could play a role in monitoring NRE's performance. The Commissioner could prepare annual reports evaluating NRE's performance. Such reports should be tabled before Parliament. In particular, the report should review the status of Action Statements and the effectiveness of Action Statements Management Plans and the Victorian forest management system generally in the protection of species and management of threatening processes.

NRE should also be required to publish details of prosecutions made under the FFG Act, the *Forests Act 1958* (Vic) ("the Forests Act"), the Wildlife Act and various regulations, at least on an annual basis.

(c) Restructure of NRE⁷

Any restructure of NRE should be carefully considered to ensure that environmental objectives and priorities are enhanced.

(d) 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

⁷ This has now occurred with the creation of DSE and Vic Forests. However, the restructure under the SFT Act does not adequately provide for biodiversity conservation. LFF made a number of submissions regarding the deficiencies in the Sustainable Forests (Timber) Bill 2004 - refer Appendix 2. However, the SFT Act reflected the terms of the Bill, and no changes were made to take into account LFF's submission on the Bill.

ETA, and when ETA is not required, in planning decisions made under the *Planning and Environment Act 1987* (Vic) ("Pea Ace).

(i) Environmental impact assessment legislation

It should be more widely required, and mandatory, in certain circumstances LFF recommends that whilst old growth and high conservation value forest continues to be logged, Victorian EIA legislation should be linked to the FFG Act so that:

- a mandatory trigger for EIA is introduced for highly hazardous activities, and activities which may 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, or the shifting of Special Protection Zones;
- 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 in the decision as to whether or not to approve an action subject to EIA.

(ii) Planning legislation

There should be greater integration between the FFG Act and the planning scheme processes. There should be a requirement to identify any impact on listed species or communities and to address those impacts in planning permit applications or planning scheme amendment applications. Further the FFG Act should be a mandatory consideration in decisions made under the P&E Act.

(iii) 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,

Furthermore, there should be some limitations on the ability to obtain a licence under the Wildlife Act to take threatened species that are listed under the FFG Act.

(iv) 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.

(v) General

The 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, community or threatening process;
- the provisions of any Action Statement or Management Plan; and
- the Victorian Flora and Fauna Guarantee Strategy.

(e) 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 of listed species. Or 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 new Canadian legislation, the *Species At Risk Act 2002*.

Currently there are exemptions under the FFG Act for logging, in the form of the Flora and Fauna Guarantee Act (Forest Produce Harvesting) Order 1988. These exemptions should be removed.

In addition to broadening the ambit of the offences, the 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 (EPBC Act)*. Generally, maximum penalties in this Act for offences similar to those in the FFG Act are \$110,000 and two years imprisonment.

(f) Third party rights

Third parties should have the right to appeal the following decisions made under the FFG Act:

- the decision of the Minister to prepare or not to list endangered species, communities of flora or fauna and threatening processes; and
- the decision of the Secretary to prepare or decide not to prepare Management Plans; and
- the decision of the Secretary 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); and
- the decision of the Minister to make or determine not to make an ICO;
- the decision of the Minister to approve or determine not to approve an Action Statement.

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 or fauna as meriting the preparation of a Management Plan; and
- 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.

Third parties should have a right to seek an enforcement order in relation to a breach of the FFG Act, an Action Plan, a Management Plan, or an ICO. Third parties should also have the ability to enforce the offence provisions of the FFG Act.

(g) Expansion of the role of Critical Habitat declarations and ICOs

(i) 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 habitat critical to the maintenance of a minimum viable population. Criteria for Critical Habitat should also be specified in the Act.

There should also be a requirement for the Minister or Secretary to make a Critical Habitat declaration or an ICO (or consider making a Critical Habitat declaration or ICO) if habitat meets the Critical Habitat criteria, or Critical Habitat is threatened, respectively.

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

(ii) Right to compensation

The FFG Act should be amended to limit the compensation provisions in section 43. 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. revegetation).

(iii) Other matters

ICOs should not be of an interim nature and should be in force until revoked.

(h) Preparation and implementation of Action Statements

It should be mandatory for Action Statements to include information on what needs to be done to protect and conserve the species or

community, or to halt the threatening process. The Flora and Fauna Guarantee Regulations should set out in detail the matters that should be included in Action Statements.

A mandatory obligation to implement Action Statements and to review their effectiveness should be included in the FFG Act. A legislation program of regular public and independent review of the status of Action Statements, and the effectiveness of Action Statements in protection of species, should be introduced.

(i) Precautionary principle

LFF submits that 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.

Conclusion

LFF's analysis shows that the existing regulatory and policy framework for the protection of threatened species in Victoria is in need of an overhaul. Fourteen years after its enactment, it is evident that while the FFG Act contains a number of useful procedures and instruments, it lacks substance and mandatory obligations. Judged against what are arguably its primary objectives - to conserve listed endangered or threatened species, and to ensure that genetic diversity of flora and fauna is maintained - the Act has not been a success.

One of the greatest failings of the Act has been the failure to implement it. For example only a small proportion of the Action Statements have been prepared. No ICOs have ever been made.

LFF believes there are a number of reasons for this, including the following:

- NRE is under resourced;
- a there appears to be a lack of government will to fully implement the FFG Act;
- there is a lack of government transparency and accountability in its decision making under and implementation of the Act;
- the Act is unenforceable; and
- the Act (and actions taken under it) are not required to be taken into account in government decision making under the Act, or generally.

Consequently, NRE should receive appropriate funding to fully implement the FFG Act, and the government commit to NRE fulfilling its obligations under the Act.

However, this of itself is not sufficient. The Act should be enforceable, and NRE should be accountable in its efforts to fulfil its obligations under the Act.

To seek to achieve this, the Act should be amended as outlined in section 5 of this review. These amendments include the following:

- third party enforcement, participation and review rights should be expanded;
- there should be specific timeframes inserted in the Act for NRE and other decision makers to take certain actions, or make decisions;
- NRE and other relevant bodies should be to report annually on progress in implementing the Act; and
- Clear criteria for decision making should be set out in the Act, and decision makers should be required to provide and publish reasons for their decisions.

Finally, the FFG Act should also be taken into account in government decision making, and integrated with the EE Act, and P&E Act. Exemptions from the application of the FFG Act (such as that which occurs by reason of the Forest Produce Harvesting Order) should be removed unless proper EIA and consideration of the FFG Act has first occurred.

Appendix 2

LFF submissions regarding the SFT Bill



21 May 2004

The Hon J Thwaites MP
Deputy Premier
Minister for Water and the Environment
Level 3, 1 Treasury Place
MELBOURNE 3000

By Fax: 9651 1188
9696 4213

Dear Minister Thwaites

SUSTAINABLE FORESTS (TIMBER) BILL 2004

Lawyers for Forests, ("LFF") writes regarding the Sustainable Forests (Timber) Bill 2004, ("the Bill") which was introduced into Parliament last week.

As the Minister is aware, LFF has taken a keen interest in the progress of the Bill, including through submitting its blueprint for reform, ("the Blueprint"). The Bill does not implement the majority of the reforms outlined in the Blueprint. As a result, LFF has serious concerns with the Bill. A number of these concerns are outlined below.

LFF continues to oppose logging in old growth and high conservation value forests. LFF notes that the Bill does not act to prevent such logging. LFF provides its comments on the Bill in the context of seeking to ensure that the Bill implements the commitments made by the Government in Our Forests Our Future and in particular ensures that logging is conducted in accordance with ecologically sustainable development ("ESD") principles, to the extent that this is possible whilst old growth and high conservation value forests are logged.

Analysis of the Bill

LFF understands the Bill purports to implement Our Forests Our Future and in particular to:

- Ensure logging is conducted in accordance with ESD principles;
- Introduce accountability and transparency in the management of Victoria's forests. A key plank of this is increased community participation in forest management; and
- Comply with Competition Policy principles, with the formation of Vicforests.

LFF supports these three policy objectives, ("the three policy objectives"). However LFF believes the Bill will not fully implement the three policy objectives unless the Bill is amended. Nor does the Bill implement a number of commitments made in the second reading speech.

The following is a summary of LFF's major concerns (references to sections are to sections of the Bill unless otherwise stated, and Acts are Victorian Acts unless otherwise stated):

ESD

1. Whilst the Bill does introduce ESD principles, which LFF supports, it is not clear how these will apply to Vicforests. This is of particular concern given that the order establishing Vicforests does not specify that Vicforests should achieve its commercial objectives within an ESD framework.
2. LFF supports the requirement in section 6 of the Bill for the Minister to determine sustainability criteria and indicators for sustainable forests management ("the Sustainability Indicators") and reporting requirements (section 6 refers).
3. However there are serious flaws with the Sustainability Indicators:
 - There is no requirement for regular review of the Sustainability Indicators. LFF believes the Sustainability Indicators should also be reviewed at least every five years.
 - There is no specified time by which the Government must develop the Sustainability Indicators. In this regard, LFF notes that the Government was required to develop Sustainability Indicators under the various Regional Forest Agreements ("RFAs"). However over five years after the first RFA was signed, they are yet to be developed. They must be developed as a matter of priority.
 - In particular, there is no requirement for the Sustainability Indicators to be developed before the first Allocation Order is made. The second reading speech states that the Allocation Order will not be made until after the completion of the Statewide Forest Resource Inventory ("SFRI") and sustainable timber resource planning process by the Department of Sustainability and Environment ("DSE"). However LFF was advised by DSE staff at a briefing session on 12 May 2004 ("the Briefing Session") that the Allocation Orders were in the process of being drafted, will indicate which areas of forest will be available to be logged over the next fifteen years, and will be based on the existing zoning system in place under the Forest Management Plans, ("FMPs") (and presumably also the RFAs).

If ESD principles are to be followed, the SFRI must be completed and the Sustainability Indicators must be developed and in place before any Allocation Order is made. LFF notes that if the Allocation Order is made before these are developed, and based on existing FMPs and RFAs, then the Bill will simply be

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authorising "business as usual" in the management of Victoria's forests. The approach outlined in the second reading speech should be implemented.

- There is no requirement for the Minister to consult with the public in developing (or once developed, in amending) the Sustainability Indicators. LFF notes the Government's commitment to community participation in the development of the Sustainability Indicators.¹ However the community participation must be more than token (and the Government's consultation process during the development of the Bill could be described as token).

LFF believes the community participation process must be specified in the Bill. Otherwise there is no guarantee that meaningful community participation will occur, and again the Bill will simply be authorising "business as usual" approaches to community participation. The appropriate community participation process and the requirements for it are discussed at paragraphs 21-23 below.

- The Bill provides that reporting against the Sustainability Indicators must not be required more than once every five years, and does not specify any minimum reporting requirements. This is inappropriate. Section 6(3)(b) should be amended so that it reads "not more than every five years."
 - Under the Bill, there is no direct requirement for Vicforests to comply with the Sustainability Indicators. As referred to above, this is of particular concern given Vicforests' commercial objectives.
4. If the Sustainability Charter is developed (and, despite a statement in the second reading speech that the Government will develop a Sustainability Charter, the Bill does not make this mandatory) Vicforests is obliged to develop initiatives and targets which respond to and support the objectives set out in the Sustainability Charter. However there is no actual requirement for Vicforests to comply with those initiatives and targets, or penalty for Vicforests for failing to comply. Further LFF understands from the Briefing Session that the Sustainability Charter will consist of unenforceable motherhood statements. Accordingly it appears that the Sustainability Charter may be of little value. Further, if the Bill is amended to require Vicforests to comply with the Sustainability Indicators, then the requirement for a separate Sustainability Charter seems superfluous, and the Sustainability Charter provisions could be deleted.
 5. Again LFF notes that the Bill does not require the Minister to consult with the community in developing the Sustainability Charter. Nor has the Government made any commitment to consulting with the public in developing the Sustainability Charter.
 6. LFF has examined the existing Victorian Forest Management System ("the Victorian FMS") in detail, including the RFAs, the Code of Forest

¹ Minister's second reading speech at page 5.

Practice for Timber Production, ("the Code"), Local Prescriptions for the Code, FMPs, Wood Utilisation Plans ("WUPs") and Forest Coupe Plans, ("FCPs").

7. It believes the documents constituting the Victorian FMS are deficient. In particular:
 - The Victorian FMS does not ensure that proper pre-logging environmental impact assessment ("EIA") is undertaken. Accordingly logging should not be exempt from the operation of the Environment Protection and Biodiversity Conservation Act 1999 (Cwth).
 - Leaving aside the deficiencies in Victoria's biodiversity conservation legislation, the Flora and Fauna Guarantee Act 1988 ("the FFG Act") and its implementation, the Victorian FMS fails to implement the FFG Act. Further, in summary provided logging operations are conducted in accordance with the Victorian FMS, the FFG Act does not apply to those logging operations.² LFF believes that the effective exemption of logging operations from the operation of the FFG Act should not apply whilst the Victorian FMS fails to fully implement the FFG Act and whilst adequate EIA is not required.
8. The Bill does not address the two issues referred to above. In particular, the Bill should be amended to require:
 - the objectives of the FFG Act and any biodiversity protection measures in place under the FFG Act (such as Action Statements) are fully implemented in the Victorian FMS and are taken into account in decision-making under the Bill and by DSE and VicForests in carrying out their functions.
 - proper EIA to be carried out before any action is undertaken which may have a significant effect on the environment (this would include pre-logging flora and fauna surveys to determine the existence of rare or endangered species and ecosystems). Mandatory triggers for EIA must be included in the Bill or the Environment Effects Act 1978.
9. Accordingly, unless the Allocation Order itself involves or requires EIA and consideration of the FFG Act in the manner outlined above, and before logging commences, the Allocation Order should not be used as a basis for land tenure based resource security. It should not simply make available those areas identified as available for logging under the RFAs and FMPs. To do so would be contrary to ESD principles.
10. LFF supports the requirement for a review of the Allocation Order every five years. However the Bill should be amended to provide that the review of the Allocation Order is required to take place before or at the same time as the Minister approves a Timber Release Plan ("TRP") or alternatively that a TRP only be approved if it relates to a period within five years from the date of the last review of the Allocation Order. The Bill should also be amended to provide that the Sustainability Indicators are

² As a result of the Forest Produce Harvesting Order made under section 48(3) of the FFG Act.

taken into account in any review.

11. There is no requirement for the Minister to consult with the public before approving (or once developed, in amending) an allocation order or TRP. This is despite a commitment to public consultation in the preparation of the first Allocation Order.³ LFF believes the community participation process discussed in paragraphs 21-23 should be required before an Allocation Order or TRP is approved or amended.
12. LFF believes that the effect of section 42 of the Bill is that Vicforests will not be able to grant licences for terms of more than five years. LFF believes this is appropriate, and reflects the Government's commitment outlined in Our Forests Our Future not to enter into long term licences, given uncertainty in resource estimates and as outlined in the Vanclay report.⁴ Can you please confirm that this is the intention?
13. The effect of section 106 of the Bill is the Secretary cannot grant licences in respect of vested timber resources – that is timber which has been allocated under a TRP. However, the Bill does not repeal those parts of section 52(1)(a) which allow the Secretary to DSE to grant forest produce licences. The Bill should repeal section 52 as far as it relates to the issue of forest produce licences.
14. LFF commends the Government for introducing sections 27 and 30 of the Bill which in summary provides that the Government does not agree to renew existing licences, nor compensate licence holders if those licences are not renewed. This is appropriate. Following the Vanclay report, it is clear that any system of forest resource allocation should be flexible to allow a reduction in forest produce taken from forests if the levels are found to be unsustainable.
15. Similarly, the Bill should specify that compensation is not payable if the timber made available under an allocation order is reduced.

Accountability and transparency

16. The Government in Our Forests Our Future promised increased community participation in forest management. However the Bill does not include any new mechanisms by which the community is guaranteed participation. Indeed, the Bill proposes to reduce the community participation process specified in the Conservation Forests and Lands Act 1987 ("the CFL Act") for the approval of a Code of Practice. It reduces the community participation process by removing the requirement to appoint an independent panel to consider submissions.
17. The Bill also increases the number of offences that can be committed on public land. As such the effect of the Bill will be to decrease community participation rights.

³ Refer to the second reading speech, page 8.

⁴ Report of the Expert Data Reference Group – Review of Sustainable Yield Rates set under the Forests Act; Professor Jerome Vanclay and Dr Brian Turner 31 October 2001.

18. Sections 93 and 94 (and in particular sub-section 94(4)) are particularly repugnant. Under these sections an authorised officer can direct that obstructions be removed, or if in summary the obstruction is not removed, remove the obstruction and seek to recover the reasonable costs incurred in removing the obstruction. However:

- the Bill in effect arguably provides that the elements of what constitutes an obstruction can be specified in regulations. It is inappropriate to specify matters which may lead to court proceedings being instituted against an individual and affect property rights in regulations instead of an Act of Parliament.
- section 94(4) arguably allows the authorised officer to remove the obstruction even if the person who owns or is responsible for an obstruction has a reasonable excuse for not removing the obstruction. **If clauses 93 and 94 are to remain, a section 94(1)(b) should be amended by adding the words "does not have a reasonable excuse for failing to remove the obstruction" after the words "an obstruction in a State forest."**

19. LFF outlined a number of community participation rights that should be included in the Bill. These include:

- Advertising of proposed decisions.
- Relevant information about proposed decisions made freely and publicly available.
- Specific right of public to make submissions in relation to proposed decisions within a period specified in the legislation.
- Expert scientific input into decision-making.
- Decision-making less administratively based.
- Reasons for decisions given.
- Rights for third parties to apply for review at VCAT of specified decisions on specified grounds.
- Relevant documentation made easily available to the public.
- Annual reports on compliance with the Sustainability Principles and FFG Act requirements provided to a properly resourced ESD Commissioner and made publicly available.

20. None of these suggestions have been incorporated in the Bill. Accordingly the Bill does not implement accountable and transparent government.

21. Whilst not ideal, LFF believes that as a minimum a community participation process similar to that outlined in Part 5 of the CFL Act should be implemented in the Bill, with the requirement for an independent panel to consider submissions. This is no different to the

process followed in the consideration of planning scheme amendments. It is not a "complex process" as stated in the second reading speech.

22. LFF believes the Bill should be amended to require a community participation process for the following decisions, ("the Specified Decisions"):

- Adopting or amending a Code of Practice;
- Adopting, reviewing or amending the Sustainability Indicators, the Sustainability Charter, an Allocation Order or TRP (subject to the proviso raised in paragraph 4 that LFF believes the Sustainability Charter may be superfluous if other amendments are made to the Bill); and
- A review of the allocation of timber resources under section 18.

(In each case, if the proposed amendment is minor or uncontroversial, the proposed amendment should be exempt from the requirement to follow the public consultation process).

23. An appropriate community participation process for inclusion in the Bill must:

- Require advertising of the Specified Decisions, including a requirement to make the draft Code of Practice, Sustainability Indicators, the Sustainability Charter, Allocation Order or TRP as the case requires, available for public inspection and accessible on the DSE website;
- Give the public the right to make submissions within the period being not less than sixty days after the notice is given;
- Require the Secretary to consider all submissions, and either change the draft in the manner requested, abandon the draft, or refer the submissions to an independent panel for consideration;
- The panel should be appointed under Part 8 of the Planning and Environment Act 1987, or alternatively be the Victorian Environment Assessment Council;
- Require the panel to provide a report, with the report made publicly available as soon as it is completed;
- Require the Minister to consider the panel report, and then determine whether to approve or amend the draft Code of Practice, Sustainability Indicators, the Sustainability Charter, Allocation Order or TRP as the case requires; and
- Require the Minister to give reasons for his or her decision on making the decision.

24. Without such a community participation process outlined in the Bill, the Bill will not ensure openness and transparency in decision making.
25. Apart from the reports provided under sections 47 and 48, the Bill does not provide that any reports or the results of any audits must be made publicly available. The Bill should be amended to require reports against the Sustainability Indicators (sections 6(3)(a), 8 refer) and other reports/results following any audit conducted under sections 9,10,12 to be made publicly available.
26. The register containing timber licence details (section 68 refers) should be required to be made available for public inspection.
27. LFF commends the Minister for adopting the Codes of Practice into the Bill by virtue of Division 1 of Part 6 of the Bill, and requiring Vicforests to comply with the Codes of Practice. However:
- the Bill does not provide any penalty if an audit ascertains that Vicforests or a licence holder has failed to comply with any Code.
 - The Bill does not require the Minister to conduct audits of compliance with any relevant Code. It also only requires public release of the audit if adverse findings are made. The Bill should be amended to require the Minister to conduct such audits, and to make those audits publicly available, irrespective of whether adverse findings are made.

Competition Policy

28. LFF acknowledges the progress of the Government in implementing the third of the three policy objectives.
29. LFF assumes the purpose of section 23 is to ensure that DSE will charge Vicforests and recover the full cost of logging. As previously advised, these costs would necessarily include, for example pre- and post-logging coupe surveys of flora and fauna and the costs of maintaining biodiversity. They would also include water costs (including an allowance for loss to aquifers) and the full cost of roading, pest control and fire management costs, and not least recovery of costs of *ecological* sustainability, not just commercial sustainability.
30. The process of setting those fees should be open and transparent, and involve public consultation.
31. The Bill does not clearly specify the role of Vicforests and DSE in forest management. From the second reading speech it appears that Vicforests will undertake "pre-harvest activities including planning and scheduling harvesting operations", "timber harvesting and associated activities in line with the Code of Forest Practices for Timber Production" and "post harvesting activities including regeneration and overseeing coupe rehabilitation."
32. As previously advised:

- DSE and Vicforests' roles should be clearly specified in the Bill to avoid confusion and promote transparency.
- VicForests' functions should be primarily related to managing the commercial sale of wood.
- VicForests involvement in 'forest management' should be limited to the minimum extent possible. In particular, VicForests should not manage the regeneration of logged coupes due to its vested interest in producing commercial crops of timber at the expense of complying with the Sustainability Principles and the ESD principles. DSE not Vicforests should adopt and approve amendments to FMPs, WUPs (if these still exist), FCPs and other Victorian FMS documentation.

Conclusion

In summary, LFF is disappointed that the Bill is short on detail, leaving much of the detail to be outlined in administrative arrangements. Given the history of forest management in Victoria, LFF is extremely concerned that whilst the Bracks Government may promise that it will act to implement the three policy objectives, this will not happen in practice.

In the absence of any meaningful community participation rights specified in the Bill, it appears that the Bracks Government is not prepared to hold itself accountable for implementing the three policy objectives.

LFF seeks an urgent meeting with you to discuss its concerns with the Bill. Please contact Vanessa Bleyer or Andrew Walker on the numbers listed below to arrange a mutually convenient time.

Yours faithfully

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