

Submission to
the State Government of Victoria
and
the Department of Natural Resources and
Environment
on the
Timber Licence Renewal Project

Lawyers for Forests, Inc.
PO Box 550
Collins Street West
Melbourne 8007
www.lawyersforforests.asn.au
info@lawyersforforests.asn.au

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1. Introduction

Lawyers for Forests, Inc. is an association of legal professionals that is working to promote the conservation and better management of Victoria's native forests.

LFF strongly believes that old growth and high conservation value forests should not be logged. However, if licences are issued to permit such forests to be logged, then LFF writes to:

- a) express its concerns over any breaches of section 52A of the Forests Act 1958 (Vic) (the **Act**);
- b) urge the Government to act to prevent breaches of the Act, Codes of Practice and other relevant controls on logging operations, including the terms of the licences, (the **logging controls**);
- c) urge the Government to continually review the sustainable yield rates; and
- d) urge the Government to grant licences which are flexible, and permit the Government to terminate them if it adopts a policy not to allow logging in old growth and high conservation value forests, or amend them if the sustainable yield rates are amended.

We also write to express our concerns with the process and constitution of the Timber Licence Renewal Project, (the **Project**). We consider that:

- a) given the importance of the Project's review, the process of the Project has not been sufficiently transparent; and
- b) the constitution of the Peak Strategy Group, (**PSG**) could not be called impartial.

We note that the Government was elected largely on the promise of accountable government. We believe the process adopted by the government does not honour this commitment. Furthermore, Crown land is a public resource and decisions affecting its use should be open, transparent, and involve appropriate public consultation.

We understand that that the terms of reference for the Project were described in the first newsletter of the Project and that this was the only publicly available statement on this issue. The first newsletter set out the Project's process and the groups established under the Project but did not make any clear statement as to the terms of reference of the Project. When we inquired about the Project we were told that "there are no public forums planned for this project" and that there would be "not be a call for submissions". We were further told that there would only be limited consultation with "interested parties". The first newsletter of the Project dated 1 June 2001 also referred to the restricted nature of the consultation. One of the Project groups, the Expert Data Reference Group was said to be required to "consult with environment stakeholders, *as determined via discussions with the PSG*" [*emphasis added*].

Our understanding of the Project and the newsletters make it clear that the Project's process was not sufficiently transparent when it is considered that it was reviewing the basis of the data (in particular the basis on which the sustainable yield rates are set) on which licences are granted for the whole of Victoria. The Project indicated

that it was prepared to receive submissions from only those groups, such as our own, that knew about the Project and specifically sought to make a submission. LFF believes that Project did not consult widely but only with those it considered “interested parties.”

We note the issue of the constitution of the PSG. It could not be said that the constitution gives the appearance of impartiality. The first newsletter of the Project stated that the PSG consists of two representatives of the Department of Natural Resources and Environment; Graham Gooding from the Victorian Association of Forest Industries; and Michael O'Connor from the Construction, Forestry, Mining and Energy Union. There is no one on the PSG representing the interests of the environment.

2. Any breaches of section 52A of the Act

2.1 Section 52A of the Act

Section 52A of the Act provides

“(1) The Secretary must ensure that, for each timber supply period, the total hardwood sawlog supply levels from State forest in a forest management area equals or is within the permitted margin of the total of the sustainable yield rates for that area during that period.

(2) For the purposes of sub-section (1), the permitted margin for a forest management area in relation to a timber supply period is 2% above or below the total of the sustainable yield rates for that area during that period.”

The “hardwood sawlog supply level” is defined as “the volume of hardwood sawlogs authorised to be taken under licence or permit issued under section 52”. The sustainable yield rates for each forest management area appear in the third schedule to the Act.

Quite simply our concern is that no hardwood supply levels exceed the sustainable yield rates by more than 2% so as to cause the Government to infringe section 52A of the Act. The licences should be issued and drafted to ensure that section 52A is not infringed. Otherwise the Minister’s decision to issue the licences may be open to review.

We have been told that this has already occurred in one Forest Management Area, the Wodonga Forest Management Area. We have not sighted the figures and therefore do not assert that the Government has infringed section 52A of the Act. Having not seen the figures we give no more weight to the comments which have been made to us with respect to the Wodonga Forest Management Area than is reasonable in the circumstances. The focus of this submission is on the future rather than past mistakes (any breach with respect to Wodonga). We ask the Government for a commitment to act to remove or significantly reduce the possibility of breaches occurring in the future. The possibility of a past breach (or breaches) adds impetus to the need for the Government to achieve this end.

The Government can remove or significantly reduce the possibility of infringing section 52A of the Act in the future by:

- a) ensuring that licences and permits (**licences**) do not total amounts in excess of the sustainable yield rates specified in the Act at any time during a timber supply period; and
- b) monitoring the activities of the licensees to determine whether any breaches of the licences occur, and;
- c) appointing an independent auditor (authorised to investigate advice from the public) to monitor logging activities to ensure that breaches of the logging controls do not occur.

The above should not be taken as an endorsement of the logging controls. We believe these are inadequate and should be the subject of a separate review.

2.2 Licences not to exceed the sustainable yield rates

Below we discuss the need for the Government to continue to collect accurate data and make appropriate assumptions on the quantity of hardwood of different grades in forest management areas. The result of the calculations made by using such data and assumptions should then be used to set appropriate sustainable yield rates. If these new sustainable yield rates differ from those appearing in Schedule 3 of the Act the Act should be amended, and the licences be capable of review and revocation.

If the continued collection of data and the review of assumptions leads to a reduction of the sustainable yield rate for any forest management area the Government will need to revisit the licences granted with respect to that area. This means that it will be crucial for either:

- a) the term of the licences to be sufficiently short and flexible to give the Government the opportunity to reduce the volume of hardwood sawlogs authorised to be taken during the timber supply period. If short term licences were issued on the basis of the current sustainable yield rates and the rates were subsequently reduced then future licences could be issued for lesser volumes; or
- b) if the term of the licences is 15 years (the timber supply period), they include revocation or variation rights triggered by amendment to the sustainable yield rates in the Act.

The licences should also contain a clause granting the Government the right to terminate the licence if the Government changes its policy on logging old growth and high conservation forests.

We note that option (b) may involve issues of compensation. We have not considered these issues in detail but recommend that the Government draft future licences to the extent permissible under law to exclude liability for compensation for any revocation or variation of licences in these circumstances.

2.3 Monitoring

The Government should ensure that the monitoring of the activities of the licensees (including monitoring by the independent auditor referred to above) is sufficient to detect any breaches of the licences and logging controls that occur.

2.4 Options available to the Government where it detects a licence infringement

We have not had the opportunity to review the terms of the proposed licences. We make a number of comments on the terms and conditions that should be incorporated into the new licences. Too often a contractual obligation is used as an excuse for ducking environmental responsibility. The licences should be drafted in a manner which does not bind the Government to environmental values the Government considers reflect the community aspirations today, but do not tomorrow.

Where the Government detects an infringement of a licence with respect to volumes taken the Government may, depending upon its rights, powers and authorities, under the logging controls and under the licence be entitled to:

- a) require the licensee to rectify the breach; or
- b) fine the licensee; or
- c) terminate the licence.

We expect that the Government would pursue these options if a long term licensee breached the licence by logging more hardwood than permitted, or otherwise breached the licence. We would also expect that the licences are drafted so that such options are open to the Government.

Also, when considering applications to grant licences to persons whom had infringed a previous licence the Government should take into account any breaches of that applicants' previous licence. Such a consideration would be relevant to the Government's decision as to whether or not to grant a new licence.

Clearly the Government will have greater control over the amount of hardwood taken where the terms of licences are short. The Government can better control the amount of timber removed from forest management areas where it issues short licences and reviews past compliance of applicants rather than seeking to penalise any long term licences whom have breached their licence during a licence period.

3. Continual review of the sustainable yield rates

3.1 The basis for the current sustainable yield rates

We are concerned that the sustainable yield rates which currently appear in Schedule 3 of the Act may not be based upon sufficiently accurate data and appropriate assumptions and methodologies. Similarly to the issue with logging in the Wodonga Forest Management Area we have not sighted information which establishes that the data is not accurate or that the assumptions and methodologies are inappropriate.

Instead we urge the Government, as a general principle, to continually collect data and review the assumptions and methodologies in order to constantly improve them. It is only reasonable to set the sustainable yield rates where a good inventory of hardwood forests is available.

The data, assumptions and methodologies should be made publicly available to ensure transparency of government.

3.2 Process to make any necessary variations to licences after a change to a sustainable yield rate.

An obvious outcome of reviewing the data and assumptions is that it is foreseeable that some of the sustainable yield rates which appear in Schedule 3 to the Act may need to be amended from time to time. Where Parliament passes such an amendment the Government will need to review the licences which it has granted. This is a process issue as well as a legal issue. We anticipate that the Government would implement processes to enable it to review all relevant licences where one of the sustainable yield rates was amended. The legal issue is that the sustainable yield rates were reduced the Government may need to vary or revoke licences if it had granted licences authorising the taking of volumes which would cause it to offend section 52A of the Act. The licences should be drafted to permit such variation.

As an ancillary point we note that the reference in sub section 52A (2) to 2% “below” the margin is problematic. It requires the Government to ensure something over which it has no real control. The Government can not require the private sector to extract hardwood, rather it can and does permit such activity. If the Government is to ensure that the total hardwood sawlog supply level is no more than 2% *below* the total sustainable yield rate then it is obliged to actively encourage the private sector to log hardwood. We recommend that this anomaly be rectified and it may be convenient to do so at the time of passing the next set of amendments to the Act.

4. Conclusion

In conclusion we:

- ask the Government to implement measures to ensure there are no breaches of the logging controls and in particular the contractual obligations of licensees;
- urge the Government to continually review the sustainable yield rates and amend the Act accordingly; and
- ask that the Government issue sufficiently flexible licenses. This can be achieved by granting shorter licences or including adequate variation and revocation rights in the longer licences.

Lawyers for Forests, Inc.
7 December 2001