LAWYERS for FORESTS

Statement from Lawyers for Forests

Forests Legislation (Amendment) Bill 2002

Introduction

1. Lawyers for Forests, ("LFF") opposes logging in old growth and high conservation value forests. However, the government's policy currently supports such logging. LFF believes that to the extent that such logging does occur in these and other state forests, it should be undertaken in a sustainable manner.

2. The Forests Legislation (Amendment) Bill 2002, ("the Bill") attempts to make the current situation even more unsustainable. In addition, LFF believes that the Bill is fundamentally flawed in the way it is drafted.

3. If this Bill is passed, we suggest that the responsible Minister will become embroiled in endless litigation. The reason is that the Bill contains incurable internal inconsistencies.

4. This statement primarily focuses on one aspect of the Bill, namely the issue of providing 'replacement' forests. Other, equally alarming, amendments are proposed to the Forests Act 1958, which attempt to restrict the public's rights to access, and protest in, state forests.

What does the Bill attempt to do?

5. The Bill proposes that if the area of forest "available" for logging under a Regional Forest Agreement ("RFA") is

reduced in size, then an area of 'replacement' forest is made available to the logging industry.

How can areas of forest "available" for logging be reduced?

6. This 'replacement provision' applies when someone within the executive arm of the State government makes a decision under an existing Act (eg the Forests Act) or when a new Act of Parliament is passed.

7. Any such allocation of land could be reversed by a future government, and no compensation would be payable for so doing. In other words, the Parliament cannot enshrine 'rights' to wood resources as it has sought to do. These rights are inherently subject to change and variation. The Bill is therefore aspirational, rather than effective.

8. The 'replacement provision' also applies when someone within the executive makes a decision under 'subordinate legislation'. This clearly includes Regulations. It is not clear whether 'subordinate legislation' would encompass decisions made under Forest Management Plans, or other relevant regulatory instruments.

9. The Act also tries to make the 'replacement provision' apply when someone takes an action under the Code of Forest Practices for Timber Production. The problems with this approach are explained below.

The inherent conflict in the Bill

10. A fundamental (and incurable) problem with the replacement provision of the Bill is that the RFAs do more than allocate "areas" of land which are "available" for logging.

11. RFAs actually accredit Victoria's regulatory system. 'Areas' available for logging are therefore defined by a

number of criteria, including the geographic location, as well as the restrictions contained in other regulatory instruments applicable to those areas.

12. In exchange for Victoria agreeing to implement its management system, the Commonwealth agreed under the RFAs not to use its Constitutional power to intervene in Victoria's system of forests management.

13. Accordingly, if administrative action is taken under an existing Act of Parliament or under the Code of Forest Practices, that action will, in all likelihood, be in accordance with the RFA. If it is not in accordance with the RFA, then the Commonwealth may terminate the RFA.

14. For example, if the 'replacement area' is *not* in a conservation zone, then making it 'available' does not achieve anything. If, on the other hand, it must be taken out of a conservation zone, then the State will, in all probability, be in breach of its obligations under the RFAs.

15. The result is that the Bill actually achieves nothing. The reason is that an area will not be 'available for timber harvesting' under the RFA unless it complies with Victoria's regulatory instruments, including the Code of Forest Practices, existing Forest Management Plans, Acts of Parliament and so on.

16. The flaw in the Bill has resulted from the drafter of the Bill taking a very *narrow* view of 'the area available for timber harvesting' under an RFA. This phrase cannot mean the areas which are simply outside of nominated conservation zones. It must have a *broader* meaning, namely those areas which are 'available' once all of the regulatory steps have been completed. These regulatory steps include ensuring that the 'area':

a. is within a General Management Zone;

b. has been notified as an available coupe on a Wood Utilisation Plan; and

c. has been made 'available' for logging under the Forest Coupe Plan, after taking into account the Code of Forest Practices.

17. Unless the broad interpretation is adopted as outlined above, then the Bill will permit actions to be taken by the Minister which are clearly in conflict with Victoria's obligations under the RFAs themselves. If Victoria does breach these obligations, then the Commonwealth may terminate those agreements. This would not provide any resource security as the Commonwealth could then bring the RFA areas under the *Environment Protection and Biodiversity Conservation Act* 1999, reintroduce export controls or take other legislative action.

An example of the inherent problems in this Bill

18. The following example illustrates that the replacement provision of the Bill, far from providing certainty for stakeholders, may make the regulation of Victoria's forests mired in even more complexity and uncertainty than is presently the case.

19. The RFAs allocate areas available for logging on the basis that, among other things, the Code of Forest Practices for Timber Production will apply. The Code seeks to ensure, among other things, that buffers are provided on streams and rainforest. In fact, one of the primary reasons why the Commonwealth accredited Victoria's forest management system under the RFAs was that Victoria had regulatory tools in place, such as the Code of Forest Practices, to ameliorate certain environmental impacts of logging activities.

20. What the Bill says is that, if this regulatory tool is used to do what it is supposed to do (ie help protect streams etc), then another area of forest should be made available to the timber industry! That is, the Bill seeks to use the industry's own code of self regulation, which it relied upon to get Commonwealth accreditation under the RFAs, to secure more areas for logging. This plainly conflicts with Victoria's obligations under the RFAs.

Constitutional Issues?

21. In addition to the problems referred to above, the Second Reading Speech refers to the potential for constitutional conflict if a compensation provision is included. It is assumed that the speech refers to a potential conflict between State and Commonwealth laws under section 109 of the Commonwealth Constitution.

22. However, it is difficult to see how there could be a constitutional difficulty with a stipulation that the State government must provide compensation for its own Ministerial action. Such a provision would not appear to conflict with any Commonwealth legislation, present or future. However, it would be virtually meaningless as a future Victorian government could repeal the Act in any event.

23. On the other hand, if a future Commonwealth Parliament made all aspects of the RFAs legally enforceable, then the provision in the Bill requiring 'replacement' forest may be in conflict with the Commonwealth law.

Conflicts with other rights

24. The proposed Bill is extremely premature given the complexity of the task which it sets out the achieve. Prior to amending the Forests Act in the manner proposed, it is essential that a comprehensive review be undertaken to

determine the way it impacts on other rights, and an analysis of the manner in which it interrelates with other legislation.

25. A large issue is, of course, whether the provisions of the Bill would prevail over other Acts of Parliament or other provisions of the Forests Act itself. For example, is it intended to prevail over the rights of bee keepers? Is it intended to prevail over legislation regulating water rights? How does it interrelate with the *Flora and Fauna Guarantee Act* 1988? These issues do not appear to have been addressed. At the very least the Bill should contain a provision which seeks to reconcile these inevitable conflicts.

Resource security legislation

26. LFF opposes this type of resource security legislation because it does not conform with a precautionary principle and does not recognise that State forests are publicly owned, and available for multiple purposes including the protection of environmental values.

27. The Department of Natural Resources and Environment, ("DNRE") is not in a position to make a long term resource commitment to the logging industry, as is proposed under the Bill. Our knowledge of the extent of forest resources is insufficient to make such a commitment.

28. This position is supported by Professor Vanclay's and Dr Turner's report, ("the Vanclay report") to the Peak Strategy Group appointed to advise the Minister on the appropriate Sustainable Yield Rates in October 2001. The State Government has announced it will accept the recommendation in the Vanclay report to reduce the Sustainable Yield Rates on average by approximately

30%. (Although has not indicated how it proposes to do so). [1]

29. The initial resource estimation on which the RFA agreements are based are flawed, and should not be enshrined and used as a basis for land tenure based resource security as proposed in the Bill

Competition policy and financial mismanagement

30. The State Government can sell public land, but to set it aside for permanent use by a private industry without receiving payment for so doing is a novel step, and completely at odds with competition policy. It would amount to financial mismanagement.

Definition of replacement area

31. The definition of the replacement area is problematic. It seeks to place a mandatory requirement on the Minister to find a replacement area. In reality, such an area may not exist. More specifically, it may not exist within the constraints of the RFA. Finally, there is no requirement that the replacement area be determined by applying a principle of no net loss of conservation values.

Mechanisms for review

32. The mechanism proposed for the review of Sustainable Yield Rates is too cumbersome. Section 52D of the Forests Act as amended by the Bill will require the Minister to give one years notice before **commencing** (not implementing) any review of the Sustainable Yield Rates. The notice period is excessive.

[1] In 2001-2002 the State Government reviewed sustainable yield rates. Professor Vanclay and Dr Turner were appointed to review the Sustainable Yield Rates and advise the Peak Strategy Group appointed to advise the Minister. In releasing its "Our Forests, Our Future Policy" the Labor State Government accepted a number of recommendations contained in the Vanclay report.

Changes from “lawful” to “authorised”

33. Further, the Bill alters the requirement from "lawful" forest operations to "authorised" forest operations and introduces the concept of a "safe working zone". The Bill thereby makes it an offence to obstruct a forest operation, whether or not it is a lawful forest operation.

34. These provisions are flawed for the following reasons.

35. There have now been numerous (hundreds) of cases where logging operations have been held to be unlawful. Protesting against unlawful forest operations is often one of the only ways that the unlawfulness of the operations can be brought to the attention of the DNRE, the government, and the public.

36. The DNRE has demonstrated a failure to observe the Code and other requirements for logging. People ought to be able to hinder unlawful logging. Now, the Secretary, would be permitted, at the stroke of a pen, to declare "safe working zones" and to "authorize" logging in them.

37. The community (and the media) would not be able to see what was done.

38. The community would not have more limited rights to remedy and redress the unlawfulness of the logging (a frequent event).

39. The DNRE could, in practice, by this means alone, override all the flora and fauna guarantees which are supposed to be observed in relation to the forest.

40. There is in the Bill no geographic limit to the extent of these "safe working zones". They could (on past performance) be huge. When Forest Operation Zones

were declared under the Kennett government, some were up to 50 kilometres by 30 kilometres. This effectively excludes people from public forests.

41. The provisions of this Bill are akin in many ways to granting private property rights over public forests. The community should not tolerate such an approach to their forests.

Conclusion

42. This Bill is internally inconsistent and simply unworkable.

43. The industry and the DNRE have together created the "security" problem by knowingly logging more than was available. So it is bizarre to suggest that this should be 'cured' at the expense of the environment.

44. Nevertheless, if the government, opposition and independent members of Parliament are truly committed to providing 'security' in accordance with RFAs, then it would be anomalous to make only one aspect enforceable, namely 'resource security'.

45. LFF acknowledge that the Forests Act needs a major overhaul. At present the RFAs are not do not fetter the power and responsibility of the Victorian Parliament and the Victorian Government to properly manage and protect State forests. In fact, the whole system of regulation of the logging industry is reliant on management plans, guidelines and codes which are difficult to enforce. This leaves the DNRE open to making executive decisions which compromise the environmental values of forests and undermine the intent of the RFAs.

46. If all aspects of the RFAs were made enforceable, a measure of security would be provided for both the industry and for those seeking to ensure that Victoria's

remaining forests are protected for their conservation values, and where appropriate, available for use by all Victorians.

47. It is noted that this statement does not endorse the current RFAs as being acceptable instruments to regulate our forests, as we have grave concerns over the scientific criteria behind the RFAs, the consultation process, the scant consideration given to the non-woodchip/timber values of the forests, and consequently the outcomes of these agreements.

48. In summary, it is noted that complete resource security cannot be achieved by way of legislative action. These forests are publicly owned. They are not a private resource. They are also supposed to be available for a mix of uses. Accordingly, securing the 'land base' for logging, while ignoring other values and uses, is totally inappropriate. Having said that, there is nothing to prevent governments from providing compensation packages to the workers from time to time in order to help them ease out of this unsustainable industry.

49. LFF would be happy to work with the government, opposition party, independents and other stakeholders in reviewing the provisions of the Forests Act. However, introducing ad hoc and ill prepared legislation such as the present Bill will only make the situation less secure and more unworkable for all stakeholders.