



21 May 2004

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

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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

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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