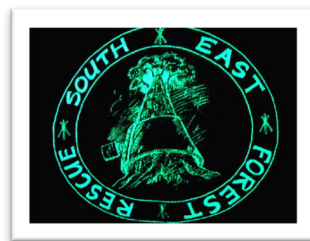


Inquiry into Climate Change and Biodiversity.

‘Native Forests as Nationally Important Ecosystems’



Climate change has made it critical that we take action to maintain the health of Australia's unique biodiversity, building the resilience of Australia's natural environment in a changing climate relies fundamentally upon native forest protection.

House of Representatives Standing Committee
on Climate Change, Environment and the Arts,
PO Box 6021 Parliament House
CANBERRA ACT 2600

ccea.reps@aph.gov.au

Re: Inquiry into Climate Change and Biodiversity

Dear Committee,

South East Forest Rescue welcomes the opportunity to provide information to the inquiry and our comments on the terms of reference below. It is on the public record that South East Forest Rescue calls for indigenous ownership of all public native forest, a complete stop on logging of endangered ecological communities, complete transfer of wood product reliance to the plantation timber industry and salvage recycled hardwood timber industry, a single authority for national native forest stewardship modelled on the New Zealand example, and an immediate nation-wide program of catchment remediation and native habitat re-forestation. We stand by our commitment to native forest protection and take all opportunities presented to advocate for native forest justice. We thank the committee for consideration of our representation to this inquiry.

Terrestrial, marine and freshwater biodiversity

Our *a priori* position is that the essential component of well-being is a healthy forested ecosystem. A degraded or depauperate native forest ecosystem affects all terrestrial, marine and freshwater biodiversity values to some extent.

The number of threatened species, threatened populations and ecological communities increased significantly since the Regional Forest Agreements were signed, and many threatened and endangered flora and fauna species are at extreme risk from current native forest logging operations. The reserve system in place to date, along with the off-reserve protection measures of the Integrated Forestry Operations Approvals, are neither comprehensive, representative, or adequate to meet the needs of threatened species survival. The number of threatened plant and animal species, and the number of endangered ecological communities in NSW between 2001 and 2009, threatened animal species increased by 21% in that time to reach 353 species, the number of threatened plant species grew by 23% to 663 species and the number of endangered ecological communities grew by 115%, therefore there were 101 threatened communities in 2009.¹ The Scientific Committee's figure for NSW species, populations or ecological communities threatened with extinction in 2011 is 1078.² This figure, when compared to the 1998 figure of 868 is the most alarming indication of the RFAs effect on our native forest ecosystems and environment.³ There are currently 36 key threatening processes listed in NSW. When the RFAs were enacted there were just eight.

¹ See Talina Drabsch, 'A Statistical Portrait of the Environment in NSW' NSW Parliamentary Library Research Service, February 2011, (online) <[http://www.parliament.nsw.gov.au/Prod/parlment/publications.nsf/0/5ED2A6066A06121ECA257839007C6E6B/\\$File/Environment+Paper.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/publications.nsf/0/5ED2A6066A06121ECA257839007C6E6B/$File/Environment+Paper.pdf)>.

² See (online) <<http://www.threatenedspecies.environment.nsw.gov.au/index.aspx>>. last accessed 22/7/11.

³ For 2000 and 2003 figures see (online) <http://www.environment.nsw.gov.au/soe/soe2003/chapter6/chp_6.3.htm#6.3.69>; for 2006 figures see (online) <http://www.environment.nsw.gov.au/soe/soe2006/chapter6/chp_6.3.htm#6.3.71>.

ESFM Criteria and Indicators⁴

KEY THREATENING PROCESS	PLAN STATUS
	2000/2001
Anthropogenic Climate Change	Planning not commenced
Bushrock removal (as described in the final determination of the Scientific Committee to list the threatening process)	Initial planning
High frequency fire resulting in the disruption of life cycle processes in plants and animal and loss of vegetation structure and composition.	Initial planning
Invasion of native plant communities by <i>Chrysanthemoides monilifera</i>	in preparation
Loss and/or degradation of sites used for hill-topping by butterflies	planning not commenced
Predation by <i>Gambusia holbrooki</i> Girard, 1859 (Plague Minnow or Mosquito Fish) (as described in the final determination of the Scientific Committee to list the threatening process)	in preparation
Predation by the European Red Fox <i>Vulpes Vulpes</i> (Linnaeus, 1758)	draft exhibited
Predation by the Feral Cat, <i>Felis catus</i> (Linnaeus, 1758)	planning not commenced
TOTAL NUMBER OF KEY THREATENING PROCESSES	8

Connectivity between ecosystems and across landscapes that may contribute to biodiversity conservation

One of the post-RFA additions to the endangered listing status within the south coast of NSW region has been the Greater Gliders of Congo-Bingie area in coastal Eurobodalla. The problem of isolation being due to historic agricultural land-clearing, this population lives within an island of coastal forest, trapped with no linkage to the foothill and escarpment forests to the west. This has been known for many years yet no mechanism has arose to remedy this broken habitat link. There needs to be achievable incentives in place for landholders to realise the benefits of restoring habitat corridors.

Another ongoing example is the threat by Forests NSW to conduct native forest logging operations in compartment 2069 of Bermagui State Forest. It is recognised that the only two remaining groups of koalas resident in south east NSW live either side of this one native forest habitat corridor that compartment 2069 forms part of. The government is not dealing honestly with the community if it continues with erroneous statements that there will be no impact on koala population viability from this proposed operation. Many other compartments also containing koala habitat are listed on Forests NSW Plan of Operations for this financial year.

How climate change impacts on biodiversity may flow on to affect human communities and the economy:

Australia's biodiversity in all its variety: ecosystems, species and genus plays a vital role in sustaining life on Earth, as plants, animals and living systems interact with the physical environment powered by the sun's energy. We, as human beings, are an integral part of the planet's biodiversity. Our lives depend on it and we have a responsibility to protect it. We respect and support the role of Australian Indigenous peoples in caring for country in the past, present and future.

We see protecting native forests and biodiversity as an essential part of tackling human-induced climate change. It is the Earth's biodiversity that endows nature with its resilience and adaptive capabilities, and simultaneously, provides large permanent carbon stocks that are essential to slowing global warming. The protection of all remnant native forest is an essential measure in curbing climate change impacts.

⁴ NSW Resource and Conservation Division, 2004 *ESFM Criteria and Indicators Manual Report*. Upper North East, Lower North East and Eden Region of NSW, Department of Infrastructure, Planning and Natural Resources. Sydney, Australia. Appendix H.

Nationally Important Ecosystems

This is about recognising that the amount of greenhouse gas emissions from cutting down trees is very significant. The world puts a lot of carbon into the atmosphere because people cut trees down [rather] than preserve them. And we know that deforestation is a significant driver of greenhouse gas emissions. [We] are about looking at ways in which we can preserve these forests. It's in our national interest to find ways to do that because these forests put carbon into the atmosphere when they are cut down.

Penny Wong, Minister for Climate Change (Cth), 2010.

The Australian native forest industry pretence of implementing Ecologically Sustainable Forest Management has failed, is corrupt, and has not delivered on obligations. These unacceptable outcomes are at the expense of the current and future generations and are to the detriment of our nationally important flora and fauna ecosystems.

On the South Coast of New South Wales thousands of hectares of remnant native forests are being clearfelled every year. The Forestry Commission of NSW, trading as Forests NSW, has descriptions for these practices varying from 'Single Tree Selection - Heavy' to 'Australian Group Selection' to 'Modified Shelter Wood', yet they all amount to clearfelling or patch clearfelling on the ground.⁵ Eighty five percent of trees felled are turned into woodchips, either at the Eden chipmill or at the various saw mills on the South Coast and then trucked down to the chipmill.

We commend the Commonwealth's statement from the Clean Energy Australia Plan pp149 – 158 Table 7: 'Land Sector Measures' that the government will increase incentives for the cessation of logging in native forests.

Old-growth native forest, rainforest and mature age native forests are being logged at an unsustainable rate.

To meet wood supply commitments, the native forest managed by Forests NSW is being cut faster than it is growing back.⁶ It has been clearly reported that Forests NSW have continuously logged over ecologically sustainable limits since the implementation of the Regional Forest Agreements ("RFAs"). This is immoral and uneconomic.

Native forestry operations in areas covered by RFAs must be subject to an independent environmental assessment that is scientifically sound and rigorous. The scientific processes used for the RFAs was politically compromised, the established Joint ANZECC/Ministerial Council on Forestry Fisheries and Aquaculture National Forest Policy Statement Implementation Subcommittee ("JANIS") criteria for forest conservation were not reasonably applied. There are large areas of high-value conservation forest that would have been reserved if the original RFA criteria for forest conservation had been applied in good faith.⁷

The current government RFA reporting approach adopted is perverse, capricious, and lacking in material substance, this has resulted in comprehensive community dis-endorsement of the regime. If the scope or terms of reference are too narrow in a process, the process will be flawed and a successful outcome cannot be reached. This is further indication that the current RFA policy is irrational and must be subject to reform as a matter of urgency. The lack of openness and transparency of both Forests NSW and the native forest industry is, in our view, verging on corrupt.⁸

The extent to which RFA milestones and obligations have been met, the results of monitoring of ESFM sustainability indicators, and the performance of the native forest logging industry under the RFAs is

⁵ See photos on p5 of this document.

⁶ Performance Audit 'Sustaining Native Forest Operations' Auditor-General's Report, (2009); "reviews of yield estimates for the southern region, due in 2004 for Eden and 2006 for Tumut and the south coast, have not been completed".

⁷ See above n 1.

⁸ See *Watt v Forests NSW* [2007] NSWADT 197; see also *Digwood v Forests NSW* [2009] NSWADT 107.

disingenuous and exceedingly below satisfactory. The performance of Forests NSW 'implementation' of the RFAs in meeting specific milestones has been an abject failure, consistently late, and professionally inadequate. Current state management of the native forest estate has gone beyond its scope as the public caretaker, has broken its pact with the community, and is needing immediate and frank reform.

There is a dis-connect within the native forest timber industry in that it has exerted undue influence to ensure desirable outcomes for its profit margins and shareholders at the expense of the current and future generations of the State. This is immoral.

We recommend the committee endorse the immediate enactment of clause 8 of the RFAs, for which the grounds have been triggered, giving effect to ending the RFAs. The solution is policy-ready with the Biodiversity Fund as the key to effective transformation.

An assessment of whether current governance arrangements are well placed to deal with the challenges of conserving biodiversity in a changing climate:

Current governance arrangements are insufficient to deal with the challenges of conserving biodiversity at present, and will be overwhelmed by the compounding pressures of a changing climate. In our view this is due to the Commonwealth ignoring the vast environmental damage caused by logging of native forests.

On the 10th anniversary of the Convention on Biological Diversity, in 2002, Australia and other parties adopted the 2010 Biodiversity Target: to reduce significantly the rate of biodiversity loss at global, regional and national levels. The Target was subsequently endorsed by the United Nations General Assembly and Incorporated into the Millennium Development Goals.

Australia failed to achieve its 2010 Biodiversity Target. We are experiencing an extinction crisis with ongoing major threats to terrestrial, freshwater and marine environments. Australia's Terrestrial Biodiversity Assessment 2008 found that existing threats to biodiversity are rapidly escalating and that climate change will compound these pressures further. It is now well documented that Australia is facing a biological catastrophe.

Australia can avert this impending disaster. As a nation, we can halt the species extinction crisis, reduce global warming, maintain and restore vital Indigenous cultural connections, and expand jobs and economies in rural, regional and remote areas. It requires the Australian Government, in concert with the community, all levels of government, and business, to take urgent, committed action.

Strategies to enhance climate change adaptation, including promoting resilience in ecosystems and human communities & Mechanisms to enhance community engagement:

We call upon the Australian Government to act decisively to fulfill its international and national obligations to protect biodiversity. Specifically the Australian Government must:

1. Follow New Zealand's example and facilitate the cessation of native forest logging.
2. Acknowledge the critical importance of safeguarding biodiversity as part of Australia's climate change response and commit to correspondingly urgent action to address the systemic drivers of biodiversity loss. In so doing, due recognition should be given both to the threat that global warming poses to biodiversity and ecosystems, and to the vital role these have in mitigating dangerous climate change;
3. Substantially increase investment in biodiversity and ecosystem protection, restoration and management to at least \$9 billion over the three years to 2012 and establish an independent widely consultative process into future funding and stewardship of Australia's, terrestrial, aquatic and marine biodiversity;
4. Restore and increase the capacity for publicly funded biodiversity research, auditing, monitoring, accounting and communication, including through an expanded independent Land, Water and Biodiversity authority.

REPRESENTATION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE INQUIRY INTO CLIMATE CHANGE & BIODIVERSITY



South East Forest Rescue 2011



INTRODUCTION

This representation is informed by active monitoring and auditing of the ongoing operations of native forestry management since the *Forestry and National Park Estate Act 1998* (NSW) (“FNPE Act”) was voted through the NSW Legislative Council by the Labour government and Coalition opposition. That evening in November 1998 marked the point where the NSW community lost the right to affect what happened to its native forest environment.

The conclusions set out below are based on extensive research and on-ground examination of the implementation or non-implementation of the RFAs and Integrated Forestry Operations Approvals (“IFOAs”) on unprotected native forest mainly in the Southern and Eden regions of NSW, but also the whole of New South Wales, Victoria, and Tasmania since the year 2000.

Definition of Ecologically Sustainable Development

Before proceeding, erroneous and mistaken definitions of Ecologically Sustainable Development (“ESD”) must be clarified. The definition of ecologically sustainable development had its origins in the report of the World Commission on Environment and Development, *Our Common Future*.⁹ Development was defined as sustainable if:

It meets the needs of the present without compromising the ability of future generations to meet their own needs.

In the international community the term is ‘sustainable development’. In Australia Bob Hawke had need to place the word ‘ecological’ in front of the phrase as developers believed they now had carte blanche to demolish the environment.¹⁰ Thus the term is now defined in Australia as development that is ‘ecologically’ sustainable.

The RFAs state that their purpose is to provide for the ecologically sustainable management and use of forested areas in the regions.¹¹ Relevantly the definition currently in place for NSW is contained within the *Protection of the Environment Administration Act* at s.6(2):

Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

- (a) (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
- (ii) an assessment of the risk-weighted consequences of various options,
- (b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
- (c) conservation of biological diversity and *ecological integrity*—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration.

There is much uncertainty on the effects of climate change, but one of the certainties is that deforestation is one of the biggest causes.

The loss of natural forests around the world contributes more to global emissions each year than the

⁹ The World Commission on Environment and Development, ‘Our Common Future’ The Brundtland Report, (1987) p8.

¹⁰ Harris and Throsby, ‘The ESD Process: Background, Implementation and Aftermath’ (1997) a paper presented at a workshop ‘The ESD Process Evaluating a Policy Experiment’ Hamilton and Crosby [eds] Academy of Social Sciences in Australia; Hawke R J, ‘Our Country Our Future’ (1989) (Statement on the Environment by the Prime Minister of Australia), Canberra: Australian Government Publishing Service.

¹¹ *Regional Forest Agreement for Southern New South Wales between the Commonwealth of Australia and the State of New South Wales* April 2001, Recital B (b).

transport sector. Curbing deforestation is a highly cost-effective way to reduce emissions; large scale international pilot programmes to explore the best ways to do this could get underway very quickly.¹²

The Stern Review goes on to state in Annex 7f:¹³

Deforestation is the single largest source of land-use change emissions, responsible for over 8 GtCO₂/yr in 2000. Deforestation leads to emissions through the following processes:

The carbon stored within the trees or vegetation is released into the atmosphere as carbon dioxide, either directly if vegetation is burnt (i.e. slash and burn) or more slowly as the unburned organic matter decays. Between 1850 and 1990, live vegetation is estimated to have seen a net loss of 400 GtCO₂ (almost 20% of the total stored in vegetation in 1850).¹⁴ Around 20% of this remains stored in forest products (for example, wood) and slash, but 80% was released into the atmosphere. The removal of vegetation and subsequent change in land-use also disturbs the soil, causing it to release its stored carbon into the atmosphere.¹⁵ Between 1850 and 1990, there was a net release of around 130 GtCO₂ from soils.

Also a definition of 'CAR' is in order. The original definition was:

Comprehensiveness: which refers to the extent to which a reserve system contains samples of the major forest ecosystem types in a region.

Adequacy: entails a suite of considerations that enable an evaluation of the extent to which the long term ecological viability of conservation values is ensured.

Representativeness: assesses the extent to which the variation and diversity within each major forest ecosystem is protected.¹⁶

There is an obvious disjunction between what the native forestry industry consider to be 'best practice' and what independent scientists, academics and eighty per cent of the community believe is sustainable. Forests NSW seem to be oblivious to the word 'ecologically'. Given what is now known on greenhouse gas emissions and forest degradation Forests NSW would have difficulty arguing that their practices are sustainable. The loss of carbon sinks and species yet to be discovered will affect future generations.

The notion that the CAR Reserve System is genuinely based on the principles of Comprehensiveness, Adequacy and Representativeness is false, as the evidence of declining populations of forest-dependent threatened species does not support the Government's argument. The output of the CAR was deeply biased towards industry objectives and as such is a flawed document.¹⁷

Serious flaws in the information and scientific process underpinning the RFAs undertaken to date have been identified.¹⁸

Most of the assessments conducted depended largely on the then existing incomplete information, out-dated maps and not on localised, on the ground information about particular areas. In many cases the science

¹² The Stern Review on the Economics of Climate Change, (online) < http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm>.

¹³ The Stern Review, above n 12, 'Emissions From the Land-use Change and Forestry Sector'.

¹⁴ Baumert, Herzog and Pershing 'Navigating the numbers: Greenhouse gas data and international climate policy' Washington, DC: World Resources Institute (2005); see also Houghton 'Revised Estimates of the Annual Flux of Carbon to the Atmosphere from Changes in Land Use and Land Management 1850-2000' (2003) 55 *Tellus B* 378.

¹⁵ Houghton J T, 'Tropical Deforestation as a Source of Greenhouse Gas Emissions' (2005) in *Tropical Deforestation and Climate Change*, Moutinho and Schwartzman [eds]; see also Intergovernmental Panel on Climate Change (2001): 'Climate change 2001: the Scientific Basis, Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change' Houghton JT, Ding Y, Griggs DJ, et al (eds), (Cambridge University Press); also Food and Agriculture Organization of the United Nations 'State of the World's Forests' Washington, DC: United Nations, (2005).

¹⁶ Mackey B, 'Regional Forest Agreements -Business as Usual in the Southern Region' (1999) 43 *National Parks Journal* 6.

¹⁷ Compliance with the criteria meant that the protected reserves had to cover the full range of forest community types, be sizeable enough to allow for species survival and reflect the diversity of the individual communities; see Hollander R, 'Changing place' Commonwealth and State Government Performance and Regional Forest Agreements' Paper presented to the Australasian Political Studies Association Conference, University of Adelaide, (2004).

¹⁸ See McDonald J, 'Regional Forest (Dis)agreements: The RFA Process and Sustainable Forest Management' (1999) 11 *Bar Law Review* 295; Redwood J, 'Sweet RFA' (2001) 26 *Alternative Law Journal* 255.

underpinning the assessments was uncertain and based on ad hoc information.¹⁹ Moreover, the assessments were not conducted based on ecological criteria but on state boundaries.²⁰ As a result, contiguous areas on various state borders were categorised as separate regions despite clear ecological connections.

The principles of ESD are now widely accepted and ratified through the signing of the *Convention on Biological Diversity*.²¹ Commonwealth, State and Local governments became bound by the *Intergovernmental Agreement on the Environment 1992*, which contains the ratified principles.²² We have observed that these principles are being systematically ignored by Forests NSW.

REGIONAL FOREST AGREEMENTS

Brief Historical Background

*The RFAs are widely perceived in the scientific community to have failed to deliver the intended protection for environmental, wilderness and heritage values that state and federal governments committed to when they signed the National Forest Policy in 1992.*²³

The Regional Forest Agreement process constituted an abandonment by the Commonwealth of its responsibilities for forests. Under s.38 of the *Environment Protection Conservation and Biodiversity Act 1999* (Cth) (“EPBC Act”) the Commonwealth undertook to refrain from exercising its environmental legislative powers for the duration of the Agreements (until 2023 if no extensions are granted).

RFAs were endorsed by the Commonwealth on the basis that the States had conducted a thorough environmental assessment of their forests. Reviews of the data used for the CRAs reveals the data was either flawed, hastily cobbled together, or non-existent. Areas that fell under these RFAs were made exempt from the EPBC Act on the basis that environmental assessments had already been undertaken and that environmental considerations were contained in the RFAs.

Moreover, the RFA ‘negotiations’ were flawed. Scientists became increasingly concerned when a political decision was made to further modify the RFA measures so that scientifically-based criteria were no longer independently applied as a first step in establishing an ‘Ecological Bottom Line’. This was a crucial decision as it was very unlikely that any RFA would deliver ESD, due to the modified criteria allowing ecological values to be traded off against economic values.²⁴

As an example of industry subterfuge, in Victoria members of the Victorian government bureaucracy removed crucial chapters of a state government commissioned report *Ecological Survey Report No.46 - Flora and Fauna of the Eastern and Western Tyers Forest Blocks and Adjacent South-Eastern Slopes of Baw Baw National Park, Central Gippsland, Victoria* which recommended the protection of the Baw Baw plateau and escarpments. The removal of these chapters ensured that one of the world’s most significant ecosystems remained available for clearfell logging.²⁵

The RFA ‘negotiations’ were also flawed from a conflict dispute resolution perspective. When the level of compromise is not active, if the negotiations satisfy processes not outcomes, if the relevant stakeholders have not been identified accurately, if the stakeholders do not have authorisation to speak on behalf of others

¹⁹ Hollander R, ‘Changing place? Commonwealth and State Government Performance and Regional Forest Agreements’ Paper presented to the Australasian Political Studies Association Conference, University of Adelaide, (2004).

²⁰ Mackey B, above n 16.

²¹ The Rio Declaration, *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, Entry into force for Australia: 29 December 1993; Australian Treaty Series 1993 No 32.

²² *National Environment Protection Council (New South Wales) Act 1995* (NSW), Schedule 1.

²³ Bekessy S, Bonyhady T, Burgman M, Hobbs R, Kershaw P, Kirkpatrick J, Krebs C, McQuillan P, Norton T, Recher H, Rose D B, and Robin L, ‘Statement From Concerned Scientists: Statement of Support for Change on Tasmania's forests’ (2004) Protecting Forests, Growing Jobs, Hobart, The Wilderness Society, 601.

²⁴ Mackey B, above n 16.

²⁵ See Mount Baw Baw Report, (online) < http://www.tcha.org.au/Baw_Baw_Report/Baw_Baw_Report.html>.

or make decisions, and if the parties do not come to the table in good faith then the process is flawed.²⁶ This was the case with the RFA process. The RFA process was a political attempt to quash conflict, and as the process progressed it became apparent that the government had not come to the table in good faith, therefore the process was doomed to fail. Environmentalists' energies were diffused through the myriad different committees and processes, plus associated travel burdens, and were often confounded by a lack of relevant data to make proper and frank assessments. This process bypassed the regulatory process in which the public interest, not represented by private parties, could be aired.

Environmental issues have a strong moral dimension. Environmental destruction and pollution is seen as immoral, unethical and not in the public interest. Some mediation theories suggest that environmentalists should abandon their moral judgements and principles and acknowledge that the position of industrial polluters is as legitimate as their own.²⁷ However, the assumption that business interests are fundamentally compatible with environmental interests is erroneous. In denying there are any serious moral issues involved in the forestry dispute, the mediation of the dispute, involving moral principles or values, promotes a moral irresponsibility.²⁸

As between black and white, grey may sometimes seem an acceptable compromise, but there are circumstances in which it is entitled to work hard towards keeping things black and white.²⁹

The RFA process was presented as negotiation, but the outcomes were finally determined and announced by the Government.

The regulation defining Regional Forest Agreements requires that all RFAs:

- (a) identifies areas in the region or regions that the parties believe are required for the purposes of a comprehensive, adequate and representative national reserve system, and provides for the conservation of those areas; and
 - (b) provides for the ecologically sustainable management and use of forested areas in the region or regions; and
 - (c) is expressed to be for the purpose of providing long-term stability of forests and forest industries; and
 - (d) is expressed to be a Regional Forest Agreement for the purposes of these Regulations;
- Having regard to studies and projects carried out in relation to all of the following matters that are relevant to the region or regions:
- (e) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;
 - (f) indigenous heritage values;
 - (g) economic values of forested areas and forest industries;
 - (h) social values (including community needs); and
 - (i) principles of ecologically sustainable management.

There arises the factual question in all cases as to whether Forests NSW have complied with these requirements.

Ecologically Sustainable: The Esfm Myth

There is no genuine attempt to implement and enforce the ESFM principles in any diligent manner. The five main principles of ESFM are:

²⁶ Susskind L, and Weinstein A, 'Towards a Theory of Environmental Dispute Resolution' (1980) 9 *Environmental Affairs* 311.

²⁷ Amy D, 'Environmental Dispute Resolution: The Promise and the Pitfalls' in Vigg N J and Craft M E *Environmental Policy in the 1990s: Towards a New Agenda*, (CQ Press, 1990).

²⁸ Preston B, in 'Limits of Environmental Dispute Mechanisms' (1995) 13 *Australian Bar Review* 158 quoting Amy D, *The Politics of Environmental Mediation*, (Columbia University Press, New York, 1980), 163.

²⁹ Preston B, above n 28, quoting Fuller L L, 'Mediation- Its Forms and Functions' (1971) 305 *Southern California Law Review* 328.

1. Maintain or increase the full suite of forest values for present and future generations across the NSW native forest estate;

Clear felling, under whatever guise put forward by Forests NSW spin doctors, the demise of species and the water shortages are all a breach of the principles of inter-generational equity. Australia has an obligation under international law to ensure that human rights are protected.³⁰ These obligations arise through Australia's ratification of various international human rights instruments like the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Australia has agreed to 'respect, protect and fulfill' these rights.³¹ Principle human rights which are subject to degradation as a result of climate change are the right to life,³² the highest standard of physical and mental health,³³ and the right to water.³⁴

The Australian Human Rights commission in its submission to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) review stated that the Act:

requires formal and direct linkages to the *Water Act 2007* as a matter of urgency.³⁵

Deforestation and degradation is one of the biggest causes of climate change.³⁶ Water quality and availability has been dramatically reduced by logging of most catchment areas.³⁷

Article 2 of the *International Covenant on Civil and Political Rights* (1976) states at (3):

Each State Party to the present Covenant undertakes:

1. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
2. To ensure that the competent authorities shall enforce such remedies when granted.

And at (5):

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Forests NSW are breaching these treaties through section 40 of the FNPE Act and by industrial logging practices.

Australia has obligations for forestry operations under international environment law. Section 1.4 (c) of the *Southern Region Forest Agreement 2002* states:

Note the obligations on the Commonwealth of Australia arising from the *Intergovernmental Working Group in Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests (Montreal Process)*, the *Convention on Biological Diversity*, *Agenda 21* and the *Kyoto Protocol on Climate Change*.

Conversely *Agenda 21* states:

³⁰ UN Office of the High Commissioner for Human Rights, 'What are Human Rights?' (2008).

³¹ UN Committee on Economic, Social and Cultural Rights, *General Comment No 9 – the Domestic Application of the Covenant* (1998) UN Doc E/C.12/1998/24, UN Human Rights Committee, *General Comment No 31 – Nature of the General Legal Obligation imposed on State Parties to the Covenant* (2004) UN Doc CCPR/C/21/Rev.1/Add.13, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3 - On the Nature of State Parties' Obligations* (1990) UN Doc, E/1991/23, annex III.

³² The right to life is contained in Article 6 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); Australia ratified the ICCPR on 13 August 1980 and the CRC on 17 December 1990.

³³ Article 3 of the *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 at 71 (1948).

³⁴ See Articles 11 and 12 ICESCR, Article 14, paragraph 2(h) CEDAW, Article 28, paragraph 2(a) CRPD and Article 24, paragraph 2(c) CRC.

³⁵ See the Australian Human Rights Commission submission 'Independent Review of the EPBC Act,' 30 January 2009.

³⁶ Garnaut R, *Garnaut Climate Change Review*, 2008.

³⁷ Mackey B, Keith H, Lindenmayer D, and Berry S, 'Green Carbon: The Role of Natural Forests in Carbon Storage, Part 1, A Green Carbon Account of Australia's South-Eastern Eucalypt Forest, and Policy Implications' ANU E Press, (2008) available (online) at < http://epress.anu.edu.au/green_carbon_citation.html>.

11.1. There are major weaknesses in the policies, methods and mechanisms adopted to support and develop the multiple ecological, economic, social and cultural roles of trees, forests and forest lands...More effective measures and approaches are often required at the national level to improve and harmonize ..legislative measures and instruments...participation of the general public, especially women and indigenous people.

There is no meaningful participation of the public in any forest industry decision making processes.

In the *Vienna Convention on the Law of Treaties 1969* Article 18 states:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.

A material breach of a treaty is:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Therefore by exempting civil litigation from preventing the destruction of NSW state forests, for not enforcing the legislative requirements for compliance, for wilfully contributing to climate change and for the destruction of forests Australia is not only in breach of its domestic obligations, it's in breach of international obligations.

2. Ensure public participation, access to information, accountability and transparency in the delivery of ESFM;

For Forests NSW record of adhering to this principle see *Watt v Forestry Commission* and *Digwood v Forestry Commission*. There have been numerous breaches of provision of publically available documents.

There is no environmental democracy and no consultation in areas covered by the RFAs. Individuals or communities call a meeting, the community objects, Forests NSW log regardless. The rights of public participation are limited to making submissions to the state and federal governments if the various pieces of legislation come up for review.

Agenda 21 states:

23.2. One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making...This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work.³⁸

Forests NSW are exempt from preparing EIS in RFA areas and there is no assessment of the impacts of logging on native forest ecosystems.

3. Ensure legislation, policies, institutional framework, codes, standards and practices related to forest management require and provide incentives for ecologically sustainable management of the native forest estate;

In contrast the FNPE Act and subordinate legislation provide incentives for unlawfulness without fear of capture. When penalties are low, and the possibilities of being found out are light, people take risks.³⁹ Regulatory systems rely upon the enforcement of statutory requirements.

³⁸ Agenda 21 also states at 23.2: Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures, (online) <<http://www.un.org/esa/dsd/agenda21/index.shtml>>; for an example of Forests NSW unwillingness to inform the public see *Watt v Forests NSW* [2007] NSWADT 197; the royalty rate is \$6.90/tonne for pulp logs from the Southern Region and \$13/tonne for Eden; Forests NSW has received 2 warning letters for not providing the public with publicly available documents and still every office visit there is argument on providing documents; for example in the first two weeks of August 2010 Forests NSW refused information to 5 members of the public.

³⁹ Dr Gerry Bates, Lecture on Fundamentals of Environmental Law, ANU, 16 July, 2009.

When there is no enforcement contraventions go unpunished and the incentive for compliance is nil.⁴⁰

‘Sustainable use’ means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.⁴¹ Despite the rhetoric on ‘sustainable forestry’ the RFAs have not been effective in protecting forest species and habitats and they do not comply with the principles of ecologically sustainable development and the conservation of biodiversity.⁴²

4. Apply precautionary principles for prevention of environmental degradation;

The Precautionary Principle is based on German and Swedish environmental laws and policies. The relationship between economic development and environmental degradation was first placed on the international agenda in 1972, at the UN Conference on the Human Environment, held in Stockholm. After the Conference, Governments set up the United Nations Environment Programme (“UNEP”), which today continues to act as a global catalyst for action to protect the environment.

By 1983, when the UN set up the World Commission on Environment and Development, environmental degradation, which had been seen as a side effect of industrial wealth with only limited impact, was understood to be a matter of survival for developing nations. Led by Gro Harlem Brundtland of Norway, the Commission put forward the concept of sustainable development as an alternative approach to one simply based on economic growth. This gave rise to the *Ministerial Declaration of the Second International Conference on the Protection of the North Sea 1987*.

After considering the 1987 Brundtland report, the UN General Assembly called for the UN Conference on Environment and Development (“UNCED”). The primary goals of the Summit were to come to an understanding that would prevent the continued deterioration of the environment, and to lay a foundation for a global partnership between the developing and the more industrialized countries, based on mutual needs and common interests, that would ensure a healthy future for the planet.

The Precautionary Principle is Principle 15:

Where there are threats of serious or irreversible environmental damage full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment.

As McClellan CJ stated:

Thus, the inherent uncertainty or bias in the scientific method combined with (generally speaking) a perennial lack of resources and a consequential lack of data to assist scientists, leads inevitably to the conclusion that there is likely to be an incomplete understanding of the full extent of the environmental impacts of any particular act or activity proposed. That prospect, supported by empirical observations gathered world-wide, led to the development of the precautionary principle as a commonsense approach to avoid or minimise serious or irreversible harm to the Environment.⁴³

The precautionary principle should have been triggered prior to the RFA process beginning in 1998.

5. Apply best available knowledge and adaptive management processes;

It is absurd to allege that these principles are at the helm of native forest management, given what is observed of day-to-day forestry operations. One of the biggest myths is that Forests NSW replant after

⁴⁰ Macintosh A, ‘Why the Environment Protection and Biodiversity Conservation Act’s Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives’ (2004) 21 *Environment and Planning Law Journal* 302.

⁴¹ *Convention on Biological Diversity* (Rio de Janeiro, 5 June 1992), Entry into Force Generally and for Australia: 29 December 1993 *Australian Treaty Series* 1993 No. 32.

⁴² *Convention on Biological Diversity* (Rio de Janeiro, 5 June 1992), Entry into Force Generally and for Australia: 29 December 1993 *Australian Treaty Series* 1993 No. 32.

⁴³ In *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399 citing Trenorden J et al in *Conservation Council of South Australia v Development Assessment Committee and Tuna Boat Owners Association* (No 2)/ [1999] SAERDC 86.

logging native forests. This is very far from the truth. Once logged and burned the forests may take decades to regenerate or they might not regrow at all, and at any rate replanting is not sufficient to offset the biodiversity losses created by clearing because of lags in species becoming established and differences in species composition.⁴⁴ Forests are altered inexorably. The public are subsidising the logging of native forests, which hold and remove vast amounts of carbon, so they can be woodchipped and sent to Japan. This is certainly not sustainable.⁴⁵

The government has not ensured the adoption of ESFM practices, environmental safeguards have not improved and OEH has not ensured the maintenance of existing regulatory controls.⁴⁶

The ESFM plans for lands under the *Forestry Act 1916* (NSW) were not completed and published by December 2001.⁴⁷ Eden, Upper and Lower North East,⁴⁸ Southern⁴⁹ and Tumut became available to the public in 2005,⁵⁰ Hume, Riverina, Monaro, Macquarie, Western, Upper and Lower North East in 2008.⁵¹ Further, these plans have a five-year lifespan, and to date the 2005 plans have not been reviewed and renewed which compounds the perception that forest management is operating outside its legal requirements.

The *United Nations Framework Convention on Climate Change* sets out that signatories will promote sustainable management, and promote and cooperate in the conservation and enhancement...of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems.

At art 4.1(d) the Montreal Process sets out ESFM:

For clarification to comply with sustainable forest management the seven elements for data compilation ESFM must be complied with; these are stated as being (i) extent of forest resources; (ii) forest biological diversity; (iii) forest health and vitality; (iv) productive functions of forest resources; (v) protective functions of forest resources; (vi) socio-economic functions of forests; and (vii) legal, policy and institutional framework; all seven elements must be present and complied with.

‘Sustainable’ Yield

In 1998 Forest Resource and Management Evaluation Systems (“FRAMES”) data was run using all land tenure, that is, land that would be included in the future reserve system. Later Forests NSW hid real data from the Auditor-General audits by amalgamating plantation and native forest volume figures.⁵² Further the native forest logging industry has increasingly been overcutting to meet wood supply agreements and has not undertaken legislated reviews of sustainable yield.

The term ESFM was used in drafting of forestry law and delegated legislation. State and Federal Governments confirmed their commitment to the *National Forest Policy Statement 1992* by agreeing to develop and implement ESFM.⁵³

⁴⁴ Forests NSW proposed to burn 23,263 hectares just in the Southern sub-region, Forests NSW Southern Region Burning Proposals 2007.

⁴⁵ See Performance Audit ‘Sustaining Native Forest Operations,’ Auditor-General’s Report, 2009.

⁴⁶ The *Southern Region Forest Agreement 2002*, Environmental Management Systems 2.1, “The EMS shall be the mechanism by which Forests NSW will implement commitments and obligations under the NSW *forest agreements* and RFAs and effectively contribute to Australia’s international obligations under the Montreal process” ESFM ‘initiatives’ are in s2.11.

⁴⁷ Southern Regional Forest Agreement cl.47 (d).

⁴⁸ See Department of Planning and Industry (DPI) (online) <http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0006/266190/esfm-northeast-lower.pdf>.

⁴⁹ See DPI (online) <http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0011/266195/esfm-southcoast-southern.pdf>.

⁵⁰ See DPI (online) <http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/266188/esfm-eden.pdf>.

⁵¹ See DPI (online) <http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0005/266189/esfm-hume.pdf>.

⁵² Auditor-General’s Report to Parliament, vol 1, 2009, at (online)

<http://www.audit.nsw.gov.au/publications/reports/financial/2009/vol1/pdfs/31_0173_forestry_commission_of_new_south_wales.pdf>.

⁵³ *Regional Forest Agreement for the Southern Region of NSW 2001* s7(a); *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Southern Region* cl 7(1); the PNF Code carefully avoids the word sustainable but provides: ‘supply of timber products from privately owned forests at a regular rate that can be maintained indefinitely for present and future generations’.

As a requirement of ESFM NSW agreed to undertake a review of Sustainable Yield every five years using FRAMES and information bases. Results of which would inform the annual volume which could be logged from the Southern region 'being mindful of achieving long-term Sustainable Yield and optimising sustainable use objectives consistent with this Agreement'.⁵⁴

The authors would agree with Mr Scott Spencer in that Forests NSW are not aware of the meaning of the term 'required':

It is somewhat concerning that Milestone 41 relating to the requirement (i.e. it is not optional) to produce annual reports of progress on meeting regional ESFM targets in ESFM Plans has not been delivered. This is surely central to accountability under the RFAs.⁵⁵

The statutes provide clear direction and guidance as to their intent for interpretation of supply commitments contained in RFAs. It is provided that Regional ESFM Plans, *Forest Agreements*, and IFOAs will collectively specify the wood supply commitments and their relationship to Sustainable Yield.⁵⁶ Further it was stated when the Southern IFOA was in process of enactment:

the IFOA also contains maximum timber volumes allowed to be harvested annually.⁵⁷

Allowable volume of trees logged is legislated to be based on 'sustainable yield' and FRAMES. The volume of pulp removed in the Southern region for the period 2002 to 2007 is equal to twelve percent above the legislated allowable cut.⁵⁸ This is above the five percent allowed in IFOA clause 5(a) where it provides, in essence, that Forests NSW must stay within the five percent range.⁵⁹

It is alleged by Forests NSW that allowable volume figures in legislation can be overridden by contractual commitments.⁶⁰ This seemingly defeats the purpose of sustainable yield and indeed legislation. On this assumption terms such as 'no more than' and 'up to' therefore are taken to mean minimum volumes. If we were to take this erroneous assumption further it would mean the legislation and delegated legislation serves no purpose.

The focus on the one term 'reflects contractual commitments' at the expense of remaining legislation is in itself indicium. There are many other clauses in various pieces of legislation, intended to work in conjunction with each other. Assumptions that there is no maximum volume required therefore seems in tension with the objects of legislative instruments.

Historic and Systemic Overcutting

Dominating much desktop and industry documents is claims that strict public forestry regulation and 'locking up' of areas has caused the need for private forestry.⁶¹ However, long before RFAs were enacted, questions of whether the native forest logging industry was sustainable were being asked.⁶² It seems real causes of lack of wood supply are overcutting and erroneous figures of sustainable yield. This has resulted

⁵⁴ *Regional Forest Agreement for the Southern Region of NSW 2001* cl 8; like all reviews legislated for forestry operations either undertaken four or five years late or not undertaken at all, this review has not been undertaken.

⁵⁵ *Final Report on Progress with Implementation of NSW Regional Forest Agreements: Report of Independent Assessor*, November 2009, (online) < http://www.daffa.gov.au/_data/assets/pdf_file/0007/1546711/assessors-report.pdf>, viewed 24 July 2010.

⁵⁶ *Southern Region Forest Agreement 2002* 8(2)(a); the Southern, Eden and Northern ESFM plans are due to expire this year.

⁵⁷ Recommendation letter to enact IFOA, Letter (HOF2042) from David Nicholson NSW EPA to DPI, 18 April, 2002, signed by Director Waters and Catchments Policy (signed 18/4/02), Acting Assistant Director General (Water and Air), Director General (signed Lisa Corbyn 19/4/02).

⁵⁸ A Draft Report on Progress with Implementation of the New South Wales Regional Forest Agreements (2009), Resource and Conservation Unit, NSW Department of Environment and Climate Change NSW, Appendix 4, p227.

⁵⁹ *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Southern Region* cl 5(a); *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Eden Region* cl 5(a).

⁶⁰ *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Southern Region* cl 5(3) To avoid doubt, the quantities of timber products specified in paragraphs (a) and (b) of subclause (2) do not impose any limitation on the quantities of those products that may be harvested under this approval. The quantities referred to simply reflect contractual commitments existing at the date of this approval.

⁶¹ This erroneousness is perpetuated within the IFOAs themselves see *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Southern Region* Note for cl 5(b).

⁶² See *South East Forests Conservation Council Inc v Director-General National Parks and Wildlife and State Forests of NSW* [1993] NSWLEC 194, Deputy Director (Policy and Wildlife).

in shortened rotation times.⁶³

The NSW Scientific Committee suggests a safe rotation period for species conservation is 150-220 years.⁶⁴ Analysis using this rotation period over a fifteen year time frame in the Southern region would suggest 50-90 compartments should have been logged, yet more than six times that, a total of 365 compartments, have been clear felled or patch clear felled.⁶⁵

In a letter dated 29 October 1998 from Ross Sigley, Forests NSW sales manager, Northern Rivers region it states:

It has taken us just 2 years to completely exhaust the quota volume in Casino, Urbenville, and Murwillumbah MA's and Tenterfield is all but finished. It must dawn on our top resources people eventually that stands carrying a level of volume which is only a fraction of their capacity are already seriously in trouble. The only way to realise any of the volume that is there...would be to have an unlimited pulp market and clear fall the forest...I suspect they [the greens] do know that we are playing the game of Brer rabbit. I hope a re-run of the frames data without using the plots that end up in the reserve system will give a more realistic picture [of the] state of the forests...I wait with hope that the Frames data can deliver some figures, which support what we know to be the case on the ground. We have just one last chance to come clean and be honest about the way things are before this UNE RFA is signed. State Forests will be held accountable for whatever happens as a result of the RFA decision and if the industry has been led to believe that the volume is there in this part of the State then we should be held responsible...⁶⁶

A memo from Ron Wilson, Forests NSW Marketing Manager to Bob Smith CEO of Forests NSW on a meeting with Davis and Herbert in 2001 is revealing.⁶⁷ Davis and Herbert (now Boral) expressed dissatisfaction with Forests NSW supply of logs. The company's allocation was 8000 cubic metres. Forests NSW stated 'the company is currently undercutting its allocation of high quality large sawlogs'. The company claimed the reason they were undercutting was that Forests NSW had not provided sufficient areas to produce sawlogs. Forests NSW denied there were any problems of supply but offered to extend the allocation period and 'let the company cut the 8000cu over two years'. Forests NSW also stated Davis and Herbert were at fault because they weren't 'value adding'. The company stated they were unhappy about 'log merchandising' and that timber was being sent 'elsewhere' which could be used by the company. Forests NSW told the company that 'without a residue market on the south coast the cost of producing sawlogs will be significantly higher'.⁶⁸

Unfortunately in the Southern and Eden regions there is an unlimited and voracious pulp market. A rerun of FRAMES was due in 2006 as part of ESFM requirements. No rerun of FRAMES has yet been undertaken. Review or no review, logging more intensively will affect remaining stand condition and ultimately sustainable yield. Given overcutting whether public and private native forestry can ever achieve the ideal of ESFM is doubtful.⁶⁹

The FRAMES industry modelling system used to derive volumes substantially over-estimated available timber volumes. To achieve the unsustainable volumes sought for the first twenty years, the system has had

⁶³ The current rotation times are between 5-15 years; for example compartment 62 of South Brooman State Forest has had 'Timber Stand Improvement' twice and been logged nine times since 1954, which is virtually every six years; see Southern Region - Compartment 62, South Brooman State Forest, Bateman's Bay Management Area, Harvest Plan approved 8/5/09.

⁶⁴ *Loss of Hollow Bearing Trees Key Threatening Process*, Department of Environment, Climate Change and Water, NSW Threatened Species Website, (online) < http://www.threatenedspecies.environment.nsw.gov.au/tsprofile/threat_profile.aspx?id=20079 > viewed 25 July 2010.

⁶⁵ Forests NSW Compartment Map and Annual Logging Records for period 1995 to 2010, this shows 691 total number of compartments.

⁶⁶ New South Wales, *Legislative Assembly*, Forestry and National Park Estate Bill, 17 November, 1998, (Fraser), p10052.

⁶⁷ Forests NSW internal memo Ron Wilson to Bob Smith and Gary Keating, 9 October 2001, H.O. 61342; the 'Use or Lose' 20 yr wood supply agreement provides for 'increased volumes of HQL and small sawlogs at one half of the company's intake' as of 2001.

⁶⁸ Forests NSW internal memo, above n 67.

⁶⁹ Lunney D, Matthews A, Eby P, and Penn A M, 'The Long-Term Effects of Logging for Woodchips on Small Mammal Populations' (2009) 36 *Wildlife Research* 691; see Gibbons P, Lindenmayer D B, Barry S C, Tanton M T, 'The Effects of Slash Burning on the Mortality and Collapse of Trees Retained on Logged Sites in South-Eastern Australia' (2000) 139 *Forest Ecology and Management* 51.

to dramatically over-cut for twenty years and thus result in much decreased volumes available thereafter. This is clearly reflected in the industry modelling, which shows a volume reduction of almost fifty percent after 2018. For example, in the Eden Region, in 2008, Forests NSW was over quota and has been over quota for each of the previous nine years.

Notably, in 2003 the NSW Government re-issued timber supply contracts, without conducting the promised timber review, for a further twenty years (thus extending the contracts out to 2023). Therefore, timber supplies have been committed outside the twenty year timeframe of the RFAs, without a wood supply review or any required RFA review. These contracts have been extended well past the point at which timber supplies will fall in 2018.

The erroneous audacity of the claim that the review of the FRAMES systems and processes ‘also meets the milestone as it applies to the Southern region’ is obvious. One aspect is applicable:

The robustness of wood supply estimates...are commonly evaluated by conducting large numbers of scenario analyses rather than by consideration of statistical measures....If the level of cut is set at a high level...in the short-term and growth is less than expected, then over-cutting will occur and the predicted long-term cut will not be sustainable.⁷⁰

It was made known by the NSW Auditor-General that Forests NSW does not routinely compare harvesting results to its yield estimates. However the authors consider these reviews necessary to test the validity of Forests NSW estimates.⁷¹ No tangible efforts have been made by Forests NSW to ensure sustainability or to produce any reporting showing that efforts are being made. Forests NSW are operating in the gloom of uncertainty. For the Upper and Lower North East region the Auditor-General stated:

To meet wood supply commitments, the native forest managed by Forests NSW on the north coast is being cut faster than it is growing back.⁷²

The authors believe this to be true for the Southern region, if ever real data becomes available. The audit report mentioned for Southern was not completed by June 2009. Statements by FNSW to the Auditor-General include; ‘It may not be ready until mid 2010’ and ‘the report will be ready by June 2010’. The report is still not available as of July 2011.

It is my understanding that the review of the sustainable yield for the Southern Region was expected to be completed by June 2009 but is still being done. Forests have indicated it will take time to check the review and are unlikely to publish the results and methods of calculating the sustainable yield (covered by Milestone 54 in the RFA review report) before mid-2010.⁷³

Our most recent information from Forests NSW states:

In regard to your inquiry on the comparison of harvest results with yield estimates that was due in February 2011 I am advised that recent changes to the yield estimate methodology have meant that this work will take an additional one to two months to complete. This work will be made available on the website when it is finalised.⁷⁴

The website offers several pages of bar chart graphs depicting estimated 100 year sustainable yield volumes for the RFA regions as current information.

Firewood Removal and Honey Production

The level of firewood removal from the Southern Region is significantly greater than other RFA areas.

⁷⁰ Forests NSW, ‘A Review of Wood Resources on the North Coast of New South Wales’ September (2004) p12.

⁷¹ Performance Audit In Brief, NSW Auditor-Generals Report to Parliament, April 2009 p2.

⁷² Performance Audit ‘Sustaining Native Forest Operations,’ Auditor-General’s Report, 2009; it was also stated ‘reviews of yield estimates for the southern region, due in 2004 for Eden and 2006 for Tumut and the south coast, have not been completed.’

⁷³ Michael Davies, Department of Environment and Climate Change, Environment Protection and Regulation Group, Crown Forestry Policy and Regulation Section (ex-Resource and Conservation Unit) 14/7/09.

⁷⁴ Email to Tony Whan from Michael Scotland, Principal Ministerial and Policy Officer Forests NSW, Sent: Wednesday, March 02, 2011 11:43 AM.

There is no evidence of studies/reports that have been undergone to review whether this level of removal is sustainable. There have been calls for help to stop the rampant firewood removal from the Golburn area especially from private land and leasehold land sources.

Honey is one of the few viable products from State forests. Of particular concern to bee farmers is the knowledge that:

forestry activities that remove flowering and/or mature trees are a continuous threat to the floral resources accessed by beekeepers.⁷⁵

The four year study undertaken by Law et al amounts to one page in a report on honeybees. It states:

This project has shown that current logging practices in NSW halve the nectar resource.⁷⁶

After many conversations with apiarists in the south east of New South Wales the conclusion to be drawn is that Forests NSW is logging unsustainably without thought to the future of the honey industry.

Pulp v Protection

Statutes provide guidance as to their intent at the beginning, usually in an 'objects clause'. Courts prefer interpretation of statutes that promote objects of legislation. At clause 1.4(d) of the *Southern Region Forest Agreement 2002* it states:

In making this agreement we:

d) State that the overriding intention of forest management across all tenures is to maintain and enhance all forest values in the environmental, social and economic interests of the State.

Clause 7 of the IFOA states:

(1) In carrying out, or authorising the carrying out of, forestry operations SForests NSW must give effect to the principles of ecologically sustainable forest management

It seems the actual volume of pulp removed in the Southern region for the period 2002 to 2007 is equal to twelve percent above the allowable cut.⁷⁷ This is above the five percent allowed in IFOA clause 5(a). In essence Forests NSW must stay within the five percent range.

In all the years of reporting the volume of pulp is inconsistent with the volume for HQL. The IFOAs do state that sole purpose pulp operations are disallowed, however Forests NSW have a myriad of ways around this. The main one is to call the operations 'thinning operations' or 'Australian Group Selection' or 'Modified Shelter Wood'. As most logging now is done by mechanical harvesters this renders most logs unfit for being a sawlog and creates pulp.⁷⁸ We would have to strongly disagree that compartments in the southern and Eden regions are chosen 'for the volume of high quality sawlogs they can deliver'. On ground evidence suggests compartments are logged to meet the wood supply agreements for pulp with SEFE.

The *National Forest Policy Statement 1992* outlined objectives and policies for the future of Australia's forests. ESFM has been incorporated in this statement in the vision, national goal and specific objectives and policies chapters.

The NFPS vision statement states:

The Governments share a vision of ecologically sustainable management of Australia's forests. This vision has a number of important characteristics... Forests and their resources are used in an efficient, environmentally sensitive and sustainable manner.

⁷⁵ Commonwealth, *Senate Standing Committee, 'More Than Honey: the Future of the Australian Honey Bee and Pollination Industries'* p 48, see (online) < <http://www.aph.gov.au/house/committee/pir/honeybee/report/chapter%203.pdf>>.

⁷⁶ Law B, and Chidel M, 'The Impact of Logging on Nectar Producing Eucalypts' (2007) Publication Number 07/138, Rural Industries Research and Development Corporation, Canberra (online) <<http://www.rirdc.gov.au>>.

⁷⁷ A Draft Report on Progress with Implementation of the New South Wales Regional Forest Agreements (2009), Resource and Conservation Unit, NSW Department of Environment and Climate Change NSW, Appendix 4, p227.

⁷⁸ Connell M J, 'Log Presentation: Log Damage Arising From Mechanical Harvesting or Processing' Prepared for the Forest and Wood Products Research and Development Corporation, Project no: PN02.1309, CSIRO Forestry, (2003).

Conversion Of Multi-Aged Forests To Regrowth

In the period 1997-2019 the majority of the timber volumes will come from the multi-aged forests of the region with the transition from 2016 onwards to full regrowth. Multi-aged forests are clear-felled in the Eden region in 10-100 hectare coupes, in a practice which Forests NSW refers to as 'Modified shelterwood harvest system'. The Resource Assessment Commission in 1992 stated that even though some silviculture systems (including Modified shelterwood harvesting system) retain habitat and seed trees these systems are still classified as clear-fell logging. This conversion of multi-aged forests into regrowth forests is against the principles of ESFM. The Eden region is the only region in NSW that the multi-aged forest is to be converted to a regrowth forest. It is questionable how this management strategy is to maintain all forest values in perpetuity.

One very important forest value is the ability of the forest to sustain biodiversity. As stated the loss of hollow bearing trees has been listed as a Key Threatening Process in New South Wales. The conversion of multi-aged forests into regrowth results in a massive reduction of hollow bearing trees from a sub-optimal 13+ per hectare to 2-6 per hectare. This is and will have a severe impact on hollow dependent fauna into the future.

Non-Reviews and Non-Compliance

The NSW Government's directive was that there were clear limitations on the scope and purpose of the RFA review, including that the review would not revisit previous decisions. This is in conflict with all RFAs which state:

The purpose of the five-yearly review is to provide an assessment of progress of the Agreement against the established milestones, and will include:

1. the extent to which milestones and obligations have been met, including management of the National Estate
 2. the results of monitoring of sustainability indicators, and
 3. invited public comment on the performance of the agreement.
- (NE RFA clause 40, Southern RFA and Eden RFA clauses 38)

In the light of the review being incredibly overdue, it is erroneous that a milestone can be considered completed if it was reached after the due date of the first five yearly review. When milestones that were due five years ago are either not completed, or not attempted, an indication is given of the lack of will of legislators and their agencies, both past and present, to adhere to international and domestic obligations. The *Regional Forest Agreement for Southern 2001* clause 38 states that:

within each five year period, a review of the performance of the Agreement will be undertaken.

And:

the mechanism for the review is to be determined by both parties before the end of the five year period and the review will be completed within three months.

Annual Ecologically Sustainable Forest Management Implementation Reports are only publicly available for the years 1999-2009. At the close of the review period in 2009 the latest report was 2005.

When undertaking forestry operations on State forests and Crown timber land in the Upper and Lower North East, Southern and Eden regions, Forests NSW and its contractors must comply with the licences and conditions in the IFOAs. Annual reports contain details of breaches and compliance with IFOAs for each region.

Tardiness of reporting is in breach of the FNPE Act. It is impossible to review the sustainability indicators without annual reports. Yet as the Office of Environment and Heritage 'page last updated' information shows, the last of these reports was two years late, but available only a few weeks before the Independent

Assessor gave his report to government for the current review in November 2009. The submission period to comment on the Draft Report on Progress with Implementation of the New South Wales RFAs closed on Monday 7 September 2009. The reports from 2003 onwards were not available by the submission deadline. Since that time the Progress Reports for 2007-2008 and 2008-2009 have been posted on the OEH, but this was once the reviews were over.

On the Commonwealth Department of Agriculture, Fisheries and Forestry (“DAFF”) website the Southern region annual reports currently range from 1999-2006, still very far behind the times, ‘Last reviewed: 08 Dec 2010’.⁷⁹

The milestone of the non-compliance with legislated requirements by Forests NSW and the various legislators is a case in point. The reviews were required to be completed ‘within each five year period’.⁸⁰

The Commonwealth will table in the Commonwealth Parliament the signed Regional Forest Agreement and, when completed, the annual reports detailing achievement of the milestones for the first four years of the Agreement and the first five-yearly review on performance against milestones and commitments.⁸¹

The word ‘will’ in the Oxford Concise Dictionary is defined as:

1 (In the second and third persons, and often in the first; see ‘shall’) expressing the future tense in statements, commands or questions.

Section 9 of the *Interpretation Act 1987* (NSW) states:

In any Act or Instrument, the word ‘shall’, if used to impose a duty, indicates that the duty must be performed.⁸²

Thus Forests NSW have been operating outside the law since 2004.

Paucity

Whilst some reports are available, none of them have been completed and tabled in time annually. The first reports for Eden and the Upper and Lower North East were one year overdue. The next two reports for Eden and Upper and Lower North East were three and four years overdue respectively. The last two reports for those areas were four and five years overdue respectively. Southern Region reports are similarly late. Again there was no mention of this, and to call the review conclusion complete is misleading to say the least.

When RFA reports were tabled in the Senate in 2005 Senator Ridgeway stated:

Essentially what we have is four slim annual reports dated 2001 and 2002 covering New South Wales, Victoria, Western Australia and Tasmania. The considerable time lapse between the date of the reports and the tabling of the reports is of great concern, especially when this is a contentious issue and one that I believe all Australians are certainly interested in, and one that came up during the recent federal election campaign. I hope it is not indicative of the attention to detail that the government is exercising in the management of Australia’s forests and forest reserves.⁸³

The time lag between tabling of the Upper and Lower North East RFAs in the House of Representatives in 2000 and tabling in the Senate in 2005 is extraordinary. The Southern RFA was tabled in 2002, more than a year after signing in 2001. The progress of this RFA milestone is appalling. Termination procedures under

⁷⁹ See (online) <<http://www.daff.gov.au/rfa/publications/annual-reports/nsw>> last accessed 22/3/11.

⁸⁰ *Regional Forest Agreement for Southern New South Wales between the Commonwealth of Australia and the State of New South Wales April 2001*, cl 38.

⁸¹ *Regional Forest Agreement for Southern* cl 41.

⁸² See the *Interpretation Act 1987* (NSW) s 9 (2).

⁸³ Commonwealth, *Parliamentary Debates*, Senate Official Hansard No 5, Monday 7 March, 2005, p71, (online) <<http://www.aph.gov.au/hansard/senate/dailys/ds070305.pdf>>.

clause 8 should be instigated forthwith. The option to extend the RFAs, given what is now known about climate change, the environment, threatened species decline and the Forests NSW performance of the agreements, is without doubt a moot option.

It is noteworthy that there were thirty one submissions to the review, of which eighteen were made public on the DAFF website, and only two of the eighteen were in support of the native forest industry. Those two supporters, Vince Phillips and Peter Mitchell, are both managers of SEFE woodchip export mill, owned by the Japanese company Nippon Paper Group, at Eden.

The legislation is nefarious to the conservation and ecological health of the native forests and biodiversity under its domain and, in our view, in breach of domestic and international obligations. The *Regional Forest Agreement Act 2002* (Cth) should be repealed as should amendment 75(2)(B) of the *Environment Protection Biodiversity and Conservation Act 1999* (Cth) be repealed and part 3, section 38 of the EPBC Act to be reinstated.

The post-RFA additions of Monga and Upper Deua into the national parks estate are welcome, though it is a pyrrhic victory, as evidenced by the ongoing use of the 'buffer-on-buffer' IFOA amendments as they are currently being interpreted on the ground.⁸⁴

Effectiveness of the Threat Abatement Plan

Output from the studies on the effectiveness of the Threat Abatement Plan have not been forthcoming. This plan cannot have proved effective at removing foxes due to the fact that the 1080 baiting program is continuing beyond 2010.⁸⁵ The effect on non-target native species is of concern.

Non-target animals can also be at risk if they consume poisoned animals or their carcasses. Among native mammals, unadapted wombats, macropods, possums and some rodents can be killed by herbivore baits. Birds may also be killed by 1080 baiting. Scavenging species such as magpies and crows have been recorded as occasional casualties, together with some introduced species (sparrow, starlings, doves and pigeons). There are also reports from the early 1990s of crimson rosella (a highly sensitive species) being killed by carrot baits laid for rabbits.⁸⁶

Most rodent species that have been tested in Australia and elsewhere are highly sensitive to 1080 poison.⁸⁷ There is some concern over the effects on Tiger Quoll populations. While Kortner et al state one of the nine deaths of tiger quolls in the study could be directly attributed to 1080 poisoning, the research by Belcher suggests there are grounds for concern.⁸⁸

one population in southern NSW declined dramatically, coinciding with 1080 baiting for wild dogs. Population declines were found to correlate with 1080 poison baiting programmes.⁸⁹

⁸⁴ The Reserve system is contained within the *Forestry and National Park Estate Act 1998* (NSW) sch1-13; each IFOA has a Comprehensive Adequate Reserve System; for an historic overview of the CAR see Dailan Pugh, Carr's CAR reserve system (1999) (online) <<http://dazed.org/npa/npj/199904/Pp0912.htm>>.

⁸⁵ See Public Notices section of 26 August 2009 edition of the Narooma News.

⁸⁶ 'The Reconsideration of Registrations of Products Containing Sodium Fluoroacetate (1080) and their Associated Labels' Preliminary Review Findings' (2005), Australian Pesticides and Veterinary Medicines Authority, Canberra, (online) <http://www.apvma.gov.au/chemrev/downloads/1080_prelim_review_findings.pdf>

⁸⁷ Mcilroy J C, 'The Sensitivity of Australian Animals to 1080 Poison IV Native and Introduced Rodents' 9(3) *Australian Wildlife Research*, 505, (online) <<http://www.publish.csiro.au/paper/WR9820505.htm>>.

⁸⁸ Gerhard Körtner A B, and Peter Watson A, 'The Immediate Impact of 1080 Aerial Baiting to Control Wild Dogs on a Spotted-tailed Quoll Population' (2005) 32(8) *Wildlife Research* 673.

⁸⁹ Belcher C L, 'Demographics of Tiger Quoll (*Dasyurus maculatus maculatus*) Populations in South-eastern Australia' 51(6) *Australian Journal of Zoology* 611, (online) <<http://www.publish.csiro.au/paper/ZO02051.htm>>; see also Belcher CL, 'The Diet of the Tiger Quoll, *Dasyurus maculatus* in South-eastern Australia' PhD Thesis, Deakin University, (2007) 55(2) *Australian Journal of Zoology*, (online) <<http://www.publish.csiro.au/paper/ZO06102.htm>>.

Sensitivity of selected native Australian species to 1080.⁹⁰

Species	Weight kg.	Sensitivity	Baits required
Magpie	0.3	1	1.3
Wedge-tail eagle	4	1	15.2
Eastern Quoll	1	3.1	3.5

Sensitivity: the higher the number the more sensitive a species to the poison '1080'.

Baits required: the average number of baits consumed where death is likely.

There seems a lack of detailed study on the cumulative impact of 1080 on predator species whose prey have consumed the poison.

The *Threatened Species Legislation Amendment Act 2004* (NSW) has enabled NSW government departments to turn a blind eye to the full extent of the species decline throughout the state. Conversely it has enabled Forests NSW to view the IFOA licence conditions as able to be broken with impunity at a significant cumulative detriment to the forest-dependent threatened species of the state, as long as it was 'an accident', which is reportedly seventy eight per cent of the time. The community was assured by government that:

The NSW RFAs provide for environmental protection in respect of forestry operations through management prescriptions and the CAR reserve system.⁹¹

What the community has seen is that this statement is erroneous. The environment in the areas covered under the NSW RFAs is in drastic decline as evidenced by the ever growing list of threatened species, the lack of water in all rivers where logging is occurring in their catchments, and the closure of oyster farmers business due to siltation.

It can be estimated that the annual sediment export from the catchment in an undisturbed condition would be of the order of 1,056 tonnes/year, and 2,640 tonnes/year for the existing catchment logging land use scenario.⁹²

As recently as 16 Aug 10 it was reported from the northern forests that:

A recent NEFA audit of Girard State Forest, near Drake, found numerous breaches of 45 logging prescriptions and the destruction of a stand of high quality old growth forest...

They did not even comply with standard logging prescriptions, let alone any special ones. This is a disgrace and unacceptable treatment of what was meant to be a "Special Prescription Zone" contributing towards our national reserve system.

Recent audits have exposed illegal logging of rainforest, wetlands, endangered ecological communities and now old growth forest. These are what the Regional Forest Agreement was meant to protect. And this is only the tip of the iceberg.⁹³

Environmental Management Systems

Evidence collated clearly demonstrates that the Environmental Management Systems ("EMS") of Forests NSW has not improved its practices or shown responsible forest custodianship. In the Eden region it has taken almost ten years to instigate the production of a clear and concise set of identification rules for Rocky Outcrops for use and implementation in the field, the guidelines of which are in conflict with the Threatened Species Licence. Many documents are not available for public scrutiny and therefore any claims of accountability by Forests NSW are simply not credible. The most ironic of these examples is 'Example 2',

⁹⁰ Saunders G, Coman B, Kinnear J, and Braysher M, 'Managing Vertebrate Pests: Foxes' (1995) Australian Government Publishing Service, Canberra, quoted in Marshall J, 'Fox in the Hen House' The Introduction of the European Red Fox (*Vulpes Vulpes*) Into Tasmania, and The Potential Threat to the Fauna Biodiversity it Represents' (online) < <http://www.socsci.flinders.edu.au/geog/geos/PDF%20Papers/Marshall.pdf>>.

⁹¹ A Draft Report on Progress with Implementation of the New South Wales Regional Forest Agreements, Resource and Conservation Unit, NSW Department of Environment and Climate Change NSW, Sydney, (2009), p45.

⁹² McAlister T, and Richardson D, 'Wonboyn Lake and Estuary - Estuary Processes Study' (2004) (online) <http://www.begavalley.nsw.gov.au/environment/estuaries/pdfs/Wonboyn_Processes_Study.pdf>.

⁹³ Pugh D, North East Forest Alliance media release 15 August 2010.

page five of the EMS: where the ‘Communications Strategy’ hotlink, is not publicly available. More examples ensue because there has been no genuine attempt by Forests NSW to perform to the expectations of their obligations. Page fourteen of the EMS describes a Forest Health Strategy assessment in preparation, these documents were needed when the EMS was released. On page eleven the EMS states that:

Monitoring of disturbance regimes is carried out through the Landscape Biodiversity Monitoring program, piloting in Western Region as of August 2008, and research.⁹⁴

The monitoring and research output should be publicly available now but seems allusive.

The Results of Monitoring of Milestones and Sustainability Indicators

Forests NSW, regulators and legislators have failed in the performance of meeting their legislated obligations.

Last year we noted some areas of non-compliance with RFA milestones. The Commission advised that it is addressing areas of non-compliance.⁹⁵

The Commonwealth’s State of the Forests Reports (“SOFRs”) quality of reporting is substandard. Basic facts such as the land area of NSW changing between the 2003 and 2008 report where it shrank by 96,000 hectares.⁹⁶

The long-awaited *Final Report on Progress with Implementation of NSW Regional Forest Agreements* confirms observations that the Regional Forest Agreements are failing to meet their transparency and sustainability obligations.

If as stated, the NSW RFAs were to provide for the ‘conservation of areas, for ESFM and twenty year certainty for native forest industries’, then the results of this report show clearly that the agreements have failed dismally on all accounts.

The report, dated November 2009, was actually due several years ago, in 2003 for Eden for example, to coincide with the RFA reviews, which the report acknowledges. The report states:

However, fundamentally, the first reviews should have been completed in the 2004-2006 period, i.e. five years from their initialisation. The fact that these reviews have been delayed 3-4 years is of considerable concern, has reduced public confidence in the outcomes and seriously distorts the process for the future.

And:

Timeframes were included in the RFAs for a reason and the failure to deliver in any reasonable timeframe could have a major impact on both public confidence in the process and the achievement of the basic objectives if the RFAs. Even if it is accepted that, in an undertaking of this nature, some delays are inevitable, delays of three to four years and in at least one case 9 years, indicate a basic problem or problems.

The report goes on to state:

The significant delays for the Southern and Eden regions reviews (3 years behind schedule) need to be addressed as soon as possible to minimise uncertainty and to allow an accurate picture about sustainability of current harvesting to emerge...No real reason is provided for the delays.

In reply additional information was provided to the independent assessor by Forests NSW which stated:

Monitoring designed to assess performance at a much finer scale (at an operational level) and/or to determine the causes of detected variation (via post-harvest assessment) would be prohibitively expensive and would involve unsatisfactory occupational health and safety risks.

⁹⁴ *Australian Forest Standard (AS 4708:2007) and EMS(ISO 14001:2004) Manual*, Forests NSW.

⁹⁵ Auditor-Generals Report, Vol 1,2009, (online)

<http://www.audit.nsw.gov.au/publications/reports/financial/2009/vol1/pdfs/31_0173_forestry_commission_of_new_south_wales.PDF>.

⁹⁶ Commonwealth State of the Forests Report, 2003 and 2008.

Forests NSW seems to be arguing that entering post-logged forest to monitor their operations is prohibitively expensive and unsafe for their trained employees. If it is unsafe for Forests NSW employees to enter post-logged forest it must be equally expensive and unsafe for their employees to enter forest while logging operations are underway therefore, if it is so expensive and unsafe, Forests NSW should heed conservationists call and end native forest logging.

COMPLIANCE TO THE REGULATIONS AND ‘PROTECTIVE’ TSL CONDITIONS

There is now substantial evidence indicating that the Integrated Forestry Operations Approvals are inoperable, unenforceable, and systemically riddled with non-compliance.⁹⁷ The non-compliance register at the Forests NSW Batemans Bay office is only available to 2009 being only one instance among many. In our view compliance milestones have not been taken seriously by Forests NSW. Auditing reporting on a public level must be made available in the FA and IFOA reports but because these documents are either not tabled or consistently late they are effectively not in the public domain.

The auditing mechanisms of the RFAs are not credible, lack the necessary comprehensiveness, are underfunded and understaffed, systematically abused, lack objective independence, are overly reliant of self-auditing processes, have not utilised, or been excessively weak in the enforcement of non-compliance and have not resulted in demonstrably improved practices. For example in 2009 OEH condoned breaching the TSL conditions for tree retention by saying:

Forests NSW did acknowledge that whilst some of the trees marked for retention did not strictly meet the requirements of hollow-bearing, an adequate number were retained across the landscape when unmarked trees were included in the count.⁹⁸

Non-compliance is par for the course during forestry operations. Further it is evident that the Department of Fisheries compliance role has been relegated to rubberstamping with only one reporting anomaly non-compliance for the whole period the statistics cover, in that recently the Department of Fisheries issued Forests NSW with a \$1000 fine.

There has been one prosecution in the Southern and Eden regions since the RFAs were implemented. The ‘accounting report for breaches and audit results’ in the Draft Report is erroneous. Table 4.2 Audit results in the lower North East Region 2002/03 notes there were no complaints for breaches of the EPL and no Clean-up notices issued. Yet SEFR has documents and correspondence between the Black Bulga Range Action Group and the EPA during that year regarding several complaints of non-compliance issues which resulted in the issuing of a Clean-up notice.⁹⁹

EPL Breaches from 2000 to 2006¹⁰⁰

During 1999–2000, State Forests identified 2,039 (875) breaches of EPL conditions for the whole estate. Breaches included incorrect felling of trees into creeks which FNSW call ‘filter strips’, machine encroachment in filter strips, excessive rutting and inadequate slashing of extraction tracks.¹⁰¹

In 2000-01 the number of checks were 3,424 and Forests NSW identified 1,538 breaches. There were five fines issued by the EPA for breaches of water regulation.¹⁰²

The number of checks conducted in 2002/03 were 3,431. Forests NSW identified 1,242 breaches made by

⁹⁷ All correspondence between SEFR and OEH from 2001.

⁹⁸ DECC ref.FIL06/1449 Ian Cranwell 16/2/09.

⁹⁹ See (online) <<http://www.environment.nsw.gov.au/prpoeo/Notices/N1024598.pdf>>.

¹⁰⁰ Annual Report to the EPA for the Environment Protection License No: 0004022 (2000, 2002, 2003, 2004, 2005, 2006) Appendix 1.

¹⁰¹ Auditor-General’s Report to Parliament, Vol 1 2001, (online)

<<http://www.audit.nsw.gov.au/publications/reports/financial/2001/vol1/173Forestry.PDF>>.

¹⁰² Auditor-General’s Report to Parliament, Vol 5, 2002, (online)

<http://www.audit.nsw.gov.au/publications/reports/financial/2002/vol5/173_ForestryCommission.pdf>

internal and external contractors. Sixty-six per cent of these breaches related to accidental felling of trees into filter strips or other exclusions relating to drainage features. Other breaches include damage to habitat or trees to be retained for future habitat. The EPA issued four fines for breaches of water regulation.¹⁰³

Forests NSW say they completed 3,558 reviews in 2003/04 (3,701 in 2004-05), covering items of compliance and identified 565 breaches (1 615) and this was for the whole estate.¹⁰⁴

Forests NSW allege there were 701 breaches of the EPL for 2005/06 in the Southern region. These figures are provided by Forests NSW and as such can be viewed in light of the history of Forests NSW provision of data.

Conversely Forests NSW states there were 322 breaches for this period. There is a dramatic difference that is systemic throughout all Forests NSW data, for example the RFA Progress Report 2003-04 states 44 EPL/TSL breaches and 592 Forests NSW breaches. The EPL Annual Reports for that year state 108 breaches, the Non-compliance register states 212 breaches.

Summary of South Coast Non-compliance Register for 2002-2007

Registered Incidents					Disciplinary Action Taken			
Breach	Licence Condition	No. of Breaches	Accident	error	Verbal	Written	Other	None
Tree/Part of tree over filter/stream exclusion zone	5.7g 5.7a11	874 115	703 81	171 34	9 5	9 9	16 5	840 96
Tree/part of tree over exclusion zone - rare forest ecosystem	5.5a	1		1				1
Tree/part of tree over exclusion zone - Rocky Outcrops	5.11a	2	2					2
Tree/part of tree over exclusion zone - Ridge/Headwater Habitat	5.8f	11	7	4				11
Tree/part of tree over exclusion zone - Rainforest	5.4f	21	14	7	1			20
Tree/part of tree over exclusion zone - Subterranean Roost	5.14.2	1		1				1
Tree felled into stream exclusion zone	5.7.1A 11	2	2					2
Removal of Tree/Part of tree from filter/stream exclusion zone	5.7.14J	1		1	1			
Excessive logging debris against retained tree	5.6.g11	27	20	7	7			20
Damage to retained tree	5.6.g	63	56	7	1		1	61
Damage to and debris under retained tree	5.6.A.G(1+11)	2	2					2
Machine entry into filter strip/stream exclusion zone	5.7h 5.7.1a111	9	1	8	2	1	1	5
Machine entry into exclusion zone - Owl Habitat	6.4.2	1		1		1		
Machine entry into exclusion zone - Yellow Belly Glider Den Site	6.13	1		1		1		
Machine entry into exclusion zone - Flying Fox exclusion	5.14.4 5.14.5	1 1	1 1					1 1
Filter strips and protection zones not correctly or completely marked for 1 st order stream	5.7a	1		1	1			
Total		1,134	890	244	27	21	23	1,063

¹⁰³ Auditor-General's Report to Parliament, 2004.

¹⁰⁴ Auditor-General's Report to Parliament 2007 Volume one.

Non-compliance Statistics by Year

Year	No. of Breaches	Percentage	Year	No	Percentage
2002	485	43%	2005	57	5%
2003	369	33%	2006	11	<1%
2004	212	19%			

The telling feature of these statistics is that ninety three percent of the time no action is taken against the non-compliance breach and any action taken is administrative. The general decline in statistical information on the occurrence of breaches is either due to vastly improved performance in the field, or a decrease in collection and auditing. The evidence in recently logged compartments suggests the latter.

Some examples given for non-compliance from the Register are:

- Two trees pushed into Rocky Outcrop/Tiger Quoll buffer prior to tree marking in the field.
- Operator was parking machine (977 Track Loader) out of sight for weekend in filter strip.
- Push out dead stag for safety reasons. Stag broke up falling across line 20m F.S.
- Enter a stream exclusion zone with dozer whilst pushing a tree off the 1st order stream boundary.
- Contractor has attempted to remove debris from 1 tree but placed another 2 more trees with debris around base near filter unable to remove without putting machine over buffer.
- Tractor driver pulled two heads out of 15m filter.
- Skidder was stuck facing downhill. Winch rope was too short to reach anything. Owing to safety risk of skidder rolling over it could not be turned before the line. Driver was left with no option but to drive over line to turn with safety.

These excuses are not only grossly inadequate they highlight the lack of care by the logging contractors and, in accepting these excuses, the lack of genuine will on the part of the State Forest Officers (“SFOs”) to regulate. This has a compounding effect in that OEH will not do any enforcement of worth on SFOs or Regional Managers.

Perhaps the worst excuse we have seen so far is taken from the 2009 Eden TSL Non-compliance register:

Nature of the Non-conformance	Reasons for the Non-conformance	Remedial Action	Mitigating Action
Incursion into old growth boundary Harvesting within mapped old growth TSL 5.3(c)	GPS was inoperable. Boundary marked by compass and hip chain	Verbal warning	SFO to pack additional batteries and request assistance when required

When threatened species and their habitats are in danger through industrial logging practices and being negligently managed by belligerent bureaucracies there currently is no protection for them. The only protection and conservation is for Nippon Paper Group (SEFE), the sawmill owners Boral, Blue Ridge Timbers and through the filter on effect, a handful of logging magnates.¹⁰⁵ These businesses have been guaranteed product for twenty years and guaranteed exemption from legislation and regulation. Erroneously Forests NSW states for the period 2000 to 2006:

No significant non-compliances of the TSL were found.¹⁰⁶

In the Tumut sub-region very little compliance monitoring is evident. OEH has not undertaken a field audit in the years 2007-09. Annual Implementation Reports (2006-07) no audits, no mention at all in 2005-06,

¹⁰⁵ Cocks, Heffernans, Mathie & Sons.

¹⁰⁶ A Draft Report on Progress with Implementation of the New South Wales Regional Forest Agreements, (2009), Resource and Conservation Unit, NSW Department of Environment and Climate Change NSW, Sydney, p172.

2004-05, 2003-04. During 2002/2003 two proactive audits were undertaken for the TSL for the Tumut sub-region. Six TSL conditions were investigated in each audit. Clearly the Tumut sub-region has been allowed to run as feral as the blackberry infestations with many systemic breaches and non-reporting.

Recent evidence from South Brooman State Forest Compartment 62, Buckenboursa 533/534 and Bodalla 3043 plainly shows that the Rainforest Identification protocols are in no way being adhered to. Documented evidence suggests rainforest breaches are systemic in daily logging practices.

Compliance and Enforceability

Illegal forestry practice has been defined as:

- logging species protected by national law
- logging outside concession boundaries
- logging in protected areas
- logging in prohibited areas such as steep slopes, river banks and catchment areas
- removing under/over-sized trees
- extracting more timber than authorised
- logging when in breach of contractual obligations
- restricting information about procurement contracts
- tailoring contract specifications to fit a specific supplier
- failing to meet licence provisions including pollution control standards.¹⁰⁷

Currently in NSW all of the above is occurring.¹⁰⁸ Illegal forest activities have far-reaching economic, social and environmental impacts including ecological degradation and exacerbation of climate change. On the South Coast there are varying forms of state-sanctioned land clearing. From farmers wanting to obtain more land for their commercial purposes, as they, or past owners have degraded their land to such an extent that they cannot grow crops on it (climate change being a mitigating factor), to Forests NSW desperately trying to sustain twenty year wood supply agreements with the chipmill and Boral.¹⁰⁹ Logging is undertaken by Forests NSW or their contractors, whether on private or public land.

Although codes of practice are generally ‘aspirational’ they may be recognised as legal instruments and accorded formal stature as legislative instruments. Where they set out standards for compliance then they create enforceable obligations. We would suggest the IFOAs are such instruments.

Forests NSW, or any other person is subject to the conditions of the IFOAs including the terms of the relevant licences.¹¹⁰ Under the Private Native Forestry Code (“PNF Code”) forestry operations under an approved Property Vegetation Plan (“PVP”) must be conducted in accordance with all provisions of the Code.¹¹¹ Both the IFOA and the PNF Code contain the precautionary principle and principle of inter-generational equity.

In *Environment East Gippsland Inc v VicForests* [2009] VSC 386 Justice Forrest held at 80:

I am not persuaded that the reference to the precautionary principle is, at least on the analysis required for this application, simply a statement of objective or lofty principle... It is the terms of the Code and the emphasis on the mandatory nature of the obligation on VicForests both before and during operations that satisfies me that there is a prima facie case that it was obliged

¹⁰⁷ Best Practices For Improving Law Compliance in the Forestry Sector, FAO Forestry Paper 145, Food and Agriculture Organisation of the United Nations, International Tropical Timber Organisation, Rome, 2005.

¹⁰⁸ See all correspondence SEFR to OEH 2001-2010.

¹⁰⁹ On the south coast logs from private native forestry make up 10% of the total volume that goes to the Eden chipmill, URS Environmental Assessment Eden Biomass Power Station; on the north coast the estimated annual volume of private native forest timber harvested is 270,000 m³.

¹¹⁰ *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Eden Region 1999*; the new unreviewed amended IFOAs make no mention of this clause.

¹¹¹ *Private Native Forestry Code of Practice for Southern NSW 2008* cl 1(2).

to comply with the Code in relation to both the application of the precautionary principle and the consideration of expert evidence relevant to the area the subject of logging.

The case as it stands is that in practice either the logging contractors are not reading the legislation or the drive for financial gain outweighs the need to comply with regulations.¹¹² This combined with the threat of enforcement and monetary loss being minimal could be a compelling factor for non-compliance. As Forests NSW and contractors are currently out of control when it comes to regulation and compliance there is therefore little hope that the legislation will have the desired affect regardless of adequacy.¹¹³

Non-compliance relies on lack or inadequacy of regulatory response. The NSW ‘whole of government’ approach has resulted in the original regulator being subsumed, the establishment of a ‘forestry unit’ within a government department which regulate another government department, who both seem to have the same goal.¹¹⁴

Regulation

Effective regulation of forestry activities is vital to ensure protection of biodiversity. Survival of ecosystems and biodiversity depends upon both New South Wales and Commonwealth governments using their powers to regulate to their fullest capacity.

The New South Wales government is primarily responsible for regulating operations of the state-run agency Forests NSW and their authorised contractors under the FNPE Act and Integrated Forestry Operations Approvals (“IFOAs”) through the Office of Environment and Heritage (“OEH”).¹¹⁵

The Commonwealth government also has a role. The Department of Sustainability, Environment, Water, Heritage, People and Communities (“DSEWPC”) has a compliance and enforcement unit. If forestry breaches affect matters of national significance (“NES”) then a formal complaint can be made to the compliance unit.

Nevertheless, as stated, despite acknowledged breaches, there has been one prosecution in the Southern Region since the EPBC Act was introduced¹¹⁶ and none actually under the EPBC Act.¹¹⁷

The EPBC Act contains provision for offences if there is damage or injury to threatened species or habitat.¹¹⁸ For example at s 207B of the EPBC Act it is provided that it is an offence to damage critical habitat if:

(b) the person knows that the action significantly damages or will significantly damage critical habitat for a listed threatened species ... or of a listed threatened ecological community; and

¹¹² See *Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741; for the classic “I thought I didn’t need approval”, and “the clearing was routine agricultural management activities”; and Appellants ‘outline of argument’ (online) at < <http://www.envlaw.com.au/greentree13.pdf>>; and see also *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 2)* [2010] NSWLEC 73; Shoalhaven Council are seemingly ahead of Bega and Eurobodalla Councils, see (online) < <http://www.shoalhaven.nsw.gov.au/council/pubdocs/soe/region/indicator%20results%2005/Vegetationclearing%2005.htm>>.

¹¹³ See Smith J, ‘Making Law Work: Compliance and Enforcement of Native Vegetation Laws in NSW’ (2009) 88 *Impact* 3; for an insightful history of the ‘Redgums decision’ see Flint C, ‘River Red Gum: Barking Owls and Broken Laws on the Murray River’ (2009) 88 *Impact* 6.

¹¹⁴ ‘OEH will continue to work with Forests NSW. The State forests of the Eden Forestry Region...were set aside by the Eden RFA 1999 to provide a guaranteed timber supply to industry. Please be assured that the NSW Government and OEH are working to protect the koala population and at the same time promoting regional economic development and employment’ Letter to L Bower from M Saxon, Acting Director South, OEH Environment Protection and Regulation, May 7, 2010.

¹¹⁵ Integrated Forestry Operations Approvals are the subordinate regulation to the *Forestry and National Park Estate Act 1998* (NSW); there is a specialised regulation unit for forestry, the OEH Environment Protection and Regulation Crown Forestry Unit.

¹¹⁶ Information provided by Ian Cranwell, head of DECC EPRG, (2009).

¹¹⁷ This seems to bear out Fisher’s hypothesis: ‘the absence of legal techniques of control and enforcement of environmental policies has probably been quite deliberate’ see Fisher D E, ‘Environmental Planning, Public Enquiries and the Law’ (1978) 52 *Australian Law Journal* 13.

¹¹⁸ The EPBC Act provides that it is unlawful to kill or injure, take, harm, trade or move a member of a listed migratory species *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 196, ss 211-211E; threatened species or ecological community *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s196B; the Act also provides for strict liability offences for taking or moving native species if the species is in or on a Commonwealth area *Environment Protection Conservation and Biodiversity Act 1999* (Cth) ss 196A–196E; see sub-section 13.3(3) of the Criminal Code for evidentiary burden.

(c) the habitat is in or on a Commonwealth area.¹¹⁹

However the Act also has provision of defences for offences of the Act and provides that certain actions are not offences. Nevertheless the relevant section for defences available is silent on native forest logging.¹²⁰ Therefore, it would follow that these defences are unavailable, as there is not explicit exemption. Thus if state-run agencies and/or their authorised contractors do not adhere to requirements they may be liable.¹²¹

State-run logging agencies may argue that breach or damage was an action that occurred as a result of an unavoidable accident,¹²² nonetheless there is legal definition of the term ‘unavoidable’.¹²³ State-run agencies could claim they did not know the area was critical habitat and in the alternative if it can be proved that they were in possession of the facts, they may argue that logging or burning is not damaging.¹²⁴ Therefore, as shown, while there are some teeth to these sections there is wriggle room.

Implementation

Effective regulatory systems rely upon enforcement of statutory requirements.¹²⁵ If there is minimal enforcement there is little incentive for compliance.¹²⁶ This is borne out by the Independent Review of the EPBC Act’s interim report findings on DSEWPC regulatory response in RFA regions in 2009 which provides:

DEWHA has been advised by the Australian Government Solicitor that the dispute resolution mechanisms of the RFA must be used in the first instance. This is not sufficient. The Commonwealth should have greater capacity to protect matters of NES under RFAs, or to ensure requisite protection is being provided.¹²⁷

The reply a year later from DSEWPC on matters of NES listed under the EPBC Act being impacted upon by logging and burning should be read in light of the above Hawke report’s findings:

The RFAs provide a robust means for governments to work together to meet our respective responsibilities over time... This Department is not able to directly investigate claims of non-compliance with an RFA. However the Department is able to refer matters to the Department of Agriculture, Fisheries and Forestry...The Department has reviewed the evidence you have provided regarding forestry activities...in relation to potential impacts on the Southern Brown Bandicoot, Smoky Mouse, Long-footed Potoroo, Swift Parrot and Tiger Quoll. In this instance it is unlikely that the forestry activities (or alleged failure to conduct surveys prior to forestry) would have had or will have a

¹¹⁹ *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 207B.

¹²⁰ For example native forest logging in NSW is not an action that is taken in a humane manner and is not reasonably necessary to relieve or prevent suffering by a member of a listed threatened species or listed threatened ecological community; *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 197(e)-(f).

¹²¹ It is not an action that is reasonably necessary to prevent a risk to human health; or necessary for the purposes of law enforcement; or an action that is reasonably necessary to deal with an emergency involving a serious threat to human life or property; *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 197(g)-(h).

¹²² *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s197(i); as in the case where mapped old growth was logged because the SFO ‘ran out of batteries in his GPS’ (\$300 fine), Forests NSW 2009 Southern Region Threatened Species Licence Non-Compliance Register, TSL Condition 4.1(f), released October 2010; or 100 hectares of Kosciuszko National Park logged because the SFO ‘got the mark up wrong’ or the logging of a gazetted Aboriginal Place because they ‘did not know it was a gazetted Aboriginal Place’ (warning letter); see ABC South East (online)

<<http://www.abc.net.au/news/stories/2011/03/17/3166054.htm?site=southeastnsw>>; Broad Left (online)

<<http://broadleft.net/2011/04/mumbulla-mountain-forest-protesters-exonerated/>>; confirmation letter OEH to SEFR, 7/06/2010.

¹²³ In Latin *damnum fatale*; not able to be avoided, prevented, or ignored; inevitable; see Oxford English Dictionary, (Oxford University Press, 2010) (online) <<http://www.oed.com/>>.

¹²⁴ *R v Hughes and Ors* (2011) Batemans Bay Local Court, (Ian Barnes, Lee Blessington, Forests NSW); Letter from Nick Roberts CEO Forests NSW to Peter Graham, DSEWPC, 30/05/2011, on burning of Koala habitat.

¹²⁵ See for example *Hastings v Brennan and Anor*; *Tantram v Courtney and Anor* (Ruling No 1) [2005] VSC 36; *R v Hughes and Ors* (2011) Batemans Bay Local Court; *R v Flint, Daines and McLean* (2009) 1 December, Deniliquin Local Court; SEFR breaches site (online) <<http://www.lisaandtony.com.au/breaches.htm>>; NEFA breaches site (online) <<http://nefa.org.au/>>; combined VIC EEG/ Flora and Fauna Research Collective breaches site (online) <<http://www.myenvironment.net.au/index.php/me/Our-work/Breaches>>.

¹²⁶ Macintosh A, ‘Why the Environment Protection and Biodiversity Conservation Act’s Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives’ (2004) 21 *Environment and Planning Law Journal* 288.

¹²⁷ The Interim Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*, Ch 6 Forestry, (online) <<http://www.environment.gov.au/epbc/review/publications/pubs/06-forestry.pdf>>.

significant impact on the Smoky Mouse or Long-footed Potoroo.¹²⁸

Notwithstanding DSEWPC's deliberate misinterpretation of enforcement principles,¹²⁹ and conflict with NES Impact Guidelines,¹³⁰ an important distinction must be made. In *Brown v Forestry Tasmania* ("the Wielangta case") Marshall J ruled that as Forestry Tasmania had not complied with the RFA it was not exempt from the EPBC Act and as stated even though the case was overturned on appeal, this judgment still stands.¹³¹ Thus there seems no real bar to DSEWPC investigating forestry activities in RFA areas,¹³² particularly if there are matters protected by Part 3 of the EPBC Act in RFA areas which are being impacted upon by state-run forestry activities.

Nevertheless there seems scarce evidence to show DSEWPC and OEH has ensured maintenance and implementation of existing regulatory controls. State-run forestry agencies have read the exemptions to insinuate that forestry operations are exempt from the whole EPBC Act, and ensuing lack of enforcement and implementation of regulations and statute provisions possibly sends a signal to agencies and their authorised contractors that may give sustenance to this belief.¹³³ Therefore significance of ss 38–40 should not be underestimated.

In deciding whether or not to prosecute the most important step is the decision. In the interests of the environment, the offender and the community at large care must be taken to ensure that the right decision is made. The wrong decision will undermine the confidence of the community in the criminal justice system.¹³⁴

Justice Lloyd stated in *Director-General of the Department of Land and Water Conservation v Greentree & Anor* [2002] NSWLEC 102 that:

In my opinion the balancing of the legitimate public interest in the conviction of a crime and punishment of those who may be guilty against ensuring that the defendants are able to meet the case sought to be made against them, requires that greater weight should be given to the former.¹³⁵

If the offender has made deliberate attempts to conceal their offences, previous administrative responses to contraventions have not resulted in compliance, the offender shows no contrition and the community of the area, and indeed Australia as a whole, expect that the offences will be dealt with by prosecution, conducted

¹²⁸ DEWHA reply to SEFR, Breaches of the EPBC Act, 3/9/2010.

¹²⁹ See Gunningham N, Grabosky P, and Sinclair D, *Smart Regulation: Designing Environmental Policy*, (Oxford University Press, Melbourne, 1998); United Nations Environment Programme Division of Environmental Law and Conventions, *Online Manual on Compliance with Enforcement of Multilateral Environmental Agreements*, (online)

<<http://www.unep.org/dec/onlineManual/Enforcement/NationalApproaches/tabid/74/Default.aspx?page=9>>; Ayres I, and Braithwaite J, *Responsive Regulation: Transcending the De-regulation Debate*, (Oxford University Press, 1992); Rachel Baird, 'Big Sticks, Carrots and Enforceable Undertakings Under the Environment Protection and Biodiversity Conservation Act 1999' (2011) 28 *Environment and Planning Law Journal* 3; Zada Lipman, 'An Evaluation of Compliance and Enforcement Mechanisms in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and Their Application by the Commonwealth' (2010) 27 *Environment and Planning Law Journal* 98.

¹³⁰ DSEWPC Guidelines for Significant Impact on Matters of NES (online)

<<http://www.environment.gov.au/epbc/publications/pubs/nas-guidelines.pdf>>.

¹³¹ See *Brown v Forestry Tasmania and Others*(No 4) [2006] FCA 1729, Marshall J; although the RFA provisions of the EPBC Act are often read as if they were an exemption, they have effect in practice as a licence, the terms of which must be complied with.

¹³² 'The Commonwealth has a particular responsibility in the area of nature conservation in relation to . . . Australia's obligations under international law, including under treaties' Intergovernmental Agreement on the Environment 1992, cl 9(3); 'parties agree to co-operate in fulfilling Australia's commitments under international nature conservation treaties and recognize the Commonwealth's responsibilities in ensuring that those commitments are met' Intergovernmental Agreement on the Environment 1992, cl 9(10).

¹³³ The Hawke Review considered application of the EPBC Act to forestry and provided that although the RFA provisions of the EPBC Act are often read as if they were exemptions they have effect as a licence, the terms of which must be complied with; "the approval has continued to operate irrespective of the extent to which the commitments contained within the agreements have been implemented, particularly in relation to environmental outcomes... The lack of transparency also limits the ability of parties to verify whether core environmental commitments or 'license conditions' of the RFAs are being met" see Final Report of the Independent Review of the EPBC Act, above n 127, 10.10.

¹³⁴ *Prosecution Policy of the Commonwealth*, DPP Prosecution Guidelines, 2009.

¹³⁵ See *Director-General of the Department of Land and Water Conservation v Greentree & Anor* [2002] NSWLEC 102, Lloyd J at [126] quoting Mason CJ, Deane and Dawson JJ in *Ridgeway v The Queen* [1994] HCA 33 at [38]; see also Australian Government Department of the Environment, Water, Heritage and the Arts, *Compliance and Enforcement Policy*.

in public before a court, then there are good grounds for prosecution.¹³⁶

The two strongest forces ensuring environmental compliance are criminal prosecutions and potential clean-up liability.¹³⁷ Regulators in Australia have been accused of not utilising the full scope of the penalty provisions and focusing on the 'less robust options'.¹³⁸ This is evidenced by the current regulatory response practice of relying on voluntary agreement. If regulators continue to implement the softer penalty provisions the deterrence objects of the legislation will be, and have been, greatly undermined.

Remedies of Threatened or Apprehended Breaches Since the Date of Assent.¹³⁹

EDEN	1999 2000	2000 2001	2001 2002	2002 2003	2003 2004	2004 2005	2005 2006	2006 2007	2007 2008	2008 2009	TOTAL
Audits	5	3	7	3	3	4	1	2	3	4	35
Breaches	57	34	39	24	33	17	91	104	108	79*	586
Warning Letter	3	3	3	2	3	3	1	2	3	1*	24
Remedial Works	17	17	5	2	13	5	8	8	4	0	79
Clean-up Action	0	0	0	0	0	0	1	0	0	0	1
PINS	0	0	0	0	0	0	0	0	0	2*	0
Prosecution	0	0	0	0	0	0	0	0	0	0	0

* investigations ongoing.

SOUTHERN	2001/ 2002	2002/ 2003	2003/ 2004	2004/ 2005	2005/ 2006	2006/ 2007	2007/ 2008	2008/ 2009	TOTAL
Audits	1	6	4	2	2	6	3	4	28
Breaches	3	196	35	1	107	1	115	27*	485
Warning Letter	1	1	2	0	2	1	3	2*	12
Remedial Works(per site)	2	4	7	1	14	1	6	0	35
Clean-up Action	0	0	0	0	0	0	1	0	1
PINS	0	1	0	0	0	1	0	2	2
Prosecutions	0	0	0	0	0	0	0	0	0

¹³⁶ DEWHA *Compliance and Enforcement Policy*, Australian Government, 2009, (online)

<<http://www.environment.gov.au/about/publications/pubs/compliance-enforcement-policy.PDF>> viewed 16 June 2010.

¹³⁷ Smith S L, 'Doing Time for Environmental Crimes: The United States Approach to Criminal Enforcement of Environmental Laws' (1995)12(3) *Environment and Planning Law Journal* 168; see *Chief Executive Officer Department of Environment and Conservation v Szulc* [2010] WASC 195, a three month jail sentence for Munghlinup farmer Maxwell Szulc, 27 July 2010, (online)

<<http://au.news.yahoo.com/thewest/al/-/breaking/7659368/wa-farmer-jailed-for-contempt/>>; for local logging companies that have had prosecution on private land see *Director-General, Department of Environment Climate Change and Water v Vin Heffernan Pty Ltd* [2010] NSWLEC 200; *Director-General Department of Environment and Climate Change v Wilton* [2008] NSWLEC 297.

¹³⁸ The Australian Network of Environmental Defender's Offices, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Submission 189, p15, (online) <<http://www.environment.gov.au/epbc/review/submissions/pubs/189-australian-network-of-environmental-defenders.pdf>> viewed 16 June 2010.

¹³⁹ OEH, Provided by Ian Cranwell, 2009.

An oft favoured quote by Forests NSW and OEH EPRG is found in the EPA Prosecution Guidelines:

It has never been the rule in this country ... that suspected criminal offences must automatically be the subject of prosecution.¹⁴⁰

In fact the full quote from Sir Hartley Shawcross goes on to state:

Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute “wherever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required *in the public interest*.”

Sheahan J held in *EPA v Forestry Commission (1997)* that:

The Forestry Commission, although gaining a profit from its activities, carries out a function in the public interest, and the public looks to the public body involved in the industry to set some standard.

Mr Justice Sheahan also held that:

The forestry industry must be persuaded to adopt preventative measures because the potential for harm to the environment is great, and is a public concern reflected in the relevant legislation.¹⁴¹

Section 25b of the FNPE Act states the purpose of the IFOAs are:

For the protection of the environment and for threatened species conservation.

It was a condition under the FNPE Act that the EPA, now OEH ‘continue to enforce the conditions’ of the Act.

The protection of native forests and the mitigation of climate change impacts is definitely in the public interest. Yet responses to forest auditing breaches have resulted in an apparent unenforceability and lack of compliance with the FNPE Act.

There is some difficulty in making a determination on the suitability of trees selected for retention after a harvesting event.¹⁴²

This situation is wholly due to the IFOA being riddled with grey-wording, myriad loopholes and allowances the forestry industry has white-anted into the prescriptions, making conservation bottom priority and Forests NSW output high priority. The promised maintenance of the enforcement of the FNPE Act has not materialised and has been budgeted to redundancy status. In Mogo State Forest for example OEH took no further enforcement action against Forests NSW for a breach when told by Forests NSW that:

Forests NSW did acknowledge that whilst some of the trees marked for retention did not strictly meet the requirements of hollow-bearing, an adequate number were retained across the landscape when unmarked trees were included in the count.¹⁴³

There is no clause in the Southern Region IFOA allowing unmarked trees to be used in habitat tree retention counts.

OEH Environment Protection and Regulations Forestry unit often resort to sending Forests NSW officers to investigate breaches. Therefore, it should come as no surprise, that when the perpetrator of the crime is sent to report on the crime the result is no evidence of the crime.

A successful strategic approach to better law compliance in the forest sector is needed by increasing clarity, transparency and consistency of forest and forest-related legislation. This could be achieved by the removal of exemptions which would encourage consistency of the regulatory framework to ensure that laws do not contradict others within the forest legal framework or other sectors, ensuring accountability and control of

¹⁴⁰ EPA *Prosecution Guidelines* at 3: Sir Hartley Shawcross QC, UK Attorney General and former Nuremberg trial prosecutor, speaking in the House of Commons on 29 January 1951, emphasis added.

¹⁴¹ *EPA v Forestry Commission of NSW* [1997] NSWLEC 96, Sheahan J.

¹⁴² Letter: OEH to South East Forest Rescue (SEFR), 12/2/08.

¹⁴³ Letter: OEH to T Whan (SEFR) 16/2/09.

forestry operations at the local level, ensuring that in-country industrial capacity does not exceed sustainable supplies, for instance, by conducting feasibility studies and/or closing down mills.

It could also be achieved by promoting the independence of the regulator, giving the regulator and authorised officers stronger enforcement powers and creating transparency of the regulatory processes.

As none of the above suggestions will be implemented and as the current criminal behaviour is so entrenched we have little faith that any code or legislative instrument will be adhered to and less faith that the regulator will enforce compliance.

BIODIVERSITY

As shown the numbers of threatened species, threatened populations and ecological communities have increased significantly since the RFAs were signed. Many threatened and endangered flora and fauna species are at extreme risk from current industrial logging operations. The Reserve system gazetted to date, along with the off-reserve protection measures of the IFOAs, are neither comprehensive, representative, or adequate to meet the needs of threatened species survival.

A recent report by Professor Richard Kingsford, Professor Brendan Mackey and a think tank of thirteen eminent scientists stated that:¹⁴⁴

Loss and degradation of habitat is the largest single threat to land species, including 80 percent of threatened species.¹⁴⁵

As evidenced the greatest threats to Australia's biodiversity are caused by broad-scale land clearing and forestry operations including establishment of plantations and fire management practices, yet these industrial forestry practices continue to remain exempt from legislation.¹⁴⁶

The Intergovernmental Agreement 1992 states that:

The parties agree that policy, legislative and administrative frameworks should provide for:

- (iv) consultation with affected individuals, groups and organisations;
- (v) consideration of all significant impacts;
- (vi) mechanisms to resolve conflict and disputes over issues which arise during the process;
- (vii) consideration of any international or national implications.¹⁴⁷

The Expert Panel stressed that the persistence and perpetuation of hollow bearing trees is imperative for the survival of forest fauna.¹⁴⁸ A discussion of the conservation measures in place to maintain these hollow bearing trees highlighted the following points:

- Tree mortality is high; the ratio of one recruit tree to one hollow bearing tree is unlikely to maintain the targeted number of hollow bearing trees in Net Harvest Areas in the mid to long term. This is particularly the case in the regrowth zones. Modelling is required to define a more appropriate ratio of recruits to hollow bearing trees.
- The rotation time between harvesting events within a compartment requires revision. Current rotation

¹⁴⁴ See (online) <<http://www.threatenedspecies.environment.nsw.gov.au/index.aspx>>; two examples illustrate this point: firstly, in relation to the endangered Hasting River Mouse, the conditions contained in the Integrated Forestry Operations Approval for this species have recently been weakened for certain core areas for the Hasting River Mouse at the behest of the Forests NSW to increase access for logging; secondly, in relation to the endangered Spotted-tailed Quoll, Forests NSW were found illegally logging a Spotted-tailed Quoll exclusion zone in Forestland State Forest in Upper and Lower North East NSW; they admitted the fact, but claimed it was a 'mistake'.

¹⁴⁵ Kingsford R T, Watson J E M, Lundquist C J, Venter O, Hughes L, Johnston E L, Therton J A, Gawel M, Keith D A, Mackey B G, Morley C, Possingham H P, Raynor B, Recher H F, and Wilson K A, 'Major Conservation Policy Issues for Biodiversity in Oceania' (p 834-840), Published Online: (2009), (online) <<http://www3.interscience.wiley.com/journal/118487636/home?CRETRY=1&SRETRY=0>>.

¹⁴⁶ See The National Strategy for the Conservation of Australia's Biological Diversity (1996).

¹⁴⁷ *Intergovernmental Agreement 1992* sch 2 (3).

¹⁴⁸ From 'Review of Protective Measures and Protective Measures and Forest Practices - Biodiversity Workshop Southern Region' Ecologically Sustainable Forest Management Group, July 1999, Project No. NA45/ESFM p176-177.

intervals are too short to allow recruitment trees to form hollows. Additionally, hollow bearing trees retained from the previous harvesting event are not permanently marked therefore could be removed in the next rotation.

- Guidelines or criteria should be developed for the selection of recruitment and hollow bearing trees. Trees with the potential to develop a broad range of hollow types should be targeted for selection. Suppressed trees should not be selected as recruit trees.
- Prescriptions for the retention and recruitment of hollow bearing trees in the NHA should be rewritten to emphasise, not only maintaining these features during a single cutting cycle, but managing them to persist in the landscape.
- Specific prescriptions should be developed for hotspots, defined as areas of high species richness. A sliding scale, where incremental increases in species diversity are matched by increases in prescription strength, was suggested.

Observations, from on-ground monitoring ten years later, see little change to the prescriptions; the habitat to recruitment ratio is still one to one; the regrowth zone is weaker, because only the hollow-bearing trees present (up to a maximum of ten per two hectares) are retained - if ten are not present then consequently less recruitment trees are retained; there are no stipulations in any harvest plans to retain previously retained trees and rotation times have shortened. For example compartment 62 of South Brooman State Forest has had 'Timber Stand Improvement' twice and been logged nine times since 1954, which is virtually every six years.¹⁴⁹

There is no available ESFM data on the marking up of retention trees, both habitat and recruitment trees, and consequently many trees that had been retained have now been logged. Indeed currently there is no available data on past history of retention trees and their location thus previously retained trees are constantly available for logging.¹⁵⁰

Habitat and recruitment tree selection is getting more parlous by the year. Many suppressed recruitment and very small habitat trees (often with no visible hollows) are always found when auditing logged areas, though strangely the stumps are invariably of the largest size class. The sliding scale idea was put in place in Eden yet the solid data on exact amounts of each habitat class that has been logged since 1999 seems non-existent and the volume of "high" class habitat is not reported on.

Forests NSW have been informed on the extent of threatened species in their region yet could only find fifteen percent of these species in the Eden region and thirteen percent in the Lower North East in the pre-harvest fauna surveys.¹⁵¹

The lack of care for threatened and endangered species is nowhere more apparent than in the ESFM report which states:

Any change to the number of species recorded on the estate are likely to reflect research and survey effort rather than true species richness of forest areas.¹⁵²

Further scientific judgment on surveying runs thus:

Unless the probability of detecting a species when it is present is equal to 1, false negative observation errors will occur in species surveys. The probability of detecting the presence of the case study species in any single standard survey based on spot-lighting and call elicitation has been found to be very low (Pr[detection/ presence] ~ 0.12–0.45); making the reliability of absence data a potentially serious form

¹⁴⁹ Southern Region – Compartment 62, South Brooman State Forest, Bateman's Bay Management Area, Harvest Plan approved 8/5/09.

¹⁵⁰ Gibbons P, Lindenmayer D B, Barry S C, Tanton M T, 'The Effects of Slash Burning on the Mortality and Collapse of Trees Retained on Logged Sites in South-Eastern Australia' (2000) 139 *Forest Ecology and Management* 51.

¹⁵¹ NSW Government 2006 ESFM 'Criteria and Indicators monitoring Report- 2001/2002: Upper North East, Lower North East and Eden Regions' A Supplementary Report to the NSW Forest Agreements Implementation Report, Forestry and Rural industry Policy, NSW Department of Natural Resources, Parramatta, p25.

¹⁵² NSW Government 2006, ESFM 'Criteria and Indicators monitoring Report- 2001/2002: Upper North East, Lower North East and Eden Regions' A Supplementary Report to the NSW Forest Agreements Implementation Report, Forestry and Rural industry Policy, NSW Department of Natural Resources, Parramatta, p37.

of uncertainty in our case study. Recent studies have demonstrated the negative impact that false-negative observation error may have on species habitat analyses, meta-population models and monitoring studies.¹⁵³

Scientists advocate an approach based on maintaining ecosystem structure and function, and therefore ultimately protecting more species.¹⁵⁴ Protecting species and diversity within functional groups is a key way to do this thereby enhancing ecosystem resilience, so that they are able to maintain their functions and processes. Further it is not enough to merely record species, the impact of the logging must be recorded.

The authors note with great concern that slow growing species such as *Macrozamia communis* (Burrawangs), *Dicksonia youngiae*, and *D antarctica* (Soft Tree Ferns), *Cyathea australis* and *C cunninghamii* (Rough Tree fern) and *Xanthorrhoea spp* (Grass Trees) are particularly vulnerable in logging areas. Most of these plants have been alive long before white settlement, they grow up to one cm of trunk per year, and when young will take up to ten years to start forming a trunk. Research shows that only between two to thirteen per cent of tree ferns regenerate after logging and never regrow on snig tracks or log dumps. Tree ferns, which play a vital role in maintaining the moisture of the forest floor and providing protection for the growth of other forest plants, are often casualties of logging.¹⁵⁵ There are no prescriptions for these flora even though they are protected under NSW legislation. If there are no prescriptions contained within the IFOAs Forests NSW do not undertake any protective measures.

IFOA and PNF Prescriptions for Species

In the Southern and Eden regions there are currently 18 compartments active in State forest and 73 Property Vegetation Plans which mainly feed the pulp market. All of these contain threatened and/or endangered species.¹⁵⁶ Once a species has been listed by the Scientific Committee it triggers numerous obligations for habitat conservation.¹⁵⁷ Thousands of dollars have been spent both State and Federally on each species recovery plan and threat abatement plan, yet despite this, and there being a plethora of legislation and regulations to conserve biodiversity, native forestry operations are exempt.

The object of IFOAs are stated at s.25 of the FNPE Act as being ‘for the protection of the environment and for threatened species conservation’.¹⁵⁸

The Scientific Committee’s main recommendations to protect hollow dependant species were to establish appropriate recruitment tree ratios as part of the Private Native Forestry Code under the *Native Vegetation Act 2003* (NSW), and adopt appropriate policies for recruitment tree ratios with a stipulated minimum retention density in areas of State forestry operations.¹⁵⁹

Both of these strategies for different land tenures are given High priority, both of these strategies have not been implemented. Given that generally eucalypts form hollows after about 120 years of age a sustainable rotation age would be one that allows forest values to regenerate.¹⁶⁰ Reducing forests to a flat rate of 5 or

¹⁵³ Wintle B A, Elith J, and Potts J M, ‘Fauna Habitat Modelling and Mapping: A Review and Case Study in the Lower Hunter Central Coast Region of NSW’ (2005) 30 *Australian Ecology* 719.

¹⁵⁴ McIntyre S, Barrett G, Kitching R, and Recher H, ‘Species Triage – Seeing Beyond Wounded Rhinos’ (1992) 6(4) *Conservation Biology* 604; see also Walker B, ‘Conserving Biodiversity Through Ecosystem Resilience’ (1995) 9(4) *Conservation Biology* 747.

¹⁵⁵ Unwin G L, and Hunt M A, ‘Conservation and Management of Soft Tree Fern *Dicksonia Antarctica* in Relation to Commercial Forestry and Horticulture, *Pteridology in Perspective*, Camus J M, Gibby M and Johns R J [eds], (1996) pp 125-137, Royal Botanic Gardens, Kew : London.

¹⁵⁶ There are 91 forest dependent species of fauna in the region, National Parks and Wildlife, Atlas of NSW Wildlife, < <http://wildlifeatlas.nationalparks.nsw.gov.au/wildlifeatlas/watlasSpecies.jsp>>, viewed 19 July 2010.

¹⁵⁷ See the *Environment Planning and Assessment Act 1979* (NSW); the *Protection of Environment Operations Act 1997* (NSW); the *Threatened Species and Conservation Act 1995* (NSW); the *Environment Protection Biodiversity and Conservation Act 1999* (Cth); *National Parks and Wildlife Act 1974* (NSW).

¹⁵⁸ *Forestry and National Park Estate Act 1998* (NSW) s25.

¹⁵⁹ *Threatened Species Conservation Act 1995* (NSW) Sch 3 s8, *Loss of Hollow Bearing Trees Key Threatening Process*;

< <http://www.environment.nsw.gov.au/determinations/LossOfHollowTreesKtp.htm>>; clicking on ‘Threat Abatement Strategies’ will take you to ‘Review and Amend or Adopt Existing Legislation or Policies’, clicking on this will take you to ‘All Priority Actions for this KTP’, clicking on that will take you back to ‘All Priority Actions for this KTP’.

¹⁶⁰ Crane M J, Montague-Drake R M, Cunningham R B, and Lindenmayer D B, ‘The Characteristics of Den Trees Used by the Squirrel Glider (*Petaurus norfolcensis*) in Temperate Australian Woodlands’ (2008) 35 *Wildlife Research* 663.

less hollow bearing trees per hectare from an optimum of 27-37 hollow bearing trees per hectare puts at risk expectations that future generations will see fauna such as the Greater Glider in the wild.

Prescriptions for threatened species and habitat conservation in IFOAs and the PNF code are grossly inadequate. Furthermore, neither a FOP or Harvest Plan can be classed as a species impact statement.¹⁶¹ It is perfunctory to merely record species. Impacts of logging and post-logging burning on species and their habitat must also be recorded and monitored to ensure due process in achieving conservation objectives.

A comparison with a species recovery plan and threat abatement plan for species and prescriptions contained within the PNF Code and the IFOA TSLs highlights the inadequacy of these prescriptions. The results of this practice is reflected in numbers of threatened and endangered species rising in line with the increase in forests logged.¹⁶²

The regulators misconception of implementation of TSLs prescriptions has ensured that many breaches of licence conditions which have destroyed habitat have gone unpunished. Furthermore Forests NSW have recommended to OEHL that many prescriptions be nullified.¹⁶³ Further the PNF Unit in OEHL have shown themselves to be completely incapable of managing and implementing the PNF Code and operations, approving more than 70% of old-growth high conservation value native forest for logging, according to information obtained through Parliament that is 7,898 hectares over a 3 year period.

‘Waste’ Versus Habitat Protection: A case study of the conditions of the Threatened Species Licence in the Southern Region

Late in 2001 the pressure was on agency players to finalise prescriptions of the TSL within the context of the heated issue of a Charcoal Factory proposal. The factory was being promised 200,000 tpa of residue timber feedstock by Forests NSW. When the RFA process began, this proposal was not in the mix. Luckily, the factory never received approval, but the ramifications of the threat continue to this day.

It became an over-riding concern for the National Parks and Wildlife Service (“NPWS”) that during the negotiations for the TSL the removal of up to 200,000 tonnes a year of residual timber was not considered to be part of Forests NSW operations in the South Coast sub-region.¹

A further concern was that the residual timber supply proposal forecasted the use of mechanical harvesting and grapple snagging. These techniques had not previously been used on the South Coast and therefore the impacts, negative or beneficial, of these types of operations in the forests of the region were not fully understood. Consequently, it was difficult for the NPWS to fully anticipate the implications of the residual timber supply proposal for the threatened species of the region. To ameliorate these concerns, NPWS proposed to include a review in the TSL to enable comprehensive assessment of the on-ground implications of the operations and for consideration of these implications in the TSL conditions:

2.1(k) SForests NSW must assist the NPWS in a review of the on-ground implications of the removal of residual timber and mechanical harvesting/grapple snagging techniques as they relate to the management of threatened species. This review must commence within 18 months of the start of supply to residual timbers to the charcoal plant.

¹⁶¹ ‘I am obliged to note that, in my opinion, the Eden FIS is an appallingly inadequate document, even by Commission standards. It suggests they do not take the Act (and the conservation of endangered fauna) very seriously’ *South East Forests Conservation Council Inc v Director-General National Parks and Wildlife and State Forests of NSW* [1993] NSWLEC 194, Deputy Director (Policy and Wildlife) Mr David Papps.

¹⁶² For 2008 figures see (online) < <http://www.threatenedspecies.environment.nsw.gov.au/index.aspx>>; for 2000 and 2003 figures see < http://www.environment.nsw.gov.au/soe/soe2003/chapter6/chp_6.3.htm#6.3.69> and for 2006 figures see < http://www.environment.nsw.gov.au/soe/soe2006/chapter6/chp_6.3.htm#6.3.71>.

¹⁶³ Original Eden TSL cl 6.6 Southern Brown Bandicoot *Isodon obesulus* a) An exclusion zone of at least 200 hectares must be implemented around each record of the species; amended Eden TSL now has very small buffer zone as evidenced by Nadgee SF Cpt 62 harvest plan; the SBB is an EPBC listed endangered species.

Forests NSW considered this reasonable and agreed to the wording of this proposal. However, the condition never made it into the final TSL document. Indeed the current prescriptions include such conditions like:

5.4(g)(4) Nothing in this condition (being condition 5.4) prevents the use of a harvesting arm of a mechanical harvester to rehabilitate or reinstate ground or soil in Rainforest or an exclusion zone around Warm Temperate Rainforest or Cool Temperate Rainforest in accordance with another term or condition of this approval.

Fragmentation

There is nothing positive to report. Fragmentation has increased but conveniently no data exists to show this. Scientifically, habitat corridors need to be one hundred to two hundred and fifty metres wide to be beneficial, the current forty to eighty metres is simply not adequate.

Fauna experts consulted during the Response to Disturbance Project have recommended that corridors and riparian buffers be expanded to 200 m for yellow-bellied gliders, 1 km along major rivers for owls, 240 m for fishing bats and golden tipped bats, and 1km (with low-intensity logging) between catchments for stuttering frogs.¹⁶⁴

Roads bring more people into an area which results in fragmentation of the landscape, but they also have much broader and wide ranging effects. At the landscape scale, roads disrupt ecosystem processes and, at both a fine and coarse scale, cause a loss of biodiversity.¹⁶⁵

Fragmentation of the landscape and the consequent habitat loss is the major threat to biodiversity.¹⁶⁶ It has been suggested that fragmentation within a forest will force the inhabitants of the logged forest patch into the surrounding forest, thereby causing dysfunctional behaviour due to higher than normal densities.¹⁶⁷ This phenomenon is reduced when the remaining forest is large and intact.

Listing forest-dwelling species

Forests NSW state that the reporting of forest dependent species depends on the reporting of SFOs prior to logging. This does not instill confidence. Forests NSW give no data on this from the Southern Region at all to the Independent Assessor. The data appeared to be CRA data which seems erroneous. There are greater glider and squirrel glider habitats within State forests in the Southern region. To base decisions on this type of erroneous data would be unjustifiable.

Status of threatened forest-dwelling species

During the 1998 – 2011 RFA period there has been a recognised increase in threatened species, endangered populations, endangered ecological communities, and key threatening processes, which is material evidence on the failure of the RFAs. KTPs such as the removal of dead trees and the loss of hollow-bearing trees occur on a daily basis on the State forest estate, creating an ecological desert with impunity.

Species extent and abundance

Current RFA mechanisms are not functioning positively. There has been no action on KTP abatement. For example the Southern Brown Bandicoot, for which the Eden IFOA initially stipulated a two hundred hectare exclusion zone, in Nadgee SF compartment 62, SBBs have been given no exclusion zone (see Operational Plan approved 30/06/09). There has been an amendment at Forests NSW request of the SBBs prescriptions on the strength of alleged SBB monitoring surveys. The authors can find no documentation to substantiate the claim that the monitoring plans mentioned by Forests NSW exist. There is a 2007 species management

¹⁶⁴ From CRA Report 'Draft Assessment of Forest Management Practices for the Eden RFA' CSIRO Forestry and Forestry Products and Andrew Smith, Sestscan and Pat O'Shaughnessy and Associates, (1997), ne27esfm, ISBN 0-642-28398-2 p48.

¹⁶⁵ Forman R T T, and Alexander L E, 'Roads and Their Major Ecological Effects' (1998) 29 *Annual Review of Ecology and Systematics* 207.

¹⁶⁶ Benson J, 'Past, Present and Future: the Role of Scientific Knowledge in Nature Conservation' (1993) *National Parks Journal* February 17; see also Wilcove D S, Rothstein D, Dubow J, Phillips A, and Losos E, 'Quantifying Threats to Imperiled Species in the United States' (1998) 48 *BioScience* 607.

¹⁶⁷ Hagan J M, Vander Haegen M, and Mckinley P S, 'The Early Development of Forest Fragmentation Effects on Birds' (1996) 10 *Conservation Biology* 188.

plan but no further monitoring reports.

The IFOA is a flawed document and the conditions it holds are therefore flawed, it is worded so that carte blanche non-compliance can be explained away as an accident, and is seriously undermining threatened species extent and abundance. To merely list a threatened species - to 'take note' of a species and its location - is not considering the impacts of logging on that species or its habitat, nor is that in any way affording protection to these species. These species have been legislated into extinction and Forests NSW, the regulatory agency OEH, the State governments and the Commonwealth are all liable under domestic and international obligations.

Climate change will dramatically increase other threats to species in the region, through increased spread of invasive species, increased fire frequency and severity, increased spread of forest dieback, and reduced stream flows. The cumulative impact of all these threats compounded by industrial logging operations operating under an exemption to the EPBC Act and the RFAs, have resulted in a major impact on threatened species.

Forest Type by Area:

There seems to be no data for the Southern Region. Updated information regarding changes to the extent of forest type in the CAR is not available. The Forests NSW statement stating the system was established in accordance with the JANIS is erroneous for a number of reasons, mainly due to the lack of willingness by legislators to promote ecology over economy.

Forests NSW has stated:

Changes to the extent of forest type on state forests are reported through data obtained from the forest management zoning (FMZ) system. This zoning is based on the nationally agreed JANIS reserve criteria which give effect to the CAR reserve. The system defines a number of zones and specifies what activities are permissible within each zone. The extent of reservation of different forest vegetation communities is a measure of the degree of protection of biological diversity at the species and ecosystem levels. The modelled forest type extents listed in the RFAs are used as the baseline to measure changes to the extent of forest types. The State of the Parks 2004 report and ESFM annual reports provide further detail on the extent and management of forest ecosystems in each region.

This information is vital for proper assessment, yet it is being left aside in Southern, and is lacking to the extent that the regionally produced 'harvesting plans' are not providing any information of how many hectares of each forest type yield association is within the net harvest areas. The information given in the recent Wandera Harvest Plan only gives basic statements such as 'stands of multi-aged regrowth with patches of maturing stands...forest stands of mixed age'.¹⁶⁸ This implies that previously undisturbed forest is being logged under this plan. This is in tension with the *National Forest Policy Statement (1992)* and the need to preserve old-growth or high conservation value forest.

The ESFM Monitoring Report for 2001/02 tells us that:

any change to the extent of forest ecosystem types can only be presented separately for each tenure, and cannot accurately identify change to the extent of forest ecosystem types across the whole public forest estate. Forest ecosystem type data are currently derived from different data sets for the national park estate and State forests and therefore cannot be directly compared.

This confounding effect needs to be amended.

¹⁶⁸ See Site Specific Harvesting Plan, Southern Region -Compartments 584, 585, and 586 Wandera State Forest, Batemans Bay Management Area, approved 1/5/08, Forests NSW.

Area of forest type by growth stage:

All observations made to date of forestry operations under the RFAs have shown that logging old-growth is a high priority, indeed it is generally recognised that the Forests NSW achievement of finalising the removal of unprotected old-growth is less than four years away.

Information showing the effect on forest type by area and growth stage (under Forests NSW Research Note 17 classification) on the State forest estate is not publicly available. There is a lack of informative data on what type of forest is used as classification and again assert that classification by growth stage is not classifying by forest type.

Unfortunately, RFAs have developed and utilised relatively simple forest ecosystem classifications - note that in my professional estimation even classifications with 100-150 types are inadequate to assess comprehensiveness.¹⁶⁹

Regeneration

The white elephant in the room is the regeneration of native forest after industrial logging. The meaning of Forests NSW statement that there is a hundred percent regeneration target set for harvested native forest is obscure. The research and data that the forest does regrow after industrial logging and burning is inadequate. The Forests NSW publicly available data is cursory to say the least, and even what little forest was surveyed did not equal 'one hundred percent regenerated'.

From the period 2001 to 2006 the number of surveys for the Southern region was twenty one covering a total of 2,176 hectares.¹⁷⁰ There is no information provided by Forests NSW or the RFA regime on the effectiveness of regeneration.

The vascular floristics about a decade after harvesting operations differed significantly from the floristics of similarly aged forest regenerating after wildfire. In clear-felled areas, weed and sedge species occurred more frequently than on wildfire sites and *Acacia dealbata* was much more abundant, whereas resprouting shrubs, tree ferns and most ground-fern species were more abundant in wildfire regeneration sites. The low survival rate of resprouting species reported in an increasing number of studies suggests that soil disturbance is likely to be a major contributor to differences.¹⁷¹

Forests NSW do not 'replant' native forest. Once logged and burned the forests may take decades to regenerate or they might not regrow at all and they are altered inexorably.¹⁷² If Forests NSW ever did replant, they'd then fail again as replanting is not sufficient to offset the biodiversity losses created by clearing because of lags in species becoming established and sustained differences in species composition.

The one hundred percent regeneration rate for Southern in 2005-06 stated in the Draft Report is not only erroneous but highly incredible given that there were no regeneration surveys undertaken in the Tumut subregion in that period. There is no data given showing how much area was assessed, except:

In 2005-06 there were no regeneration surveys in the UNE or Eden regions.¹⁷³

Information from Forests NSW concerning Southern Region regeneration assessments for the period 2001-02 to 2005-06 stated that a total of 2019 hectares had been surveyed in the southern sub-region, and only 167 hectares in the Tumut sub-region.¹⁷⁴ The analysis reports that 'are available' on this clause 52 data are actually unavailable. The assessment report completed by 31 December 2006 is similarly 'unavailable'. There is a lack of comprehensive information available showing the full extent of regeneration surveying

¹⁶⁹ Mackey B, 'Regional Forest Agreements – Business as Usual in the Southern Region?' (1999) 43 *National Parks Journal* 6.

¹⁷⁰ Southern IFOA Clause 52 Assessment of Regeneration Report 20/6/07, Forests NSW Batemans Bay; this 'report' is a thin five line by five column table.

¹⁷¹ Ough K, 'Regeneration of Wet Forest Flora a Decade after Clear-felling or Wildfire - Is There a Difference?' 49(5) *Australian Journal of Botany* 645, (online) <<http://www.publish.csiro.au/paper/BT99053.htm>>.

¹⁷² Forests NSW burned 23,000 hectares in the South East alone in 2007; Forests NSW Annual Report 2007.

¹⁷³ A Draft Report on Progress with Implementation of the New South Wales Regional Forest Agreements, (2009), Resource and Conservation Unit, NSW Department of Environment and Climate Change NSW, Sydney, p129.

¹⁷⁴ 'Southern IFOA Clause 52 Assessment of Regeneration', Forests NSW Batemans Bay Office, 20/6/07.

efforts and the results thereof.

Comparisons to other reporting is incongruous in relation to effective regeneration. For example, in the State of the Forests Report 2008 (“SOFR”) at Table 37 on page 67 it is noted that in 2005-06 NSW had 3,870 hectares effectively regenerated; meanwhile in the Draft Report on Implementation on page 129 there were no regeneration surveys in Upper North East and Eden Regions; noted above Tumut also had zero surveys for the year; which means that 3,438 hectares must have been assessed solely in the Lower North East region that year. This seems like an incredible focus of regeneration surveying for the year 2005-06.

Based on the state and territory listings the largest increases in numbers of threatened taxa nationally are occurring on the south coast of New South Wales. Change in status of listed taxa in New South Wales is concentrated in subregions along the east coast. All species have as reasons for listing or decline, habitat loss, fragmentation due to road construction, intensive timber harvesting and altered fire regimes.¹⁷⁵

Fire

The fire regime practiced by Forests NSW is anachronistic and below standard. For example in 2005-06 seven percent of State forest was burned in wildfire and 38,008 hectares were burned as ‘hazard reduction’ for a total expenditure of over eight and a half million dollars.¹⁷⁶ This is a waste of taxpayers’ money given the concerns citizens are expressing over climate change and biodiversity impact.

An example of these ‘mitigation measures’ is the incident of 27 August 2009. A ‘fuel management’ fire that was started by Forests NSW in compartments west of Gulaga Mountain, jumped containment lines and ‘got away’ burning out of control up the mountain and continued burning down the eastern flank threatening the two Tilba villages.¹⁷⁷ Previously communities had called for no burns on the mountain and requested Forests NSW to extinguish this fire. This fire had been burning for two weeks. Forests NSW ignored community concerns and the severe drought weather conditions. Homes were threatened, sacred sites burnt, rainforest and koala habitat decimated and threatened species like the Long Nosed Potoroo in extreme danger if not exterminated.

The Rural Fire Service states:

In southern NSW (generally from the Illawarra south) bush fire hazard reduction burning is typically conducted in autumn. Burning in spring (after fuels have dried out sufficiently following winter rainfall) is usually avoided because there is potential for re-ignition in summer when rainfall is lowest and conditions are hot and dry. Spring burning in the south should only be carried out by, or with the assistance of, very experienced burning crews and should be avoided in years of below average rainfall.¹⁷⁸

The other factor on the South Coast is the high wind season which is in August through to October. The RFS also state:

These conditions will take into account environmental factors such as:
the presence of threatened species or endangered ecological communities;
the risk of soil erosion or mass movement;
fire history and minimum fire frequency intervals for specific vegetation types;
the location of water bodies and waterside vegetation; and
the effect of smoke on the local community.

The conditions may include measures to protect biodiversity by limiting the frequency of burns, or

¹⁷⁵ *Assessment of Australia’s Terrestrial Biodiversity 2008*, Biodiversity Assessment Working Group of the National Land and Water Resources Audit for the Australian Government, Canberra, Department of the Environment, Water, Heritage and the Arts 2009.

¹⁷⁶ Forests NSW Seeing Report 2005-06, p28.

¹⁷⁷ 13/08/2009 Eurobodalla, Mountain Rd, Bodalla State Forest CENTRAL TILBA, Forests NSW, (online) <http://www.rfs.nsw.gov.au/dsp_more_info.cfm?CON_ID=7929&CAT_ID=689>.

¹⁷⁸ NSW Rural Fire Service, ‘Standards for Low Intensity Bush Fire Reduction Burning’ s5, (online) <http://www.rfs.nsw.gov.au/file_system/attachments/State08/Attachment_20060131_C4C3FB83.pdf>.

excluding fire from specific areas. Failure to comply with the conditions will result in fines if damage is done to the environment.¹⁷⁹

This is not an isolated incident. There have been numerous instances of fires ‘getting away’ from Forests NSW and burning out of control.

There is a perception among forest fire management that prescribed burning is simply lighting fires to burn-off the undergrowth and that this can be carried out with only a basic understanding of fire behaviour...Indeed where burning off has been carried out this way the results have been less than favourable and has resulted in injury and death. In the eastern states prescribed burning is largely carried out using rules of thumb based on a MacArthur’s original burning guide for dry eucalypt forests produced in the 1960s. (MacArthur 1962)¹⁸⁰

Forests NSW administrative breaches might seem insignificant but they can result in damaging consequences. For instance Forests NSW ‘Southern Region Burning Proposals 2007’ contains Burning Plan Number 07BAN3053 (the one that ‘got away’) further stating that the areas last burn was in 1996, yet on the adjoining Burning Plan Number 07BAN3048 parts of the area are mapped as last burned in 2000, 2001 and 2005. These areas have been heavily logged which leaves incredibly high amounts of tree heads, leaves, tree butts and bark. For example post logging fuel loads are said to be fifty to one hundred and fifty tonnes per hectare of logging slash and ten to twenty tonnes per hectare in between tree heads.¹⁸¹

Forests NSW states it is committed to the RFA ESFM practices and will ensure that Forests NSW will:
Minimise adverse impacts on the environment; Minimise the risk of escape causing wild fire; and
Monitor the impacts on the environment.¹⁸²

Forests NSW has not performed its duty to these principles.

Clearfelling and burning, which is likened by forest industries as akin to the natural disturbance of a high intensity bush fire, causes even-aged forest regrowth, and has been shown to be detrimental to those organisms that rely on successional growth.¹⁸³ This is especially true for those organisms that rely on the retention of tree hollows.¹⁸⁴

Further, to use ‘grazing’ as a fire mitigation measure is definitely ingenious.¹⁸⁵ The development of cows that eat sticks and leaf litter must be a world first.

The change in species composition of ecosystems due to the preferential grazing of palatable species is only one effect from grazing. Cloven-hoofed animals have contributed to soil compaction and general degradation of ecological processes by causing the loss of leaf litter and the associated loss of soil micro-organisms and available carbon, reduced soil water infiltration rates and an increase in soil erosion.¹⁸⁶ These effects are particularly pronounced in temperate woodlands.¹⁸⁷

Although fire may be a natural disturbance, periodical human induced burning can alter both long and short-term ecological processes, and irreversibly affect ecosystem diversity and productivity. In particular, human

¹⁷⁹ NSW Rural Fire Service above n 178, Step 2.

¹⁸⁰ Submission from CSIRO to House Select Committee on the Recent Australian Bushfires, (2003), Sub No.434 (online) <<http://www.apf.gov.au/House/committee/bushfires/inquiry/subs/sub434.pdf>>.

¹⁸¹ Wandera Cpts 584,585,586 Harvesting Plan, approved 1/5/08, p35.

¹⁸² ESFM Plan, Southern Region 2005.

¹⁸³ Lindenmayer D B, and Franklin J F, ‘Managing Stand Structure as Part of Ecologically Sustainable Forest Management in Australian Mountain Ash Forests’ (1997) 11 *Conservation Biology* 1053; see also Lindenmayer D B, and Franklin J F, ‘Re-inventing the Discipline of Forestry - a Forest Ecology Perspective’ (1997) 60 *Australian Forestry* 53; and Lindenmayer D B, Norton T W, and Tanton M T, ‘Differences Between Wildfire and Clearfelling on the Structure of Mountain Ash Forests of Victoria and Their Implications for Fauna Dependent on Tree Hollows’ (1990) 53 *Australian Forestry* 61.

¹⁸⁴ See ‘Reserve Adequacy and the Management of Biodiversity’ Land Assessment Unit, National Parks and Wildlife Service, A Supplement to the Reserve Design Report, A Project Undertaken as Part of the NSW Comprehensive Regional Assessments, Project Number NA 43/EH, July, 1999.

¹⁸⁵ The NSW Forest Agreements Implementation Report (2001/2002) published in 2006, p63.

¹⁸⁶ See NSW Forest Agreements Implementation Report, above n 185.

¹⁸⁷ See ‘Reserve Adequacy and the Management of Biodiversity, above n 184.

induced burning may affect natural succession, organic production and decomposition, nutrient and water circulation, and soil development.¹⁸⁸ Current scientific opinion is in conflict with Forests NSW fire practices.¹⁸⁹

The recent examples of burning smoky mouse habitat in Nalbaugh SF and core koala habitat in Bodalla SF are cases in point. Koala records appear in Bodalla State Forest Compartments 3061, 3065 and 3066. In the Southern region where a koala record appears in, or within, two kilometres of compartments that will have 'specified forestry activities' undertaken this triggers cl.6.11 and cl.8.8.10 of the Southern IFOA Appendix B Threatened Species Licence.

The Southern TSL states:

6.11 Koala *Phascolarctos cinereus*

For all specified forestry activities:

a) When koalas or evidence of koalas are detected in a compartment, habitat will be retained according to this Condition. Habitat retained under this condition must be mapped in the Harvesting Plan.

h) Browse Tree Retention

iii. Specified forestry activities and post-logging burning must minimise damage to retained Koala browse trees. The potential for damage should be minimised by techniques of directional felling. Felled heads must be flattened or removed from five metres of stems retained to meet this prescription.

Hazard reduction is a 'specified forestry activity' as defined in the Southern TSL Appendix B, page 8:

"Specified forestry activities" means:

- i. Tree felling or killing (excluding miscellaneous forestry operations);*
- ii. Construction and operation of log dumps;*
- iii. Construction and operation of snig tracks;*
- iv. Road construction (NB. routine road maintenance is not a specified forestry activity);*
- v. Road re-opening;*
- vi. Commercial collection of firewood;*
- vii. Bush fire hazard reduction work;*

In our view this action triggered the Southern IFOA TSL 8.8.10 Koala prescriptions. It is our understanding that Forests NSW did not undertake adequate koala surveys for this area. Further as there are previous koala records we state this habitat is defined as 'core habitat'.

Sthn IFOA TSL 8.8.10

Where there is a Koala record within two kilometres of a compartment boundary, or local knowledge indicates that koalas are likely to be present, the following surveys must be implemented:

a) Survey Method

- i. Where habitat within the compartment has been identified as core Koala habitat by the Modelled Areas of Habitat Significance for Vertebrate Fauna in the Southern CRA, Condition 8.8.10 b) **Transect Survey with Quadrats** must be carried out in the modelled habitat.*

¹⁸⁸ See 'Reserve Adequacy and the Management of Biodiversity', above n 184, quoting Ovington J D, 'Ecological Processes and National Park Management' National Parks, Conservation and Development: 'The Role of Protected Areas in Sustaining Society' Proceedings of the World Congress on National Parks, Smithsonian Institution Press, Washington D C, (1984).

¹⁸⁹ Driscoll D, Lindenmayer D B, Bennett A, Bode M, Bradstock R, Cary G, Clarke M F, Dexter N, Fensham R, Friend G, Gill M, James S, Kay G, Keith D A, MacGregor C, Russell-Smith J, Salt D, Watson J, Williams R J, York A, 'Fire Management for Biodiversity Conservation: Key Research Questions and our Capacity to Answer Them' (2010) 143 *Biological Conservation* 1928.

This burn did not appear on FNSW plan of burning operations as aerial ignition, it was stated it would be conducted as broad area ground ignition.

44. Planning burning operations

Annual plan of burning operations

(1) SFNSW is to prepare an annual plan (“annual plan of burning operations”) in relation to proposed burning for the purposes of bush fire hazard reduction or regeneration (“burning operations”) in the Southern Region.

(2) The annual plan of burning operations is to specify the following matters in respect of the 12 months to which the plan relates:

(a) the location and timing (including season and frequency) of proposed burning operations by reference to State forest name and compartment number or other identifying particulars (in the case of Crown-timber lands other than State forests); and

(b) any other matter relating to the matters set out in paragraph (a) that DoP informs SFNSW is to be specified.

(3) Burning operations may only be carried out in the locations and at the times specified in the annual plan of burning operations.

(4) SFNSW may, from time to time, amend the annual plan of burning operations, and where it does so, burning operations may be carried out in accordance with the amended plan.

Further it is our understanding that this is the one instance in which Forests NSW must carry out a comparative assessment of the potential impacts on the environment.

Assessment prior to burning

(5) Prior to burning operations being carried out on any tract of forested land in the Southern Region, SFNSW must carry out a comparative assessment of the potential impacts on the environment of proceeding with the operations and the potential impacts on the environment of not proceeding with the operations.

(6) Without limiting the generality of subclause (5), in carrying out the comparative assessment, SFNSW must consider the frequency and intensity of any fires (including wildfires) that have occurred on the relevant tract of forested land.

Site specific plan of burning operations

(7) Subject to subclause (13), prior to burning operations being carried out on any tract of forested land in the Southern Region, SFNSW must prepare a plan in respect of the tract (“site specific plan of burning operations”) which specifies the following:

(a) the measures to be taken to minimise any adverse impacts of the operations on the environment and the risk of wildfire resulting from the operations; and

(b) the steps to be taken to monitor the impacts of the operations on the environment.

(8) SFNSW must give effect to the site specific plan of burning operations.

(9) SFNSW may amend the site specific plan of burning operations (wholly or in part), and where it does so, SFNSW must give effect to the plan as amended and subclause (8) no longer applies.

(10) To the extent of any inconsistency between this approval and a site specific plan of burning operations (including an amended site specific plan of burning operations), this approval prevails.

To our knowledge there has been no Bush Fire Risk Management Plan undertaken for this area.

South Coast TSL 5.16 Burning

When fulfilling its responsibilities under the Rural Fires Act 1997, SFNSW must take account of the following principles:

a) Hazard reduction work must take account of wildfire history, intensity, frequency and seasonality, and reflect the ecological requirements of any threatened species, or their habitat,

known or likely to occur in the area.

b) Hazard reduction work must be conducted in a manner which promotes and maintains an understorey mosaic which includes significant areas of dense understorey vegetation.

c) Hazard reduction work must be conducted in a manner which minimises the impact on large fallen logs (greater than 40 centimetres diameter and greater than five metres in length).

(Note: It is acknowledged that hazard reduction work will be covered by a Bush Fire Risk Management Plan and that this plan is required to take into account the impact of burning activities on threatened species including areas where fire intervals are less than five years.)

The Model Regional Fuel Management Plan states that modelled habitat must not be deliberately ignited. It also states that Ridge and Headwater Habitat must not be deliberately ignited.

6.5 Corporate Prescriptions in IFOA areas

Where fuel management burning operations are carried out within IFOA areas, a number of features and their exclusion/protection zones require special treatment. Prescriptions for these features/zones are listed in Table 11.

Ridge and Headwater Habitat

Ridge and Headwater Habitat will not be deliberately ignited.

Modelled Habitat

Modelled Habitat will not be deliberately ignited.

We brought this to the attention of Forests NSW on the morning of the burn. Forests NSW burned regardless. However as evidenced Forests NSW and their authorised contractors have a distinct contempt for the law and licence conditions. Bodalla State Forest is also habitat for many EPBC listed species.

Post Fire Recovery and Research

The roll out of RFAs throughout the State's forested zones was the first step to increasing fire risk for NSW:

One of the major planning constraints associated with thinning is the higher level of fuel present after the operations. It is not considered feasible in Tasmania to carry out fuel reduction burns in thinned coupes because of the high fuel loads and the sensitivity of the retained trees to fire. The location of thinned coupes amongst conventionally logged coupes is problematic, as it is not recommended that any regeneration burn take place within two kilometres of areas with high levels of flash fuel within two years of harvest (Cheney 1988).

And:

Tree crowns (heads), bark, and other harvest residue make up the fuel load. The climate on the floor of the forest is altered by thinning, with higher wind speeds and temperature, lower humidity, and lower moisture content in the fuel itself. Understorey vegetation characteristics change because of these changes to the microclimate, especially increased light. Bracken ferns and cutting grass may grow vigorously, each having a far higher flammability than the replaced woody species (Cheney and Gould 1991).

Strangely this is from the Forestry Commissions own data but is only now coming to light and certainly was not mentioned in 1998, when the RFAs were signed.

Native forests can take hundreds of years to recover from Forests NSW mismanaged and very hot post-logging burns.

Ecosystem Health and Vitality

The biggest and most common 'negative agents' to the health and vitality of ecosystems are logging contractors and Forests NSW. The ecosystem health and vitality of a native forest becomes severely affected once logged and burnt.

Commercially logged forests have substantially lower carbon stocks and reduced biodiversity than

intact natural forests, and studies have shown carbon stocks to be 40 to 60 per cent lower depending on the intensity of logging.¹⁹⁰

The data shows ongoing areas treated and expenditure on feral animals, but does not indicate what quantities are present, or what quantities have been exterminated, and therefore does not show how effective this program is.

Forests NSW stated at Table 5.18 on page 132 of the Draft Report that in 2004-05 in the Southern Region 877 734 hectares of Forests NSW forest estate were treated for introduced predators, but earlier on page 101 it states at Table 5.1 that in the same year in the same region there were only 205 545 hectares of forest estate managed by Forests NSW.

There is a lack of independent scientific assessment examining the effectiveness of the RFA feral animal and weeds program. An example of weeds control in the Southern region can be found in compartment 516 of Buckenbroua State Forest, an area of unprotected wilderness west of Batemans Bay, where logging machinery introduced Scotch Thistle to the recently logged environment. The famous ring of lantana around Gulaga Mountain in State forest compartments has not lessened in extent yet \$575 965 was spent by Forests NSW on weed management during the period 2002-2006.

Hundreds of thousands of dollars was spent in the Southern region but again there is no data on what outcomes or effects this spending had on noxious weeds. We note the whole of this criterion manages to evade mention of climate change, whereas it was stated in the SOFR 2008 that climate change will have a profound effect on forests.

Soil and Water Resources

...the most fundamental resources of a forest environment: soil and water.¹⁹¹

As reported, in the State of the Forests Report 2008, NSW has about 200,000 hectares managed specifically for water supply. This equates to 0.24% of the land area of the state, or 0.76% of the NSW native forest area.¹⁹²

Many studies have shown that microbial biomass decreases following forest harvesting, and that these changes occurred before measurable changes in soil organic matter quantity were found. The decline of microbial Carbon and Nitrogen following tree removal ranged between twenty seven percent and sixty four percent. When bacterial and fungal biomass were determined separately, it was found that fungal biomass declined more sharply than bacteria. The often rapid decrease in fungal biomass may be explained by a reduction in ectomycorrhizal fungi, which decline sharply once the root system of cut stems can no longer support them.

Conventional practices in intensive forest use such as short rotations, use of heavy machinery, harrowing and high intensity burning of slash can be viewed as detrimental to soil health. After burning, the organic content of forest soils can be transformed into ash and mineralised nutrients. This may result in an intense pulse of nutrients that can change the soil pH and can easily be leached, leaving a nutrient and humus poor soil, with a significantly different structure from the original condition.¹⁹³

Research by the CSIRO states:

Timber harvesting and its associated activities cause drastic changes in soil physical structures and hydraulic

¹⁹⁰ Mackey B, Keith H, Lindenmayer D, Berry S, 'Green Carbon: The Role of Natural Forests in Carbon Storage, Part 1, 'A Green Carbon Account of Australia's South-Eastern Eucalypt Forest, and Policy Implications' ANU E Press, (2008), Online version available at: (online) <http://epress.anu.edu.au/green_carbon_citation.html>.

¹⁹¹ *Australia's State of the Forests Report 2008*, Montreal Process Implementation Group for Australia (2008), Bureau of Rural Sciences, Canberra, p87.

¹⁹² See the State of the Forests Report, 2008, above n 191, pp7 and 89.

¹⁹³ Green D, and McQuillan P, 'The Soil Mites of Warra and their Recovery Under Modern Forestry Practices' (2004) (online) <http://www.warra.com/warra/research_projects/research_project_WRA103.html>.

properties. In situ changes of surface soil hydraulic properties using a newly developed disc permeameter are assessed. Five forest sites, two radiata pine forests near Oberon and three native eucalypt forests near Eden NSW, were investigated for the impact of timber harvesting on soil structure and hydraulic properties. On most sites, there was an increase in soil bulk density and a declining trend in sorptivity and hydraulic conductivity associated with logging. Changes in hydraulic properties suggest that the logging and associated activities had resulted in soil compaction, attributable mainly to redistribution of soil pore sizes and with a decrease mostly in pores greater than 3mm in diameter. This reduction in macroporosity suggests a reduction in aeration and a change of water retention characteristics.¹⁹⁴

Usually the majority of forestry operation non-compliances reported are on EPL breaches and how they relate to soil and water protection practices. One CRA report stated that all impacts of logging were significant at only buffer widths of less than 30 metres.¹⁹⁵

Currently all unmapped, first and second order streams have less than thirty metre buffers, which suggests that current logging adjacent to these streams is having a significant impact. This report went on to say that the methodology used for the EPLs is not scientifically defensible. Even more recent research found in the SOFR 2008 suggests that twenty metre buffers need to be retained to generally reduce turbidity levels.¹⁹⁶

Forestry machinery compacts soil, preventing absorption of rainwater. When it rains the run-off carries a significant amount of sediment into streams. Movement of this machinery and other logging-related vehicles along forest roads raises a large volume of dust (30 -90 tonnes per year for every hectare of unsealed road, compared to 0.3 tonnes for unsealed roads in undisturbed forests). Erosion is the largest contributor to turbid water in Australia.

A study of the Eurobodalla catchments in NSW showed that approximately 905 tonnes of sediment were transported through the river in one four-day storm. This is compared with thirteen tonnes for the previous six-month period.¹⁹⁷ Significant sediment loads have also been identified as coming from the 50,000 kilometres of unsealed roads within state forests and reserves.¹⁹⁸ Suspended sediment loads in inland waters caused by gully erosion and degraded flow paths, can have significant impacts such as siltation of river channels, infilling of wetlands, reduced light penetration inhibiting photosynthesis, and loss of habitat and spawning sites for gravel-bed dependent fish.¹⁹⁹

Water costs have soared since the CRA analysis was done. The price per kilolitre in the Eurobodalla in 2000 was \$0.80.²⁰⁰ It is currently \$2.40 per kilolitre and \$3.60 for consumption of over one hundred fifty kilolitres. When forests are logged, the amount of water flowing in creeks and rivers, after a short initial increase, can decrease by up to fifty percent. It may even cease to flow in dry periods. Regrowth needs much more water to grow than mature trees.

In 1999 it was estimated that the cost of water lost by the logging of 2000 hectares of native forests in the Eurobodalla catchments in one year to be over ten million dollars. This amount is compounded each year

¹⁹⁴ Hung J (CSIRO, Division of Soils); Lacey ST (State Forests of New South Wales); Ryan PJ 'Impact of Forest Harvesting on the Hydraulic Properties of Surface Soil' (1996) 161(2) *Soil Science* 79.

¹⁹⁵ From CRA report 'Water Quality and Quantity for the UNE, LNE and Southern RFA Regions' (1998) Project NA61/ESFM, p54.

¹⁹⁶ See the State of the Forests Report 2008, above n 191, p109.

¹⁹⁷ Drewry J J, Newham L T H, Greene R S B, Jakeman A J and Croke B F W, 'An Approach to Assess and Manage Nutrient Loads in Coastal Catchments of the Eurobodalla Region, NSW, Australia' (2005), MODSIM 2005 International Congress on Modelling and Simulation, pp 2658-2664.

¹⁹⁸ Drewry J J, Newham L T H, and Greene R S B, 'An Index-Based Modelling Approach to Evaluate Nutrient Loss Risk at Catchment-Scales' (2008) Integrated Catchment Assessment and Management Centre, The Australian National University, Canberra (online) <http://www.mssanz.org.au/modsim07/papers/43_s47/AnIndex-Baseds47_Drewry_.pdf>.

¹⁹⁹ See Monitoring and Evaluation Trials, New South Wales Region, Southern Catchment, Phase 1 Report, (2004) National Land & Water Resources Audit, (online) <<http://lwa.gov.au/files/products/national-land-and-water-resources-audit/er050846/er050846.pdf>>; and also NSW Diffuse Source Water Strategy, DECC 2009/085, (online) <<http://www.environment.nsw.gov.au/resources/water/09085dswp.pdf>>.

²⁰⁰ See the Water Use and Allocation in the Eurobodalla (online) <<http://www.esc.nsw.gov.au/site/plans/Documents/Archive/1999/SOE/SOERd/TheReport/Eurobodalla/IndicatorResults/WaterDemandManagement.htm>>.

that these catchment forests continue to be logged.²⁰¹ Therefore there is a need to independently reassess the economic costs of the RFA as it applies to water quantity and security.

The severity of the prolonged drought and inclement climate change conditions is readily portrayed by the flow recordings of the three rivers, the Tuross, Deua, and Buckenboursa, in the Eurobodalla Shire. The Shire's water supply depends upon these rivers. Logging in these catchments is continuing to compound the negative effects of this form of land use on catchment hydrology. Since the last minor flood peak in February 2008 these rivers have been extremely low.

LEGISLATIVE FRAMEWORKS

To tell deliberate lies while genuinely believing in them, to forget any fact that has become inconvenient, and then, when it becomes necessary again, to draw it back from oblivion for just so long as it is needed, to deny the existence of objective reality and all the while to take account of the reality which one denies—all this is indispensably necessary.²⁰²

Foresters have eagerly endorsed part of Principle 1 of the UN *Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* which states:

(a) States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies...

However the Principle goes on to state:

And have responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.²⁰³

The strict statutory obligations of the *Environment Planning and Assessment Act 1979* (NSW) ("EPA Act"), the *Protection of Environment Operations Act 1997* (NSW) ("POEO Act"), the *Threatened Species and Conservation Act 1995* (NSW) ("TSC Act"), *National Parks and Wildlife Act 1974* (NSW) ("NPW Act 1974") and the *Environment Protection Biodiversity and Conservation Act 1999* (Cth) ("EPBC Act") are such that, arguably, anyone contemplating illegal activities against native flora, fauna or the environment does so at their peril.²⁰⁴ Not so the Forestry Commission, trading as Forests NSW, for areas covered under the IFOAs and RFAs.

Forestry operations are bound by the *Protection of the Environment Operations Act 1997* and are licensed under Section 55. Under the IFOA these licences provide that State Forests must comply with Section 120 of the POEO Act:

Except as may be expressly provided in any condition of this licence.²⁰⁵

Under clause 29(3A) and (3B) Forests NSW can turn the EPLs on and off depending on whether they want to log unmapped drainage lines with immunity.

There are several international agreements and domestic policy documents that are legally and morally binding on the Commonwealth.

The Rio Declaration, *Convention on Biological Diversity* 1992 at Article 8(c) states:

²⁰¹ Atech Group, 'Southern Forests Catchment Values and Threats' (1999) (online) <<http://www.atechgroup.com.au>>.

²⁰² Orwell G, *Nineteen Eighty-Four*, (1949) Penguin Books, England, (reprint 1980), p171.

²⁰³ *Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (Rio de Janeiro, 3-14 June 1992) A/CONF.151/26 (Vol. III) emphasis added.

²⁰⁴ Macintosh A, 'Why the Environment Protection and Biodiversity Conservation Act's Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives' (2004) 21 *Environment and Planning Law Journal* 288.

²⁰⁵ Southern Region IFOA at Appendix A(5) (emphasis added).

Each Contracting Party shall, as far as possible and as appropriate:

Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas with a view to ensuring their conservation and sustainable use;

and

(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.²⁰⁶

Commonwealth, State and Local governments are governed by the obligations of the *Intergovernmental Agreement on the Environment 1992* which states:²⁰⁷

The parties consider that the adoption of sound environmental practices and procedures, as a basis for ecologically sustainable development, will benefit both the Australian people and environment, and the international community and environment. This requires the effective integration of economic and environmental considerations in decision-making processes, in order to improve community well-being and to benefit future generations.²⁰⁸

The Montreal Process at Criteria 7 states:²⁰⁹

Legal, institutional and policy framework for forest conservation and sustainable management

7.1 Extent to which the legal framework (laws, regulations, guidelines) supports the conservation and sustainable management of forests, including the extent to which it:

- Clarifies property rights, provides for appropriate land tenure arrangements, recognizes customary and traditional rights of indigenous people, and provides means of resolving property disputes by due process;
- Provides opportunities for public participation in public policy and decision-making related to forests and public access to information;
- Provides for the management of forests to conserve special environmental, cultural, social and/or scientific values.²¹⁰

Criteria 7.2 states:

7.2 Extent to which the institutional framework supports the conservation and sustainable management of forests, including the capacity to:

Provide for public involvement activities and public education, awareness and extension programs, and make available forest-related information;

7.5.d Enhancement of ability to predict impacts of human intervention on forests;

7.5.e Ability to predict impacts on forests of possible climate change.²¹¹

And at 7.2e is the requirement to: Enforce laws, regulations and guidelines.²¹²

NSW State Legislation

The *Forestry and National Park Estate Act 1998* (NSW).

There are many exemptions to civil litigation under the FNPE Act. The Act states at s.36 that if logging or roading is in an area covered under the IFOAs that Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW) does not apply, an environmental planning instrument under the EPA Act cannot 'prohibit, require development consent for or otherwise restrict forestry operations' and in (5): this applies to an

²⁰⁶ The Rio Declaration, *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, Entry into force for Australia: 29 December 1993, Australian Treaty Series 1993 No 32.

²⁰⁷ *National Environment Protection Council (New South Wales) Act 1995 (NSW), Schedule 1, Intergovernmental Agreement on the Environment 1992.*

²⁰⁸ For an in-depth analysis on inter-generational equity see Dr Laura Horn, 'Climate Change Litigation Actions for Future Generations' (2008) 25 *Environment and Planning Law Journal* 115.

²⁰⁹ Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests '*The Montréal Process*' Third Edition, December 2007, (online) <www.rinya.maff.go.jp/mpci/>.

²¹⁰ *The Montréal Process*, above n 209, a) c) d) e).

²¹¹ The authors have had many conversation with Forests NSW officers who truly believe there is no such thing as climate change.

²¹² The Montreal Process also states at 7.4 Capacity to measure and monitor changes in the conservation and sustainable management of forests, including: 7.4.a Availability and extent of up-to-date data, statistics and other information important to measuring or describing indicators associated with criteria 1-7; 7.4.b Scope, frequency and statistical reliability of forest inventories, assessments, monitoring and other relevant information; 7.5.b Development of methodologies to measure and integrate environmental and social costs and benefits into markets and public policies, and to reflect forest-related resource depletion or replenishment in national accounting systems; of which have not been adhered to by Forests NSW.

environmental planning instrument made before or after the commencement of this section.²¹³

Forestry operations in IFOA areas cannot be the subject of an order under Division 2A of Part 6 of the EPA Act, any approval of forestry operations that is in force under Division 4 of Part 5 of the EPA Act has no effect during any period that Part 5 of that Act does not apply to the forestry operations, and any development consent for forestry operations that is in force under Part 4 of the EPA Act has no effect during any period that development consent under Part 4 of that Act is not required for the forestry operations.²¹⁴

Stop work orders and interim protection orders of the NPW Act and the TSC Act do not apply.²¹⁵ An order under section 124 of the *Local Government Act 1993* does not have effect.²¹⁶ At s39 an area in which forestry operations authorised by an IFOA may be carried out cannot be proposed or identified as, or declared to be, a wilderness area under the *Wilderness Act 1987* (NSW) or the NPWA Act.

At s 40 proceedings may not be brought if the breach is:

A breach of the FNPE Act (including a breach of any forest agreement), a breach of an IFOA (including a breach of the terms of any licence provided by the approval), a breach of an Act or law that arises because any defence provided by any such licence is not available as a result of a breach of the licence, the Act that includes the statutory provision (including a breach of an instrument made under that Act) if the breach relates to forestry operations to which an IFOA applies.²¹⁷

Section 40 also exempts the Act from:

A provision of an Act that gives any person a right to institute proceedings in a court to remedy or restrain a breach (or a threatened or apprehended breach) of the Act or an instrument made under the Act, whether or not any right of the person has been or may be infringed by or as a consequence of that breach.

However a contravention of the terms of a relevant licence makes the person carrying out the forestry operations liable for offences for which the licence provides a defence (eg. damage to critical habitat of threatened species under the NPW Act; offence of polluting waters under the POEO Act 1997).²¹⁸

Threatened Species Conservation Act 1995 (NSW)²¹⁹

Forests NSW hold licences granted by the Director-General of National Parks and Wildlife. The licence holder must comply with conditions and requirements of the licence. The person carrying out the forestry operations is liable for an offence under the NPW Act.²²⁰ The licence holder is not authorised to harm endangered populations or communities, pick plants that are part of those communities, damage critical habitat or damage the habitat of endangered populations or communities.

As is standard with forestry operations there is a loophole:

it may be a defence to a prosecution for an offence if the accused proves that the offence was authorised to be done, and was done in accordance with a general licence or was the subject of a certificate issued under s95 (2) of the TSC Act.²²¹

However the relevant phrase is 'in accordance with'. If the logging is not undertaken in accordance with the

²¹³ *Forestry and National Park Estate Act 1998* (NSW) s 36 (1).

²¹⁴ *Forestry and National Park Estate Act 1998* (NSW) ss 36(2), (2A), (3), (4).

²¹⁵ *National Park and Wildlife Act 1974* (NSW) s 37 Part 6A; the *Threatened Species Conservation Act 1995* (NSW) Division 1 of Part 7 (*Forestry and National Park Estate Act 1998* (NSW) s 37).

²¹⁶ *Forestry and National Park Estate Act 1998* (NSW) s 38.

²¹⁷ *Forestry and National Park Estate Act 1998* (NSW) s 40 (2)(a) – (d); at 40 (1); the *Forestry and National Park Estate Act 1998* (NSW) is also exempt from s 219, s 252 and s 253 of the *Protection of the Environment Operations Act 1997*.

²¹⁸ *Forestry and National Park Estate Act 1998* (NSW) note on p21.

²¹⁹ Farrier D, 'Fragmented Law in Fragmented Landscapes: the Slow Evolution of Integrated Natural Resource Management in NSW' (2002) 19 *Environment and Planning Law Journal* 89; Farrier D, Kelly AHH, Comino M and Bond M, 'Integrated Land and Water Management in New South Wales: Plans, Problems and Possibilities' (1998) 5 *Australian Journal of Natural Resource Law and Policy* 153.

²²⁰ *National Park and Wildlife Act 1974* (NSW) s118A.

²²¹ *National Park and Wildlife Act 1974* (NSW) s 3 (a), s 3(a1).

relevant provisions then this defence is not available.

Garth Riddell sums up the TSC Act succinctly:

After 10 years in operation the TSC Act has not met its primary objectives. Although it has made a small contribution to the conservation of biological diversity and the promotion of ecologically sustainable development, it has not gone far enough. The Act's protections are procedural rather than substantive, its provisions are placatory rather than effective and its operation has been hampered by a lack of funding, lack of will and widespread misunderstanding of the concepts underlying it.²²²

In conclusion, in our view, the legislation exemptions are not 'rightly framed' and are classic examples of 'flawed legislation'.²²³ They are in breach of international obligations on the environment and human rights, they are inequitable, unjust and unfair. Their only purpose is to serve the greedy at the expense of community.

Concomitance

Forests NSW must exercise its powers in accordance with a number of environmental, social and economic objectives.²²⁴ In doing so, it must take into account other matters including preservation and enhancement of the environment.²²⁵ Every State forest must be managed in accordance with a management plan, either individually or collectively within a forest management area.²²⁶ The plan must define the forest management strategy to be adopted and the conditions of harvesting.²²⁷ Harvest plans are binding, unless approval is sought from the regional manager.²²⁸ A harvesting plan must be prepared for each logging operation in accordance with the Code of Practice and the IFOAs.²²⁹ The harvesting plan must be consistent with the management plan, and must specify a number of conditions aimed at environmental protection.²³⁰ Working plans for flora reserves must be prepared prior to operations.²³¹ Threatened Species Licences ("TSLs") and Environment Pollution Licences ("EPLs") must be adhered to.

The obligations which arise cannot merely be declared to have been met. The Commonwealth and the various Ministers and departments are required to meet their statutory obligations. 'Provide' and 'must' have the meaning that the regulations must be adhered to. Procedures which are required by law to be observed and are not observed render the action as unlawful. Where there are specific procedures that are required to be followed and those procedures are not followed then the operations are unlawful.

Finally and further in *South Australia v The Commonwealth* (1962) 108 CLR 130 Dixon CJ stated:

the High Court of Australia has more than once affirmed the rights and obligations subsisting between individuals as the guide to the ascertainment of the legal rights of which the Court has cognizance. That principle includes agreement as a category of right, but it would exclude agreements of which the subject of the mutual undertakings is the exercise of political power: the agreements are not such as are capable of existing between individuals, their subject-matter is the peculiar and exclusive characteristic of governments. Even an agreement of the Crown with an individual respecting the future exercise of discretionary powers - that they will or will not be exercised in a particular way - probably cannot be a valid contract.²³²

²²² Garth Riddell, 'A Crumbling Wall: The Threatened Species Conservation Act 10 years On' (2005) 22 *Environment and Planning Law Journal* 446.

²²³ Sax J L, *Defending the Environment*, Vintage Books, (1971), Ch 6 pp 155-156.

²²⁴ *Forestry Act 1916* (NSW), ss 17(3)(a) – (d).

²²⁵ *Forestry Act 1916* (NSW), s 8A(2).

²²⁶ *Forestry Regulation 1999* (NSW), r5(1) and 5(2).

²²⁷ *Forestry Regulation 1999* (NSW), r5(6).

²²⁸ *Forestry Regulation 1999* (NSW), r5(7).

²²⁹ See State Forests of New South Wales, Code of Logging Practice.

²³⁰ These are imposed by statute see *Environmental Planning and Assessment Act 1979* (NSW); *Protection of the Environment Operations Act 1997* (NSW); *National Parks and Wildlife Act 1974* (NSW).

²³¹ *Forestry Act 1916* (NSW), s 25A(5).

²³² *South Australia v The Commonwealth* (1962) 108 CLR 130, Dixon CJ, citing Sir Harrison Moore at [147].

We are of the opinion that it is not possible for the Commonwealth to enter into agreements which bind the legislative *and* executive arms of government, which the RFAs do in NSW by way of s.40 of the *Forestry and National Park Estate Act 1998* (NSW) (“FNPE Act”). This in effect renders the whole of the delegated legislation *ultra vires*. Therefore all native forest logging under this legislation is unlawful regardless of compliance issues.

Export Tax Exemption

As stated the conditions which are required for RFAs have not been met. There is significant on-ground, historical and contemporary evidence available to demonstrate this. Therefore if the RFA and legislated requirements have not been met the Eden chipmill company, South East Fibre Exports (“SEFE”) cannot receive the tax and licence exemptions under the *Export Control Act 1982* (Cth).

An exporter will only be able to remove logs from a source in an RFA area if removal of logs is in accordance with the RFA. If the RFA and IFOAs requirements have not been met, then the exemption under the *Export Control Act 1982* does not apply and the exporter must obtain a licence.

The *Regional Forest Agreement Act 2002* at s.6 states:

(2) An export control law does not apply to RFA wood unless it expressly refers to RFA wood. For this purpose, ***export control law*** means a provision of a law of the Commonwealth (other than the *Export Control Act 1982*) that prohibits or restricts exports, or has the effect of prohibiting or restricting exports.

(4) Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

The RFAs are agreements and Forests NSW must comply with its obligations under the RFAs in order to get exemptions from the EPA Act and TSC Act’s requirements. In *Brown v Forestry Tasmania* Marshall J ruled that as Forestry Tasmania had not complied with the RFA it was not exempt from the EPBC Act and even though the case was overturned on appeal, the judgment still stands.²³³ If the Federal Court decision could be brought down in NSW at this time, then all NSW forestry operations in RFA/IFOA areas would have to cease due to non-compliance.

NATIVE FORESTRY UNDER THE EPBC ACT’S EIA REGIME

As stated earlier in 1999 the Commonwealth formally abandoned its responsibilities for protection of state native forests with enactment of the *Environment Protection Conservation and Biodiversity Act 1999* (Cth) (“EPBC Act”). Under this Act at Part 3B the Commonwealth refrains from exercising its environmental legislative powers for the duration of the RFAs. Areas that fall under the RFAs were made exempt from the EPBC Act on the basis that environmental assessments had been undertaken and that environmental considerations were contained in RFAs. However, as stated, while some assessments were carried out, in many instances there was no assessment of impacts of logging on the environment.²³⁴ This lack of environmental impact assessment gives rise to questions on whether the Part 3B exemptions may be considered inconsistent with international obligations, domestic legislation and recommendations of experts. The exemptions also give rise to questions on what environmental outcomes was the Commonwealth hoping to achieve and what were the objectives of the exemptions.²³⁵

²³³ See *Brown v Forestry Tasmania and Others* [2006] FCA 1729, Marshall J.

²³⁴ Mackey B, ‘Regional Forest Agreements – Business as Usual in the Southern Region?’ above n 169; there was no assessment on the impacts of logging on climate change, and no consideration of changing technologies or methods of logging, for example the common use now of mechanical harvesters, cable logging and methods such as Australian Group Selection; see the Southern Region Forest Agreement 2002 (NSW) cl 2.4.5.4; there is argument that even though an area may have been subject to a regional assessment (CRA) under NSW law, this may not be relevant to the question of liability under the EPBC Act.

²³⁵ See State of the World’s Forests, UN Food and Agricultural Organization, Rome, FAO, 2011, (online)

It is stated that the greatest threats to Australia's biodiversity are caused by broad-scale land clearing and forestry operations including fire management practices. Further there are clear links between climate change, deforestation and forest degradation²³⁶ yet forestry practices continue to remain exempt from legislation in these RFA areas.²³⁷ The Oceania Report 2010 provides:

Loss and degradation of habitat is the largest single threat to land species, including 80 percent of threatened species.²³⁸

This section focuses on two cases, the *Redgums* case,²³⁹ and the *Smoky Mouse* case,²⁴⁰ and discusses issues they raise in relation to operation of the EPBC Act and environmental impact assessment ("EIA") requirements. The section goes on to present an outline of the Part 3B ss 38–41 and historical context, interaction between the EPBC Act and other federal and state regulatory regimes, discuss the sections application, and whether these exemptions could be seen to have in any way improved environmental outcomes in line with objects of the EPBC Act.

An analysis of the cases is presented, as well as an outline of their implications. The effectiveness of Commonwealth regulation of state-run agencies and public native forests under ss 38–41 is assessed using the cases to evaluate the role of the Commonwealth in providing any protection for the environment under the EPBC Act.²⁴¹

Much has been written on EIA under the EPBC Act and other legislative regimes, both domestically and internationally.²⁴² The most constructive outcome of EIA, it is said, is that decision makers have more

<<http://www.fao.org/docrep/013/i2000e/i2000e.pdf>>, viewed 19/05/2011; in countries where deforestation rates have fallen this outcome has mainly been achieved because they have no forests left; see *Convention on Biological Diversity* (Rio de Janeiro, 5 June 1992), Australian Treaty Series 1993 No 32 (entry into force generally and for Australia: 29 December 1993; Agenda 21, relevantly Chapter 11, 12, 13 and 15, UN Economic and Social Development Division for Sustainable Development (agreed in 1992)(online) <<http://www.un.org/esa/dsd/agenda21/>>; Millennium Development Goals (established in 2000); The Bali Ministerial Declarations on Forest Law Enforcement and Governance, (agreed in 2002); the Yaoundé Ministerial Declarations on Forest Law Enforcement and Governance (2003); The Final Statement on "Forests, Source of Life", (made at the XII World Forestry Congress, in Quebec City, Canada, in 2003); *ASEAN Agreement on the Conservation of Nature and Natural Resources*, July 9, 1985; *United Nations Framework Convention on Climate Change* (New York, 9 May 1992), (entry into force generally and for Australia: 21 March 1994) Australian Treaty Series 1994 No 2, ("UNFCCC Convention"); *Kyoto Protocol To The United Nations Framework Convention On Climate Change* Kyoto, 11 December 1997(signed for Australia: New York, 24 April 1998, entered into force generally: 16 February 2005, ratified by Australia on 12 December 2007 entered into force for Australia: 11 March 2008) Australian Treaty Series [2008]; *The Convention for the Protection of the Natural Resources and Environment of the South Pacific*, Nov 24, 1986, (entered into force Aug 22, 1990) Australian Treaty Series No 31 (1990) ("SREP Convention").

²³⁶ Stern N, *The Stern Review on the Economics of Climate Change: Emissions from the Land-use Change and Forestry Sector*, Cambridge University Press, 2006, (online) <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm>; see *The Critical Decade: Climate science, Risks and Responses*, (Climate Commission Secretariat, Department of Climate Change and Energy Efficiency, 2011) (the Garnaut Report) (online) <<http://www.garnautreview.org.au/update-2011/update-papers/up4-transforming-rural-land-use.pdf>>.

²³⁷ See *The National Strategy for the Conservation of Australia's Biological Diversity* (1996).

²³⁸ Kingsford R T, Watson J E M, Lundquist C J, Venter O, Hughes L, Johnston E L, Therton J A, Gawel M, Keith D A, Mackey B G, Morley C, Possingham H P, Raynor B, Recher H F, and Wilson K A, 'Major Conservation Policy Issues for Biodiversity in Oceania' (2009) *InterScience* 834, (online) <<http://www3.interscience.wiley.com/journal/118487636/home?CRETRY=1&SRETRY=0>>.

²³⁹ *National Parks Association v Forest Commission of NSW* (2007) NSWLEC, Short Minutes of Order, Case No 40854.

²⁴⁰ *Director-General, Department of Environment, Climate Change and Water v Forestry Commission of New South Wales* [2011] NSWLEC 102.

²⁴¹ See for example *Nature Conservation Council of NSW Inc v Minister for Environment and Water Resources* [2007] AATA 1876; Kirsty Ruddock and Jessica Wood 'Nature Conservation Council of NSW Inc v Minister for Environment and Water Resources & Ors (The Grey Nurse Sharks Case)' Environmental Defenders Office, NSW (online) <http://www.edo.org.au/edonsw/site/pdf/presentations/grey_nurse_sharks_Kirsty_070605.pdf>; Rachael de Hosson 'The Limits of Merits Review and the EPBC Act: Grey Nurse Sharks, Fisheries and the AAT' (2010) 27 *Environment and Planning Law Journal* 223; some examples are *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCA 113; *Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3; *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463; *Lawyers for Forests Inc v Minister for the Environment Heritage and the Arts* [2009] FCAFC 114; *Anvil Hill Project Watch Association Inc v Minister For Environment And Water Resources and Another* [2007] FCA 1480; *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510; *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8; *Booth v Bosworth* [2001] FCA 1453; *Brown v Forestry Tasmania and Others(No 4)* [2006] FCA 1729; for a thorough analysis of cases brought under the EPBC Act see Andrew Macintosh, 'The Commonwealth' in *Mills, Mines and Other Controversies*, Tim Bonyhady, and Andrew Macintosh, (eds), (Federation Press, 2010).

²⁴² Margaret A Young 'The Primacy of Development: Environmental Impact Assessment In Indonesia and Australia' (1999) 1(2) *Australian Journal of Asian Law* 154, (online) <<http://digital.federationpress.com.au/8gsgl/1/>>; for an outline of the NSW EIA regime see Jemilah Hallinan 'Sandon Point' in *Mills, Mines and Other Controversies*, above n 241; Jeff Smith, 'Special Cases: Planning and the Law in Australia' (2011) 26(3) *Australian Environment Review*; Gerry Bates, *Environmental Law in Australia*, 7th ed, (LexisNexis Butterworths, Australia, 2010) Ch 10;

information at their disposal.²⁴³ It has been argued that if proper and actual EIA were conducted, with the outcome of protecting the environment, with the environment as the client, instead of the alternative, which is to pave the way for industrial development, perhaps the outcomes would be less dispositive.²⁴⁴ Nevertheless as a tool, a big stick, EIA can have its uses for the public. This was the circumstance with Riverina Redgum state forests in New South Wales.

Riverina Redgum forests contain known or likely habitat for 17 nationally threatened species and 13 migratory birds listed under CAMBA and JAMBA conventions.²⁴⁵ Nationally threatened species include the Superb Parrot, Regent Parrot and Southern Bell Frog.²⁴⁶ Approximately 84,084 hectares of state forests were listed on the Ramsar Convention in 2003 as part of the NSW Central Murray State Forest site.²⁴⁷ The site is located adjacent to the Murray River and Edwards River which includes the Koondrook-Perricoota, Millewa and Werai State Forests.

In 1994 the NSW Forestry Commission (“FNSW”) conducted fauna surveys in some Riverina Redgum forests as preparation for development of a fauna impact statement (“FIS”).²⁴⁸ When the *Threatened Species Conservation Act 1995* (NSW) (“TSC Act”) was enacted FNSW discontinued this surveying. With the introduction of the *Forestry and National Park Estate Act 1998* (NSW) (“FNPE Act”) the process was abandoned. FNSW logged these state forests for 15 years without conducting an EIA as required by either the *Environmental Planning and Assessment Act 1979* (NSW) (“EPA Act”) or the EPBC Act.

While 107 000 hectares are now unavailable for logging, and change of tenure may at first appear commendable, there is still some logging of the area and no surety that activities endangering threatened species will be assessed or regulated. Nevertheless responsibility rests with both state and federal governments to regulate state-run forestry activities.

THE CASES

NPA v Forest Commission and NSW Redgum Action v Forests NSW – the ‘Redgum Case’

NPA v Forest Commission was the first proceedings to be brought against FNSW that concerned a state-run public forest, since enactment of the EPBC Act and RFAs, by a third party.²⁴⁹ The case is notable in that it examined EIA requirements for public forestry in NSW under the EPBC Act. This case offers an

David Farrier, and Paul Stein (eds) *The Environmental Law Handbook: Planning and Land Use in NSW*, 4th ed, (Redfern Legal Centre Publishing, 2006) Ch 6; Brown A L and MacDonald G T, ‘From Environmental Impact Assessment to Environment Design and Planning’ (1995) 2 *Australasian Journal of Environmental Management*; Bonyhady T, and Macintosh A, (eds), *Mills, Mines and Other Controversies*, above n 241; Macintosh A, ‘The EPBC Survey Project: Final Data Report’ Australian Centre for Environmental Law, ANU, (online) <<http://law.anu.edu.au/ancel/index/asp>>; Turner S, ‘Review of Jane Holder and Donald McGillivray: Taking Stock of Environmental Assessment’ (2008) 20 *Journal of Environmental Law* 323.

²⁴³ Bonyhady T, ‘Introduction’, above n 241.

²⁴⁴ ‘EIA is merely an approval process with a predetermined outcome – that is approval of the project’ Jeff Smith, ‘The Dodgy, The Bad and the Good: a Community and NGO Perspective on EIA Practice’ (2005) Paper delivered to Environment Institute of Australia forum Environmental Defenders Office, (online) <http://www.edo.org.au/edonsw/site/part3a_speech050531.php>.

²⁴⁵ *Chinese Australian Migratory Bird Agreement*, Agreement Between the Government of Australia and the Government of the People’s Republic of China for the Protection of Migratory Birds and their Environment (Canberra, 20 October 1986) Entry into force: 1 September 1988 *Australia Treaty Series* 1988 No 22; *Japanese Australian Migratory Bird Agreement*, Agreement Between the Government of Australia and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment (Tokyo, 6 February 1974) Entry into force: 30 April 1981 *Australia Treaty Series* 1981 No 6.

²⁴⁶ See Flint C, ‘River Red Gum: Barking Owls and Broken Laws on the Murray River’ (2009) 88 *Impact* 6.

²⁴⁷ *Convention on Wetlands of International Importance, Especially as Waterfowl Habitat* (Ramsar, Iran, 2 February 1971) (entry into force for Australia and generally: 21 December 1975) *Australian Treaty Series* 1975 No 48.

²⁴⁸ Required by the *Timber Industry (Interim Protection) Act 1992* (NSW) which, when it came into force, exempted the Forestry Commission from s 111 and s 112 of the EPA Act, however FNSW still were required to produce Fauna Impact Statements; with the enactment of the *Forestry and National Park Estate Act 1998* the TIIP Act was repealed and FNSW were not required to produce FIS; then the Forestry Commission was trading as State Forests NSW, now trading as Forests NSW.

²⁴⁹ *National Parks Association v Forest Commission of NSW* (2007) NSWLEC Short Minutes of Order, Case No 40854; see media release NPA (online) <http://www.npansw.org.au/index.php?option=com_content&view=article&id=92:legal-challenge-to-murray-red-gum-logging&catid=20:2007&Itemid=439>; this was aided by a blockade in Barmah Millewa State Forest, see NPA media release (online) <http://www.npansw.org.au/index.php?option=com_content&view=article&id=89:red-gum-blockade-support-calls-to-relocate-logging&catid=20:2007&Itemid=439>.

opportunity to evaluate the Commonwealth's role under ss 38–41, provides an opportunity to scrutinise an integral part of the EPBC Act and highlights limitations of enforcing environmental protection in practice.

While most forestry operations are exempt, the EPBC Act does contain requirements for environmental approvals of forestry activities that will have a significant impact on a declared World Heritage property, a National Heritage place or a declared Ramsar wetland.²⁵⁰ In non-RFA areas the EPBC Act's requirements are to be considered in addition to existing approvals required under state law. This means that any forestry activity still needs to be approved under all applicable state laws as well as under the EPBC Act for non-RFA areas. The Redgum forests were part of a declared Ramsar wetland and further did not fall under an IFOA or RFA.

The NPA has been working to protect the environment since 1957 and the Redgum forests on the River Murray since 1995. After successfully helping to protect the Victorian side of the Redgum forests in 2007 it decided that legal action was necessary to ensure the Redgum forests in NSW were adequately protected.²⁵¹ The NPA wrote to the federal government raising concerns about legality of logging under the EPBC Act in early 2007 due to the lack of EIA then, when receiving no relief from both the state and federal governments, began legal action, deciding to use the EPA Act and the Land and Environment Court ("LEC") as venue, stating that FNSW had failed to conduct an EIA.²⁵²

The NPA argued that forestry activity was caught under Part 3 of the EPA Act, due to a prior declaration by the Minister for Infrastructure and Planning in 2005.²⁵³ In court FNSW admitted that the forestry activities required approval under the EPA Act. As a result of these proceedings FNSW gave a series of undertakings including to undertake an EIS incorporating an SIS under Part 5 of the EPA Act for logging in the Murray, Murrumbidgee and Mildura management areas, to be placed on exhibition by June 1, 2009.

In June 2008, FNSW lodged a Major Project application under Part 3A of the EPA Act for logging and associated roading in south-western NSW to the Department of Planning, accompanied by a preliminary EA. In late July 2008, the NSW Department of Planning issued Director-General's requirements to FNSW. Notwithstanding these conditions FNSW did not complete an EIA addressing the Director-General's requirements.

In 2008, the NPA conducted a detailed EIA of likely impacts of logging and associated activities on matters of NES, utilising the Guidelines for Significant Impact set down by DSEWPC.²⁵⁴ The NPA concluded that logging was having a significant impact on matters of NES.²⁵⁵ FNSW were required to obtain approval from the Commonwealth as the forests were not in an RFA area. Redgum logging operations were not

²⁵⁰ *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 42

²⁵¹ While the public are barred from litigation through s 40 of the *Forestry and National Park Estate Act 1998*(NSW) however in non IFOA areas the public are not barred by s 40.

²⁵² *National Parks Association v Forest Commission of NSW* (2007) NSWLEC Short Minutes of Order, Case No 40854; standing was not an issue although the *Administrative Decisions (Judicial Review) Act 1977* (Cth) states individuals or groups do not have standing to apply for a review unless they have a private right affected, the definition for 'person aggrieved' has been broadened under the EPBC Act, if the person or group that has been, for the two years prior to the offence, protecting, conserving or researching the environment, and is recognised by the public and governments as the protector of those environmental interests, they can establish standing; for definition of person or group aggrieved see the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 487; a person or organisation with a 'mere emotional or intellectual concern' or belief affected by the administrative action did not have standing in the past to seek review; see for example, *Onus v Alcoa of Australia Ltd* [1981] 149 CLR 27, and *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492.

²⁵³ NSW Government Gazette No 96 on 29 July 2005: 'I, the Minister for Infrastructure and Planning, declare under section s 75B(1) of the Environmental Planning and Assessment Act 1979 that the following developments are projects to which Part 3A applies: development that is an activity for which the proponent is also the determining authority and that, in the opinion of the proponent, would (but for this order) require an environmental impact statement to be obtained under Part 5'.

²⁵⁴ DSEWPC Guidelines for Significant Impact on Matters of NES (online) <<http://www.environment.gov.au/epbc/publications/pubs/neg-guidelines.pdf>>.

²⁵⁵ See Flint C, and Woods G, *The Impacts of River Red Gum Logging and Associated Activities in NSW on Matters of National Environmental Significance* (2008) (Unpublished Report for the National Parks Association of NSW); see also NPA (online) <http://www.npansw.org.au/index.php?option=com_content&view=article&id=379:national-park-proposals&catid=95:red-gum&Itemid=461>.

exempt under the prior authorisation provision,²⁵⁶ or the continuing use provisions.²⁵⁷ Nevertheless FNSW did not refer the activity to the Commonwealth under the EPBC Act.

The NPA provided this report to DSEWPC and investigation of logging operations by DSEWPC commenced in August 2008.²⁵⁸ On 1 May 2009 DSEWPC took action, writing a letter to FNSW. The Department's investigation of the impacts of forestry operations focused on two matters of NES, the Superb Parrot and the Ramsar wetland site. The investigation found that there was a likelihood of significant impact. In coming to this decision DSEWPC took particular note of a new form of logging called Australian Group Selection ("AGS"). The Department considered that AGS constituted an intensification of use and its environmental impacts required assessment and approval. DSEWPC considered that this type of logging practice was:

likely to be having a significant impact upon the Central Murray State Forests Ramsar site and the connectivity of habitat for, but not limited to, the Superb Parrot (*Polytelis swainsonii*) in the wider region.²⁵⁹

DSEWPC requested FNSW undertake the following:

Refer the ongoing operations for consideration under the EPBC Act 1999 before or no later than the 31st August 2009. By 31 May 2009 cessation of the use of Australian Group Selection (AGS) across the SW NSW Murray Mildura Management Area. By 31st May 2009 cessation of all harvesting operations in the Central Murray State Forests Ramsar site until further advice from this Department or referral of the wider operations.

FNSW were also requested to commission comprehensive pre-logging flora and fauna surveys, to be undertaken by an independent expert party, in all coupes proposed for logging upon receipt of the letter.

Then there was a media flurry. On 18 May DSEWPC met with FNSW. On 20 May, DSEWPC wrote a letter to FNSW that 'supersedes the Department's letter of 1 May'. The letter rescinded the previous request, and instead proposed logging continue under some 'interim arrangements' while a strategic assessment was undertaken. The letter stated that:

harvest prescriptions would be needed to ensure no unacceptable impacts in the short-term on matters of national environmental significance.²⁶⁰

Nevertheless FNSW rejected this new proposal. They stated that they were in conformity with the EPBC Act in that they were logging in accordance with the RFAs.²⁶¹ The EPBC Act provides:

An action does not need approval if it is taken in accordance with Regional Forest Agreements.²⁶²

Further FNSW also inferred the statement is to be read in conjunction with s 40 of the EPBC Act which provides:

A person may undertake forestry operations in an RFA region in a State or Territory without approval under Part 9 for the purposes of a provision of Part 3 if there is not a regional forest agreement in force for any of the region.²⁶³

²⁵⁶ *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 43A.

²⁵⁷ *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 43B.

²⁵⁸ This was in conjunction with a blockade by activists in the Barmah-Millewa State Forests.

²⁵⁹ Rose Webb DSEWPC, letter to Nick Roberts Forests NSW, 01/05/2009.

²⁶⁰ Gerard Early DSEWPC letter to Forests NSW, 20/05/2009.

²⁶¹ Nick Roberts Forests NSW to Gerard Early DSEWPC, 21/05/2009.

²⁶² *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 11.

²⁶³ *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 40; while this is a credulous interpretation of the provisions it highlights clearly what Gerry Bates observed, in that 'The tortuous nature of the drafting...Doesn't win any prizes for 'plain English' drafting. The concepts,...organization and language all conspire to make this Act virtually unintelligible to anyone who hasn't a few days to waste unravelling it' Bates G, Submission No 30, Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, *Comments on the Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2009, (online)

In the letter to FNSW of 20 May, Gerard Early of DSEWPC wrote:

I should note that this agreement is about the assessment process to be undertaken and the interim arrangements reflect the intentions and good will of our two governments. Nevertheless the EPBC Act does contain provision for third party actions and until the Strategic Assessment is completed the possibility remains that such actions could be pursued by others.²⁶⁴

NSW Redgum Action Inc v Forests NSW

On June 1 when no EIS was forthcoming a second blockade of the area by environmental activists ensued.²⁶⁵ The NGO, NSW Redgum Action Inc, gave instructions to the EDO to commence legal proceedings. Again the decision was made not to use the EPBC Act, even though FNSW were clearly in breach.²⁶⁶ Instead proceedings were commenced for breach of the EPA Act. Pursuant to s 75B of the EPA Act, the logging of Riverina Redgum forests was a project to which Part 3A applied, if FNSW was both the proponent and the determining authority, and no valid approval under Part 3A had been granted by the Minister for Planning.

Accordingly, we seek your written undertaking within 14 days of the date of this letter that Forests NSW will immediately cease all timber harvesting operations and associated works in the Riverina Region incorporating the Murray, Murrumbidgee and Mildura Forestry Management Areas, until such time as a lawful approval under section 75J of the Act is granted.²⁶⁷

In August 2009, the NSW Government formally commissioned a regional forest assessment of Riverina Redgum forests to be conducted by the Natural Resources Commission. In November 2009, 57 scientists wrote an open letter to the NSW Premier calling for new Riverina Redgum national parks and improved environmental flows.²⁶⁸

In December three activists answered charges under the Forestry Regulation 2009 (NSW) in Deniliquin Local Court.²⁶⁹ Counsel for the defence argued that for forestry regulations to be enlivened, there had to be a lawful logging operation. The Defence submitted that, because the logging operation was unlawful, the magistrate was required to make a material finding. If the magistrate then found logging had taken place unlawfully, the forestry regulation, being subordinate legislation, could not be used against the protestors. The magistrate found that the logging of the Redgums was unlawful in that the operation required a Part 3A approval under the EPA Act because the area was not covered by an IFOA, and such approval had not been obtained.²⁷⁰

In mid December 2009 Red Gum Forest Action lodged legal proceedings against FNSW in the LEC. Concurrently there was lobbying of the NSW Minister for the Environment by the traditional custodians, the Yorta Yorta, the NPA and supportive Ministers in state government. The findings of the NRC were released

<<http://www.environment.gov.au/epbc/review/comments/pubs/030-dr-gerry-bates.pdf>>.

²⁶⁴ Despite Early waving the big stick of third party litigation Redgum forests in NSW were still being logged without any additional constraints, regardless of the activity having been deemed unlawful by DSEWPC on 1 May 2009, with a business as usual approach by Forests NSW; see Flint C, 'Government Must Act on Red Gum' (2009) NPA Journal, (online)

<http://www.npansw.org.au/index.php?option=com_docman&Itemid=526>.

²⁶⁵ Barmah Millewa State Forests, see 'Help Save the Murray River Redgums' SEFR Youtube website (online)

<<http://www.youtube.com/motherofdetention>>.

²⁶⁶ The Minister is required to consider all adverse impacts on the world heritage values of a declared World Heritage property Ramsar or a listed migratory species, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2); while there is still ability to nominate areas for world heritage the Southern RFA provides 'The Parties agree that any World Heritage Nomination involving any part of the forest estate in the Southern region will be from within the CAR Reserve System' Regional Forest Agreement for Southern New South Wales Between the Commonwealth of Australia and the State of New South Wales April 2001, cl 30.

²⁶⁷ Environmental Defenders Office NSW to Forests NSW, 09/07/09.

²⁶⁸ Marian Wilkinson 'Top Scientists Join Calls to Save Threatened Red Gum Forests' November 23, 2009 (online)

<<http://www.smh.com.au/environment/top-scientists-join-calls-to-save-threatened-red-gum-forests-20091122-isvp.html>>.

²⁶⁹ *R v Flint, Daines and McLean* (2009) 1 December, Deniliquin Local Court.

²⁷⁰ ABC 'Forests NSW Defends Logging Actions' Dec 3, 2009, (online) <<http://www.abc.net.au/news/stories/2009/12/03/2760745.htm>>.

which painted a damning picture of the land degradation in the area.²⁷¹ Finally the decision was made by the NSW Minister to declare the area a National Park which came into effect in June 2010.²⁷² Legal proceedings were withdrawn.

OEH v Forests NSW – the ‘Smoked Mouse Case’

The *Smoked Mouse* case provides useful comparison between RFA and non-RFA areas, also highlighting the distinction between ss38 – 40 and s 41. It is notable in that it was the first prosecution in the Southern Region since enactment of the EPBC Act and RFAs.

The Smoky Mouse (*Pseudomys fumeus Brazenor*) is listed as endangered under the EPBC Act. Major threats to the species include predation by introduced carnivores, habitat changes due to altered fire regimes, dieback caused by Cinnamon Fungus (*Phytophthora cinnamomi*), and loss, modification and fragmentation of habitat due to road construction and intensive timber harvesting.

The national Recovery Plan for the Smoky Mouse is the first recovery plan prepared for the species. The plan details the species’ distribution, habitat, conservation status, threats, and recovery objectives and actions necessary to ensure the long-term survival of the Smoky Mouse. It was intended that the national Recovery Plan facilitate local plans and actions for recovery which will conform to the national plan.

Of seven sites in NSW where evidence of the species has been recorded, and despite considerable survey effort across the known NSW range for the species, the Nullica area is the only site where the Smoky Mouse is currently found. The population of Smoky Mouse around Nullica appears to have declined in recent years.²⁷³ Since 2007, numbers have increased slightly, but still less than 10 individuals have been recorded in each year.

Approximately 25% of the Smoky Mouse habitat in the Nullica State Forest has been logged, including 33% of what is considered to be key habitat for the species. 20% of the total area of occurrence of the Smoky Mouse within national parks and state forests in NSW has been logged since 1990.²⁷⁴

Inappropriate fire regimes may affect the quality and viability of Smoky Mouse habitat. High fire frequency could potentially simplify heath understorey in dry forests towards early successional species, depleting floristic diversity, encouraging predators,²⁷⁵ and potentially decreasing the abundance and diversity of hypogeal fungi.²⁷⁶ ‘High frequency fire resulting in the disruption of life cycle processes in plants and animals and loss of vegetation structure and composition’ is listed as a Key Threatening Process under the TSC Act.²⁷⁷

The NSW Scientific Committee, established by the TSC Act, made a final determination to move the Smoky Mouse from endangered to critically endangered in 2010.²⁷⁸ The Eden IFOA containing prescriptions for

²⁷¹ Natural Resources Commission, *Final Assessment Report: Riverina Bioregion Regional Forest Assessment River Red Gums and Woodland Forests* (online) <<http://www.nrc.nsw.gov.au/Workwedo/Forestassessment/Riverredgumforestsassessment.aspx>>.

²⁷² For historic rundown see NPA (online) <http://www.npansw.org.au/index.php?option=com_content&task=view&id=378&Itemid=463>.

²⁷³ Ford F, ‘The Smoky Mouse in the Nullica Region and Kosciuszko National Park: Winter and Spring 1998’ (1998) (unpublished report to New South Wales National Parks and Wildlife Service, Queanbeyan); Ford F, Cockburn A, and Broome L, ‘Habitat Preference, Diet and Demography of the Smoky Mouse, *Pseudomys fumeus* (Rodentia: Muridae), in South-eastern New South Wales’ (2003) 30 *Wildlife Research* 89.

²⁷⁴ Final Determination on Smoky Mouse (*Pseudomys fumeus*), NSW Threatened Species Committee 2010 (online) <<http://www.environment.nsw.gov.au/determinations/smokymouseFD.htm>>.

²⁷⁵ Catling P C, ‘*Rattus lutreolus*, Colonizer of Heathland after Fire in the Absence of *Pseudomys* Species?’ (1986) 13 *Australian Wildlife Research* 127; Catling P C, ‘Ecological Effects of Prescribed Burning Practices on the Mammals of South-eastern Australia’ in *Conservation of Australia’s Forest Fauna*, Lunney D (ed), (Royal Zoological Society of NSW: Mosman, 1991) 353.

²⁷⁶ Claridge A W, and Cork S J, ‘Survey of the Distribution of Hypogeal Fungi in the Forests of South-eastern Mainland Australia’ (1997) (a consultancy report to the Environment Australia Forests Biodiversity Program) CSIRO Division of Wildlife and Ecology, 1997; Forests NSW and OEHS Species Management Plan, South Eastern NSW, Smoky Mouse (*Pseudomys fumeus*), IFOA Species Management Plan No 3 (2008).

²⁷⁷ *Threatened Species Conservation Act 1995* (NSW) Schedule 3 s B.

²⁷⁸ *Threatened Species Conservation Act 1995* (NSW) Part 1 of Schedule 1A; listing of Critically Endangered species is provided for by Part 2.

the protection of the Smoky Mouse, in place for 12 years, was amended in 2008 to provide exclusion zones for Smoky Mouse habitat.²⁷⁹ Since March 2008 the FNSW/OEH Species Management Plan has been in place. FNSW provide information on how their department is ensuring the protection of Smoky Mouse habitat.²⁸⁰ An NGO, South East Forest Rescue (“SEFR”), audited the Nullica compartments and filed breach reports to OEH with more than 30 breaches of the IFOA Threatened Species Licence.²⁸¹

However despite two breach reports, a warning letter from OEH, and on-paper protection, in 2010 FNSW burned 60 of the 70 hectares they had set aside as reserved habitat for the Smoky Mouse. In November 2010 OEH commenced proceedings against FNSW on the grounds that the offence resulted in significant potential harm to the habitat of a threatened species, however the process seemed to stall.

In March 2011 there was a change of government in NSW, the liberals ousting the labour party who had been in government for sixteen years. In June 2011 FNSW were brought before the Land and Environment Court, subsequently convicted, fined \$5600, and ordered to pay costs of \$19,000 after pleading guilty to the offence.²⁸² Pepper J stated:

Given the number of offences the Forestry Commission has been convicted of and in light of the additional enforcement notices issued against it, I find that the Forestry Commission’s conduct does manifest a reckless attitude towards compliance with its environmental obligations.²⁸³

Nevertheless if OEH had chosen to prosecute under the EPBC Act the offence is punishable on conviction by imprisonment for not more than 2 years, or a fine not exceeding 1,000 penalty units, or both.²⁸⁴ However prosecution would have to prove that FNSW ‘knowingly’ destroyed the habitat.²⁸⁵

It is evident that FNSW knew the area was habitat for the Smoky Mouse, however FNSW argued the fire was an accident. Nevertheless the LEC found that FNSW had lit the post-logging burn, did not take adequate steps to prevent it from burning into the nearby exclusion zone, and that the destruction of the exclusion zone was preventable.²⁸⁶ The LEC ordered that in lieu of the fine FNSW must put the money towards helping to fund a monitoring program implemented by OEH for three years.

Implication

The *Smoky Mouse* case is important in that it was the first time in NSW since the RFAs were enacted that there had been a prosecution by the regulator for threatened species. It was the first prosecution in the Southern region and it is only the second prosecution in New South Wales under the RFA regime.²⁸⁷

Nevertheless, as shown by the *Redgums* cases and the *Smoky Mouse* case, the EPBC Act was not only ineffective in capturing the offences, it was not the Act of choice for the regulator or the NGOs for many reasons. Further the Commonwealth in both instances was slow to act and even slower to regulate, then

²⁷⁹ Integrated Forestry Operations Approval Eden Region 1998, Appendix B Threatened Species Licence, cl.6.8A(b).

²⁸⁰ See Appendix 1 of this paper.

²⁸¹ SEFR to OEH, sent 21/4/08.

²⁸² OEH Media Release (online) <<http://www.environment.nsw.gov.au/media/DecMedia11060804.htm>>; ABC ‘Forests NSW Guilty over Habitat Burn’ June 9, 2011 (online) <<http://www.abc.net.au/news/stories/2011/06/09/3239643.htm>>.

²⁸³ *Director-General, Department of Environment, Climate Change and Water v Forestry Commission of New South Wales* [2011] NSWLEC 102.

²⁸⁴ *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 207.

²⁸⁵ See *Wright v West Torrens City Corporation* (1996) 91 LGERA 197, 208; *Owen v Willtara Construction Pty Ltd* (1998) 103 LGERA 137, 151; *contra Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 103 LGERA 355.

²⁸⁶ *Director-General, Department of Environment, Climate Change and Water v Forestry Commission of New South Wales* [2011] NSWLEC 102, Pepper J, [103].

²⁸⁷ In May 2011 in Bodalla State Forest FNSW burned koala habitat, when breached they stated it was hazard reduction burning and as such did not need to undertake surveys, however hazard reduction burning is a ‘specified forestry activity’ and as such FNSW were in breach of the IFOAs; *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Southern Region 2001* Threatened Species Licence Appendix B, r 8.10; definition of specified forestry activities, 8.

either defaulting or not acting at all.²⁸⁸ In the *Redgums* cases the EPBC Act was open to public enforcement however the NGOs, through much discussion, chose not to bring action under the Act as there were too many obstacles, further, evidence of successful cases was minimal.²⁸⁹ Needless to say the EPBC Act was not open to the public in the *Smoky Mouse* case, however it was open to the regulator, who chose not to bring action under it.²⁹⁰

Sections 38–40

To understand ss 38–40 an overview of historical jurisdictional issues and the historical context in which these sections were placed in the Act is required. The National Forestry Policy Statement was agreed to by the states and the Commonwealth in 1992.²⁹¹ In it were the beginnings of the Commonwealth's official extraction from responsibility over native forests. While seeming new and in response to the *Rio Declaration* it was in the main following the traditional environmental policy of Australia which was to 'enable and facilitate the development of the country's natural resources'.²⁹²

Following the NFPS the COAG agreement 1997 laid out policy for the Commonwealth EIA regime. The COAG agreement states the parties:

Agree that the environmental assessment and approval processes relating to matters of national environmental significance should be streamlined with the objectives of: relying on State processes as the preferred means of assessing proposals.²⁹³

The parties also agreed that nothing would affect any arrangements for RFAs.²⁹⁴ Consequently inserted into the EPBCA as ss 38–40, any logging in RFA areas is not assessed by the Commonwealth or the state to determine if the activity is managed in an ecologically sustainable way. No assessment on the impacts of logging on species or ecosystems is carried out.

When the exemptions were introduced, it was officially stated as being on assumptions that there were, or would be, protective mechanisms in place and exemptions would 'streamline' the process.²⁹⁵ However concurrently in many areas these protective mechanisms were being eroded. For example while the EPBC Bill was being debated, in NSW the FNPE Act was being enacted that exempted FNSW from all other EIA,

²⁸⁸ Compare *Greentree v Minister for Environment and Heritage* (2005) 143 LGERA 1.

²⁸⁹ Reasons stated were costs of getting into the Federal Court, risks of costs being awarded against them should they fail and lack of legal aid, however they still felt they had the EPBC Act up their sleeve; pers comm Flint to Stone 15/06/2011; this is in line with Chris McGrath who submitted there be 're-establishment of legal aid for public interest litigation', provision for application by public interest litigants at the beginning of a case for costs and to 'reinsert s 478 into the EPBC Act to remove the requirement to provide an undertaking as to damages' Dr Chris McGrath, Submission No 17, Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, *Submissions to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, 19 December 2008, (online) <<http://www.environment.gov.au/epbc/review/submissions/pubs/017-chris-mcgrath.pdf>>; see also Chris McGrath 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environment and Planning Law Journal* 324; Rachel Baird 'Public Interest Litigation and the Environment Protection and Biodiversity Conservation Act' (2008) 25 *Environment and Planning Law Journal* 410.

²⁹⁰ 'The legislation which has identified a specific environmental risk can probably do no more than facilitate the amelioration of the degradation which has already taken place' Fisher D E, 'Environmental Planning, Public Enquiries and the Law' above n 117; see Angela Langdon, and David Farrier, 'The Jervis Bay Leek Orchid - A Case Study of the Consideration Given to Threatened Species Conservation in Strategic Land Use Planning and Development Control Processes in NSW' (2010) 13(2) *Australasian Journal of Natural Resources Law and Policy* 195.

²⁹¹ *National Forest Policy Statement: A New Focus For Australia's Forests*, Commonwealth of Australia 1992, 1995.

²⁹² Fisher D E, 'Environmental Planning, Public Enquiries and the Law' above n 117; Fisher D E, 'Considerations, Principles and Objectives in Environmental Management in Australia' (2000) 17 *Environmental Planning and Law Journal* 260; Gerry Bates, *Environmental Law in Australia*, above n 242, Ch 5, 105; James Crawford, 'The Constitution and the Environment' (1991) 13(1) *Sydney Law Review* 11.

²⁹³ The Council of Australian Government's *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (COAG 1997) cl 5.

²⁹⁴ The Council of Australian Government's *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (COAG 1997) cl 10.

²⁹⁵ Environment Protection And Biodiversity Conservation Bill 1998: Environment Protection And Biodiversity Conservation Bill Explanatory Memorandum cl 11(16), 12(22), 16(36), cl 18 and 19(47), 20(57), 25(84), 26(90), 28(97) 38(113) 'The object of this subdivision recognises that in each RFA region a comprehensive assessment is being, or has been, undertaken to address the environmental, economic and social impacts of forestry operations. In particular, environmental assessments are being conducted in accordance with the Environment Protection (Impact of Proposals) Act 1974. In each region, interim arrangements for the protection and management of forests are in place pending finalisation of an RFA. The objectives of the RFA scheme as a whole include the establishment of a comprehensive, adequate and representative reserve system and the implementation of ecologically sustainable forest management. These objectives are being pursued in relation to each region. The objects of this Act will be met through the RFA process for each region and, accordingly, the Act does not apply to forestry operations in RFA regions.'

protective legislation and third party litigation.²⁹⁶

Perhaps the legislation exemptions were put in place because the EIA processes were costly, time consuming and became increasingly more difficult for state-run forestry agencies to comply with.²⁹⁷ It seems protests were also very costly and time consuming for police and governments.²⁹⁸ Nevertheless: Since the contradictions remain the same and the legislation is merely an overlay it is likely to give rise to further conflicts at a later date.²⁹⁹

If assumptions are correct this was a deliberate policy of governments to block legal challenges and give the government complete discretion.³⁰⁰ It is quite clear that this facilitated the interests of the various state-run agencies, the various woodchipping companies, the union and the industry lobby groups.³⁰¹ As Chambliss and Seidman rightly point out:

Sometimes legislation arises to further the interests of one group or another, against other interest groups and sometimes the entire society.³⁰²

An indication that this was the case is the reaction of the Commonwealth when the Queensland government announced its refusal to sign the Queensland RFA, and proposed instead a transition to hardwood plantations.³⁰³ The Commonwealth Minister for Forestry, Wilson Tuckey, wrote personally to thirty sawmills that would be affected, within three days of the Queensland government's announcement, opposing the plantation proposal, couched in a concern for jobs:³⁰⁴

Our fundamental view is that a SE Queensland RFA must provide for a continued, viable native timber industry...[it must fall] within the parameters of ...our requirement for real jobs protection and growth.³⁰⁵

Enforcement Exemptions and Interaction with Other Regulatory Regimes

Under the *Regional Forest Agreement Act 2002* (Cth) ("RFA Act") RFAs were endorsed by the Commonwealth on the basis that the states had conducted a thorough environmental assessment of their forests. The RFA Act removes RFA areas from the scope of the *Export Control Act 1982*(Cth) and other associated regulations. Operators are not required to obtain a yearly licence to export woodchips, woodchip

²⁹⁶ *Forestry and National Park Estate Act 1998* (NSW) s 36 exempts forestry in IFOA areas from *Environmental Planning and Assessment Act 1979* (NSW); *Forestry and National Park Estate Act 1998* (NSW) s 37 exempts from *National Parks and Wildlife Act 1974* (NSW) and *Threatened Species Conservation Act 1995* (NSW); *Forestry and National Park Estate Act 1998* (NSW) s 38 *Local Government Act 1993* (NSW); *Forestry and National Park Estate Act 1998* (NSW) s 39 *Wilderness Act 1987*(NSW); *Forestry and National Park Estate Act 1998* (NSW) s 40 also exempts from ss 219, 252 and 253 of the *Protection of the Environment Operations Act 1997* (NSW).

²⁹⁷ Aidan Ricketts and Nicole Rogers 'Third Party Rights in NSW Environmental Legislation: the Backlash' (1999) 16 *Environment and Planning Law Journal* 2.

²⁹⁸ For an extensive history of native forest logging and the RFA process see Ajani J, *The Forest Wars*, (Melbourne University Press, 2007).

²⁹⁹ See Ajani J, 'Australia's Transition from Native Forests to Plantations: The Implications for Woodchips, Pulp Mills, Tax Breaks and Climate Change' (2008) 15 *Agenda: A Journal of Policy Analysis and Reform* 3..

³⁰⁰ Bottomely S, and Parker S, *Law in Context*, (Federation Press, 1997), 81.

³⁰¹ In the Explanatory Memorandum to the Regional Forest Agreement Bill 2002 (1) it was stated that the exemptions were put in place because of 'The problem that conflict over the use of native forests had established a climate of uncertainty for investors and contributed to community uncertainty that environmental values were being adequately protected. These conflicts stemmed mainly from the perception by some that harvest rates were unsustainable.'

³⁰² Then National Association of Forest Industries (NAFI); now Australian Forests Products Association (AFPA) is the very well-funded lobbying body of the woodchip industry, based in Canberra.

³⁰³ See Chambliss W, and Seidman R, *Law, Order and Power*, (Addison-Wesley Pub Co, 1982), 77-78.

³⁰⁴ Brown A J, 'Beyond Public Native Forest Logging: National Forest Policy and Regional Forest Agreements After South East Queensland' (2001) 18(2) *Environment and Planning Law Journal*.

³⁰⁵ Media Release, W Tuckey MP, 'Report does not support QLD RFA proposal' REF AFFA99/130TU, 30 Nov 1999; the Minister was in direct conflict with the QLD Timber Board.

³⁰⁶ This statement was proved erroneous when more jobs were created as part of the plantation sector proposal than under the status quo of the RFA proposal, however it is the same argument the Minister and industry put forward in the Redgums case and the same argument when negotiations were undertaken in 2002 on the south coast; see NPA media release (online)

<http://www.npansw.org.au/index.php?option=com_content&view=article&id=566:documents-reveal-truth-about-logging-dispute&catid=105:2009&Itemid=486>; it is also the same argument in *South East Forests Conservation Council Incorporated v Director-General National Parks and Wildlife Service* [1993] NSWLEC 194.

exporters do not have to pay tax on exports and there are no limits on the amount of woodchips which can be removed.³⁰⁶

The RFA Act reinforces those provisions of an RFA agreement which require the Commonwealth to compensate a state.³⁰⁷ Under an RFA when the Commonwealth takes any action to protect environmental or heritage values in native forests, which prevents or limits the use of land for any forestry operations, compensation is required, unless there has been breach of the Act, the RFA or other proven illegality.³⁰⁸

Clause 6 of the RFA Act removes forestry operations conducted on land covered by an RFA from being subject to the EIA provisions in the EPBC Act. This reinforces the position that no EIA under Commonwealth legislation is required.³⁰⁹

The EPBC Act also contains a number of other enforcement exemptions. Relevantly there are exemptions for the activities authorised under a facility installation permit granted under the *Telecommunications Act 1997* (Cth),³¹⁰ or actions under existing uses which are defined as ‘a use that is a lawful continuation of a use of land that was occurring immediately before the commencement of the Act’.³¹¹

No EIA- No Exemption

Part 3B of the EPBC Act provides that EIA requirements do not apply to forestry operations in RFA areas.³¹² At s 39 it is provided that Part 9 does not apply, if the logging is undertaken in accordance with an RFA. However if the logging is not in accordance it would seem that both Part 3 and Part 9 would apply.³¹³ As the Act is silent on further exemptions it would seem that state-run native forest logging agencies are not exempt from the rest of the Act.

Objects provisions provide the extent and purpose of legislation and guide the parameters of the exercise of legal power. The object of Part 3B is stated as being to:

ensure that an approval under Part 9 is not required for forestry operations in a region for which a process (involving the conduct of a comprehensive regional assessment, assessment under the *Environment Protection (Impact of Proposals) Act 1974* and protection of the environment through agreements between the Commonwealth and the relevant State and conditions on licences for the export of wood chips) of developing and negotiating a regional forest agreement is being, or has been, carried on.³¹⁴

However this must be read in conjunction with the overarching objects of the Act. Relevantly the objects of the Act are:

- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
- (c) to promote the conservation of biodiversity; and
- (ca) to provide for the protection and conservation of heritage.³¹⁵

³⁰⁶ The significance of this is that currently 90% of south east NSW native forest is turned into woodchips; the *Export Control Act 1982* regulates the export of ‘prescribed goods’; in 2008 SEFE exported 977,074 tonnes of green wood and recorded a record profit of \$10 907 529, the original DA stated 10 000 tonnes would be exported.

³⁰⁷ See *Regional Forest Agreements Act 2002* (Cth) s 8.

³⁰⁸ See *Regional Forest Agreement for Southern New South Wales* between the Commonwealth of Australia and the State of New South Wales April 2001, cl.108(3) and cl.108(11); see also *Brown v Forestry Tasmania and Others(No 4)* [2006] FCA 1729

³⁰⁹ *Regional Forest Agreement Act 2002* (Cth) s6 (4); see *Forestry Tasmania v Brown* [2007] FCAFC 186.

³¹⁰ The *Telecommunications Act 1997* (Cth) Sch 3 s 28.

³¹¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 43B.

³¹² However at s 38 it is provided that Part 3 does not apply to RFA areas.

³¹³ See *Brown v Forestry Tasmania and Others(No 4)* [2006] FCA 1729.

³¹⁴ There seems the assumption that there are protective conditions on licences for the export of wood chips.

³¹⁵ *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 3(1).

Additionally, it is provided that the Act includes provisions to:

- (i) protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species) and ensure the conservation of migratory species;³¹⁶

This would seem to suggest that state-run agencies must not undertake an action or activity that has, or is likely to have, a significant impact on matters of NES if the activity is inconsistent with the objects of the Act, or Australia's obligations under the Convention on Biodiversity, or the Apia Convention, CITES, a recovery plan for the species or community or a threat abatement plan.³¹⁷ State-run agencies must also have regard to the precautionary principle and must not undertake an activity that would be inconsistent with international obligations.³¹⁸ It would follow that, as a state sponsored agency, the state-run forestry agencies must comply with the same provisions as the Minister.³¹⁹

As the Part 3B objects provide, an approval is not required for forestry operations in a region where a process of assessment has been undertaken. This would seem to suggest that if there has been no EIA undertaken for forestry operations in RFA areas the forestry operations are not exempt from Part 9 of the Act. Further it would follow that as the EPBC Act is silent on exemption from Part 1, state-run agencies must comply with the objects of the EPBC Act.³²⁰ However as analysis of the Southern Sub-region and Eden Region will show there seems some doubt that the NSW state-run agency has complied.

NSW: Southern and Eden Region EIA

One of the main criticisms at the time of introduction of the EPBC Act was that RFAs were being negotiated without minimum standards for environmental impact assessment or public participation.³²¹ It is stated by FNSW that under the Southern RFA, signed by the Commonwealth and NSW Governments in 2001, that the whole of the South Coast area state forests were 'not required to meet the regional reservation targets' and accordingly 'the remaining area of state forest is available for harvesting'.³²² The 1998 Senate Inquiry stated 'a comprehensive assessment to address the environmental, economic and social impacts of forestry operations is undertaken in each RFA region prior to the completion of an RFA'.³²³

It is now quite clear that the committee was wrong. The CRA report, showing what was required to be

³¹⁶ *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 3(2).

³¹⁷ *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 146L; *Convention on Biological Diversity* (Rio de Janeiro, 5 June 1992), (entry into force generally and for Australia: 29 December 1993) Australian Treaty Series 1993 No 32; *Convention on Conservation of Nature in the South Pacific* (Apia, Western Samoa, 12 June 1976; (entry into force for Australia and generally: 26 June 1990) Australian Treaty Series 1990 No 41; *Convention on the International Trade in Endangered Species of Wild Fauna and Flora* (entry into force generally: 1 July 1975 entry into force for Australia: 27 October 1976) Australian Treaty Series 1976 No 29.

³¹⁸ *Regional Forest Agreement Act 2002* (Cth); Regional Forest Agreement for the Eden Region of New South Wales between the Commonwealth of Australia and the State of New South Wales August 1999, Attachment 14 cl 44, principle 4.

³¹⁹ The Minister must take account of the precautionary principle in making any decision, consistent with other provisions of the Act, brought in through the objects of the EPBC Act and at s 391, see *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 391; relevantly applicable to s 75 does the action need approval, that is, is it a controlled action and s 133 approving the taking of the action; two cases provide for interesting decisions on what has been classed a 'controlled action' see Queensland Hunter Gas Pipeline project (840km crossing QLD/NSW border) DSEWPC EPBC Act Referral Lists (online)

<http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=4620>, NSW Department of Planning (online) <http://majorprojects.planning.nsw.gov.au/page/project-sectors/transport--communications--energy-water/pipelines/?action=view_job&job_id=25>; compare Eastern Star Gas Pipeline project (272km from Colah to Newcastle) DSEWPC EPBC Act Referral Lists (online) <http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referrals;limit=90>.

³²⁰ See *Environment East Gippsland Inc v VicForests* [2010] VSC 335.

³²¹ Environmental Defender's Office NSW, Submission No 15, Senate Environment, Communications, Information Technology and the Arts Committees, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*, (1998); the regulation defining Regional Forest Agreements requires that the RFA be: an agreement between the Commonwealth and a State, in respect of a region or regions, that: (a) identifies areas in the region or regions that the parties believe are required for the purposes of a comprehensive, adequate and representative national reserve system, and provides for the conservation of those areas; and (b) provides for the ecologically sustainable management and use of forested areas in the region or regions; and (c) is expressed to be for the purpose of providing long-term stability of forests and forest industries.

³²² Letter from Nick Roberts CEO Forests NSW to Dan Nikolin, DSEWPC, 13/05/2011.

³²³ Senate Environment, Communications, Information Technology and the Arts Committees, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*, Ch 6 Protecting the Environment, (online) <http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/1999-02/bio/report/c06.htm#FOOTNOTE_83>.

conserved to meet the JANIS criteria, stated that all but 51 hectares of the state forest area of the Southern sub-region were required to be set aside and protected from logging.³²⁴ The state and Commonwealth governments ignored this report.

The ‘comprehensive environmental assessment’ for the Southern sub-region consisted of two environmental impact assessments covering Wandella/Dampier and Badja/Quenbeyan.³²⁵ As there are 24 state forests in the Southern sub-region, and there seems to have been no other EIA undertaken, it would be remiss to classify that as comprehensive.³²⁶

The Eden region was subject to an EIA however the critique at the time was less than positive, the main argument being that the assessment was inadequate. The criticisms at the time mirrored common criticism of most EIA in that it failed to address environmental impacts adequately, there was a lack of data and scientific research on the impacts of logging to species and ecosystems of the area, and is underscored by parallel criticisms of the fauna impact statement:

I am obliged to note that, in my opinion, the Eden FIS is an appallingly inadequate document, even by Commission standards. It suggests they do not take the Act (and the conservation of endangered fauna) very seriously.³²⁷

While EIA processes were quickly adopted by many countries and Australia was no exception,³²⁸ FNSW were less than enthusiastic.³²⁹ EIA theory suggests the purpose of EIA is:

To ensure, to the greatest extent that is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account.³³⁰

Therefore if assumptions are correct this could give some understanding on why state-run agencies are opposed to EIA. If due process is followed the impacts caused by logging on species and ecosystems would have to be fully examined.³³¹ It follows that merely having an RFA in place cannot be considered a form of assessment, particularly if no EIA has been undertaken. Therefore this would seem to suggest that if there has been no EIA the state-run agencies are not afforded exemption from requirements of the EPBC Act.³³²

³²⁴ Nature Conservation Council RFA Submission No 2000; New South Wales, *National Park Estate (Southern Reservations) Bill 2000 Second Reading*, Legislative Assembly, Parliament Hansard, 6 December 2000, (Evans); *Nationally Agreed Criteria for the Establishment of a CAR Reserve System for Forests in Australia*, A Report by the Joint ANZECC / MCFFA National Forest Policy Statement Implementation Subcommittee, 1997.

³²⁵ *Proposed Foothills Logging Operations Wandella-Dampier, Narooma District*, Environmental Impact Statement, Forestry Commission of New South Wales, April 1983; *Proposed Forestry Operations in the Queanbeyan and Badja Management Areas*, Environmental Impact Statement, State Forests NSW, 1995.

³²⁶ AGS has become more prevalent in the Eden and Southern regions, there has been no assessment of AGS; in the *Redgums case* DSEWPC provided that ‘AGS constitutes an intensification of use and its environmental impacts, if any, require assessment and approval’; Rose Webb DSEWPC, letter to Nick Roberts Forests NSW, 01/05/2009.

³²⁷ David Papps, Deputy Director (Policy and Wildlife) National Parks and Wildlife Service, 1997 in *South East Forests Conservation Council Incorporated v Director-General National Parks and Wildlife Service* [1993] NSWLEC 194.

³²⁸ Andrew Macintosh, ‘The Australian Government’s Environmental Impact Assessment (EIA) Regime: Using Surveys to Identify Proponent Views on Cost-effectiveness’ (2010) 28(3) *Impact Assessment and Project Appraisal* 175.

³²⁹ See for example *Jaraius v Forestry Commission of New South Wales & Ors* [1988] NSWLEC 11; *J Corkill v Forestry Commission of NSW* [1990] NSWLEC 129; *T R Bailey v The Forestry Commission of New South Wales* [1989] NSWLEC 24; *In The Matter of the Appeal of Giselle Marie Thomas* [1991] NSWDC 90/52/0165; Margaret Young, above n 242; see *Jeffrey Nicholls v Director General National Parks and Wildlife Service and Forestry Commission of New South Wales and Minister for Planning* [1994] NSWLEC 155; Green Left Weekly ‘Forests Logged Without EIS’ (1994) (online) <<http://www.greenleft.org.au/node/6890>>; *Upper Hunter Timbers Pty Ltd v Forestry Commission of New South Wales* [2001] NSWCA 64.

³³⁰ *Environment Protection (Impact of Proposals) Act 1974*(Cth); *Kivi v Forestry Commission* [1982] NSWLEC; see Stephen Jay, Carys Jones, Paul Slinn, Christopher Wood, ‘Environmental Impact Assessment: Retrospect and prospect’ (2007) 27 *Environmental Impact Assessment Review* 287.

³³¹ The closest to an EIA can be found in the ESFM plan for the Southern Region, it provides: ‘Forests NSW has completed an Aspects and Impacts analysis of forestry operations and determined those operations having the greatest potential for environmental impacts to comprise: Timber harvesting involving tree felling, log extraction and log haulage; Road construction and maintenance, particularly drainage feature crossings and side cuts on steep side slopes; Fire management including fuel hazard reduction burning, particularly in ecologically sensitive habitats and streamside buffers: these operations require in-depth planning, supervision and monitoring’ Forests NSW ESFM Plan, Southern Region (2005), 53.

³³² The Hawke report provides that ‘rather than being an exemption from the Act, the establishment of RFAs ... actually constitutes a form of assessment and approval for the purposes of the Act’ Final Report of the Independent Review of the EPBC Act, above n 127.

Have The Exemptions Improved Environmental Protection?

It is hard to deduce how exemption from protective legislation can improve protection in any way. There is much argument that actions which are caught by the EPBC Act are no better or worse for EIA requirements.³³³ The two cases presented would suggest support for this argument.

On Australia's loss of forests the UN State of the Forests Report 2011 provides:

Oceania also experienced a negative trend ... since 2000 and caused it to register the largest annual loss of any country in the region between 2000 and 2010.³³⁴

Deforestation and forest degradation is one of the biggest causes of climate change.³³⁵ Water quality and availability has been dramatically reduced by logging of most catchment areas.³³⁶ It is intractable to classify this as sustainable.³³⁷

As stated 1998 FRAMES data was run using all land tenure, including land that was classified as future reserve.³³⁸ The effect of this was an overestimation of the amount of hectares that could be logged and still be sustainable.³³⁹ Further the state-run agencies have increasingly been overcutting to meet wood supply agreements, and lastly they have not undertaken the required reviews of sustainable yield.³⁴⁰

In summation native forestry operations in areas covered by RFAs failed to be subject to independent environmental assessment which was scientifically sound and rigorous. The scientific processes in the RFAs were politically compromised, the established JANIS criteria for forest conservation were not fully applied, and either disregarded or altered in many cases. In many areas there was failure to undertake EIA.³⁴¹

A Self-Inflicted Restriction

The Commonwealth has 'vast plenary power' in relation to the environment however chooses not to exercise this power.³⁴² Further through the exemptions the Commonwealth's role is restricted which limits the extent to which it can foster change in state forest logging operations or contractors behaviour. The Commonwealth claims it has no control over the way in which regulations are implemented and therefore the state-run agencies are able to log without fear of capture.

The Commonwealth's subordinate role in relation to RFA forestry operations was further cemented by

³³³ Andrew Macintosh, 'The Commonwealth' in Bonyhady and Macintosh, above n 241; see also Andrew Macintosh, 'The EPBCA Survey Report' above n 328.

³³⁴ *State of the World's Forests 2011*, above n 235, 9.

³³⁵ Professor Ross Garnaut, *Garnaut Climate Change Review*, 2008.

³³⁶ Mackey B, Keith H, Lindenmayer D, Berry S, 'Green Carbon: The Role of Natural Forests in Carbon Storage, Part 1: A Green Carbon Account of Australia's South-Eastern Eucalypt Forest, and Policy Implications' (ANU E-Press, 2008), (online) <http://epress.anu.edu.au/green_carbon_citation.html>.

³³⁷ Lindenmayer stated 'Sustainability is a weasel word. [the word usage should be to] perpetuate ecological integrity' see Lindenmayer D, Tamar Natural Resource Management Biodiversity Conference, June 25th 2007; reported in *Tasmanian Country* 29th June 2007.

³³⁸ New South Wales, Legislative Assembly, *Forestry and National Park Estate Bill*, 17 November, 1998, (Fraser), 10052.

³³⁹ The definition of sustainable forestry is that the rate of logging of forest shall not exceed levels which can be permanently sustained; South East Forest Rescue, Submission to FSC on Sustainable Yield in Native Forests, 2010, (online) <<http://www.lisaandtony.com.au/FSC%20sus%20yield.pdf>>.

³⁴⁰ Regional Forest Agreement for Southern New South Wales Between the Commonwealth of Australia and the State of New South Wales April 2001, cl 8; ABC 'Crucial Forest Audit Ongoing' 26 Jan, 2011 (online)

<<http://www.abc.net.au/news/stories/2011/01/26/3122143.htm?site=southeastnsw>>; see NSW Auditor-General reports 2001-2010; 'reviews of yield estimates for the southern region, due in 2004 for Eden and 2006 for Tumut and the south coast, have not been completed' Performance Audit 'Sustaining Native Forest Operations' Auditor-Generals Report, Vol 1, 2009, (online) <http://www.audit.nsw.gov.au/publications/reports/financial/2009/vol1/pdfs/31_0173_forestry_commission_of_new_south_wales.pdf>.

³⁴¹ Brendan Mackey, above n 169; Forests NSW erred in the original hectare figures that were available for logging in JANIS, and erred in sustainable volume figures under FRAMES.

³⁴² Tim Bonyhady, ANU Lecture, Commonwealth Environmental Law, 2011; see James Crawford, 'The Constitution and the Environment' (1991) 13(1) *Sydney Law Review* 11; Gerry Bates, above n 242, Ch 5.

amendments in 2006 by the Howard government.³⁴³ Section 75(2B) was inserted into the Act in order to limit the considerations that the Minister must take into account in RFA areas. It provides that the Minister must not consider any adverse impacts of any forestry operation in an RFA region. In other words if somehow a forestry operation was caught by the EPBC Act the Minister does not have to consider any impacts on the environment caused by the logging.³⁴⁴

Compensation

Perhaps the biggest restriction on the Commonwealth's ability to raise the bar of state-run agencies forestry practices rests not only on the exemptions but on the deliberate policy to stop legal challenges at both levels of government, which gave government complete discretion. Perhaps this policy may work if regulators are strict in monitoring compliance, and imposing rigorous conditions, however as evidenced there has been less than adequate regulatory response.³⁴⁵

This self-inflicted tying of the Commonwealth's hands is nowhere more apparent than when there is likelihood of land tenure change. Whenever there is this likelihood FNSW raise the red flag of compensation. However provision of compensation rests on many factors.

The assertion that the RFAs have been vigorously defended and implemented by the Commonwealth, the NSW Government or state-run agencies is moot.³⁴⁶ If there has been breach of RFAs or legislated requirements there is argument that no compensation is payable.³⁴⁷

The Southern RFA provides that no compensation is payable for any loss or damage which would have been sustained regardless of the Commonwealth's action, and further no compensation is payable for any additional areas included in the CAR Reserve System.³⁴⁸ The RFA further provides:

No compensation is payable under clause 108.2 in relation to any loss or damage which the person who sustained the loss or damage might have avoided by taking reasonable steps in mitigation including by the making of alternative contractual arrangements which would have avoided or reduced that loss or damage.³⁴⁹

There is little evidence to suggest that state-run agencies and their authorised contractors have undertaken what is required, or adhered to legislation and relevant subordinate regulations, however there is evidence of

³⁴³ The *Environment Protection and Biodiversity Conservation Amendment Act 2006* (Cth) further reduced rights of the public to participate in decision making processes under the EPBC Act. The public cannot request an emergency listing on the National Heritage list and there is no longer a right to appeal to the Administrative Appeals Tribunal against various decisions by the Minister under Part 13A or s 303CC(5), *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s303GJ.

³⁴⁴ *Environment Protection and Biodiversity Act 1999* (Cth) s 75(2B).

³⁴⁵ *Forestry and National Park Estate Act 1998* (NSW) Part 4; *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Southern Region 2001*; the IFOAs are available on the Office of Environment and Heritage website at: (online) <www.environment.nsw.gov.au/forestagreements/agreementsIFOAs.htm>; *Terms of Licence Under the Threatened Species Conservation Act 1995 for the South Coast Sub-Region of the Southern Region* Appendix B, ("Southern TSL").

³⁴⁶ In the Southern and Eden Regions Forests NSW has received four fines and 41 warning letters since 1999; one prosecution by the EPA in 2004, and recently a fine for logging an EEC on the north coast, pers com Office of Environment and Heritage EPR Crown Forestry Unit, Steve Hartley 2010; see IFOA review reports, available at (online) <<http://www.environment.nsw.gov.au/forestagreements/reviews.htm>>.

³⁴⁷ Under common law compensation is payable in most cases when a landowner is required to do more than is normally required; 'Regulation of land use is presumed, in the absence of a clear contrary intent, not to require payment of compensation' David Farrier, ANU Lecture, 2010; Simon Evans 'When Is an Acquisition of Property Not an Acquisition of Property? The Search for a Principled Approach to Section 51(xxxi)' (2000) 11 *Public Law Review* 183; Davidson I E, 'The Equitable Remedy of Compensation' (1982) 13 *Melbourne University Law Review* 349; Forests NSW argue their property has been effectively acquired and that the Commonwealth must provide compensation, 'To bring the constitutional provision [s 51(xxxi)] into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be' see *Commonwealth v Tasmania* (1983) 158 CLR 1, [145]; the Commonwealth is not acquiring any property, it is transferring tenure through regulation from one NSW government department to a different NSW government department – NPWS see *Evans v Forestry Commission, Spicer v Forestry Commission* (1982) NSWSCA; further as the 2010 NSW Auditor-General's report points out, standing trees are in fact a negative liability and now account for quite a part of FNSW \$232 million dollar debt

³⁴⁸ Regional Forest Agreement for Southern New South Wales between the Commonwealth of Australia and the State of New South Wales April 2001, cl 108(3).

³⁴⁹ Regional Forest Agreement for Southern New South Wales between the Commonwealth of Australia and the State of New South Wales April 2001, cl 108(11).

systemic non-compliance.³⁵⁰ This situation could have been mitigated had the governments and the state-run agencies followed due process in RFA negotiations. Further if the state-run agencies had taken reasonable steps at some form of mitigation they may have been entitled to compensation. Arguably as the restrictions would be placed to prevent a public harm, if assumptions are correct, there seems no requirement for provision of compensation to state-run agencies.³⁵¹

In the Southern sub-region as the state-run agency is currently logging in breach of legislation and delegated legislation, and prior to 1998 they did not undertake any EIS in most of the Southern Region, and the EIS and FIS that was undertaken in the Eden Region were inadequate, they therefore may have no claim to compensation, or to compliance with legislation for the past twenty years.

International Obligations

The EPBC Act was enacted to enable domestic law as a result of ratification of international treaties. This raises questions of conflict of the exemptions with the Commonwealth's international obligations. Logging of native forests is sanctioned by Australia through the exemptions. Logging is conducted without restrictions on GHG emissions. Forests NSW, VicForests or Forestry Tasmania are state-run agencies.³⁵² The woodchipping company in Eden is a state sponsored company.

There is strong clear evidence of the failure by state-run agencies to ensure contractors adhere to obligations, resulting in environmental harm.³⁵³ Therefore there is a clear direct line from Australia to the state-run agencies to their contracted logging companies and contractors to the environmental harm of public native forests, including greenhouse gas emissions, caused by logging.³⁵⁴

Thus the Commonwealth is responsible for the breach of obligations by its sponsored companies, by its agencies and by the logging contractors, resulting in environmental harm.³⁵⁵ Therefore Australia could be seen to be in breach not only of the EPBC Act but of customary international law and its obligations under international environmental law.³⁵⁶

³⁵⁰ An example of this is the TSL Non-compliance Register for the Southern region is non-complying, in that it is not current and only available up until 2007; the Southern region EPL Non-compliance Register is unavailable; breaches are recorded as 30 verbal warnings, 20 written warnings, 1 PIN, 25 'other' in 2002-2007; the EPL and TSL non-compliance register for Eden is 'not available'; see SEFR Breaches (online) <<http://www.lisaandtony.com.au/breaches.htm>>.

³⁵¹ Although a different jurisdiction *Just v Marinette County* 201 NW 2d 761 (1972) may be useful: 'It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful' quoting Freund in *The Police Power*, 546; and 'Thus the necessity for monetary compensation for loss suffered to an owner by police power restrictions are placed on property in order to create a public benefit, rather than to prevent a public harm' quoting Rathkopf, *The Law of Zoning and Planning*, Vol 1, ch 6, 6.

³⁵² Forests NSW is the name used by the Forestry Commission of New South Wales, a statutory corporation established by the *Forestry Act 1916*, (NSW) s 7, trading as a corporation sole.

³⁵³ Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Southern Region 2001 r 57(1).

³⁵⁴ In 2010 this was calculated to be approximately 26 million tonnes CO₂e per year on the south coast of NSW.

³⁵⁵ A state, having ratified a treaty, is bound by the conditions imposed; see *Vienna Convention on the Law of Treaties 1969*, done at Vienna on 23 May 1969; (entry into force 27 January 1980, United Nations, Treaty Series, vol 1155, 331), 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'; if a convention has been ratified by a state it applies to the whole territory over which that state has jurisdiction; Australian domestic law provides that no treaty to which Australia is a party will have internal effect until it is incorporated into domestic law, see *Polities v Commonwealth* (1945) 70 CLR 60; *Chow Hung Ching v R* 77 (1948) CLR 449; *Bradley v Commonwealth* (1973) 128 CLR 557; however article 27 of the *Vienna Convention* provides that a state cannot invoke internal law as justification for failure to perform a treaty; the Commonwealth cannot contend that any matter covered by a treaty is a matter for domestic states and not one of the Commonwealth's obligations, therefore invocation of RFAs and IFOAs is no justification for non-compliance; John Tobin, 'Using Human Rights in Litigation and Advocacy: A Basic Road Map to Research' University of Melbourne, (online) <<http://www.hrlrc.org.au/files/TG2W3D9WTE/Human%20Rights%20Research.doc>>; Clause 1.4 (c) of the *Southern Region Forest Agreement 2002* states the Ministers 'note the obligations on the Commonwealth of Australia arising from the *Intergovernmental Working Group in Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests (Montreal Process)*, the *Convention on Biological Diversity*, *Agenda 21* and the *Kyoto Protocol on Climate Change*'; in *Minister v Teoh* Australia's treaty obligations were given effect in that the High Court found that there was real expectation that the terms of a treaty would be adhered to in the carrying out of administrative action; see *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; *contra Horta v Commonwealth* (1994) 181 CLR 183; however see *Richardson v Forestry Commission* (1988) 77 ALR 237.

³⁵⁶ *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 146L; *The Tacna-Arica Arbitration (Chile v Peru)* 2 RIAA (1925) 921 established that it is only material breach which justifies termination or suspension; article 33 of the *Responsibility of States for Internationally Wrongful Acts 2001* sets out the scope of international obligations; 'The obligations of the responsible State ... may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the

Options for Change

It is fairly obvious, through the above analysis of the *Redgums* case, the *Smoky Mouse* case and lack of any real EIA, that by these exemptions industry needs were accommodated with scant regard to international obligations or positive environmental outcomes. The exemptions have left high value forestry areas that fall under RFAs, which are based on a scientifically flawed assessment processes, unprotected and unassessed. The Act must therefore dramatically increase its scope to truly regulate and protect Australia's environment.

It would seem that in order for the climate, forest species and habitats to be substantively protected, the EPBC Act must apply to forestry operations in RFA areas where they are likely to have impacts on biodiversity and threatened species. The most advantageous or least detrimental option would be to amend the EPBC Act by removal of ss 38–40 and s 75(2B).

The Minister may grant exemptions from the provisions in Part 3 if they are satisfied it is in the national interest that the provisions do not apply.³⁵⁷ While normatively read to pertain to exempting development from complying with protective provisions for listed species, argument could be made that this applies to Part 3B as Part 3B is contained within Part 3. Argument could be made that exemption from the exemptions, or removal of Part 3B would be in the national and public interest.

The Commonwealth admits its responsibility for care of native forests in the COAG Agreement.³⁵⁸ It is inappropriate for the Commonwealth to remain in a position where it cannot regulate forestry activities given Australia's international obligations to protect threatened species and the widening knowledge about the effects of deforestation on climate change. Without reform the Commonwealth will not avoid severe impacts to Australia's major natural assets and, consequently, will not be effective in avoiding climate change. Perhaps it is important to recognise this failure and attempt to rectify it, rather than silently ignore it.

Conceivably in enactment legislators believed that state-run logging agencies would adhere to the many laws and subordinate legislation, however this circumstance has been brought about through lack of adherence to data provision, to legislation and regulations on the part of state-run agencies and their authorised contractors, combined with the government's failure to regulate, in NSW the exemption to third party litigation through s 40 of the FNPE Act, compounded with the effects of climate change.

Questions posed by commentators when the EPBC Act was enacted have been answered. RFAs have not fulfilled their purpose, the FNPE Act and delegated legislation has not been adhered to and vast tracts of land have been clear-felled, patch clear-felled and burned.³⁵⁹ Over the last thirteen years unlawful logging and burning of rainforest and old-growth, of threatened and endangered species habitat, of endangered ecological communities, of gazetted Aboriginal Place, of National Park, of FMZs, of Special Protection

international obligation and on the circumstances of the breach; at art 33 (2) 'This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'; see Gerry Bates, above n 242, Ch 5.

³⁵⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 28, s 158; for a detailed look at why the referral, assessment and approval process of the EPBC Act has failed to fulfil environmental protection; see Andrew Macintosh, 'Environment Protection and Biodiversity Conservation Act: An Ongoing Failure' The Australia Institute Ltd, Discussion Paper, July 2006.

³⁵⁸ 'The Commonwealth has a responsibility and an interest in relation to the development and implementation of Regional Forest Agreements and the National Forest Policy Statement, and under relevant international instruments including the Rio Statement of Forest Principles, the International Tropical Timbers Agreement, the Report of the UN Intergovernmental Panel on Forests and Agenda 21' COAG Agreement, Attachment 1 Part 1, cl 11.

³⁵⁹ For an historic legal overview of the RFAs see McDonald J, 'Regional Forest (DIS) Agreements: The RFA Process and Sustainable Forest Management' (1999) *Bond Law Review* 295; while much in the article is correct the CAR was neither comprehensive nor scientifically rigorous; see also Tribe J, 'The Law of the Jungles: Regional Forest Agreements' (1998) 15 *Environment and Planning Law Journal* 2; see Park H, 'Fragments of Forest Management, a Private Practice: an Assessment of the Implementation of the Regional Forest Agreements on Private Land in the Southern and Eden Regions of NSW' (2006) 10 *Australasian Journal of Natural Resources Law and Policy* 2, 183.

Zones and creeks have occurred in direct breach with legislative instruments.³⁶⁰

As long as the state-run agencies believe themselves exempt from the EPBC Act, due to the exemptions provided through ss 38–40, the situation will not improve.³⁶¹ Excluding areas or processes from the Act is only valid where the process in place for assessing those areas is equal to, or preferably better than, the EPBC Act processes. As there are no real assessment requirements in areas under RFAs and IFOAs the exclusion and exemptions are therefore indefensible.

While in theory legislation cannot of itself protect the environment the ability for regulators and the public for adequate enforcement utilising protective legislation can have that effect. Without that ability, with no provision in legislation, there is no means for enforcement or protection.

What is clear, after review of submissions and parliamentary debate at the time of enactment of the EPBC Act is that most concerns have come to pass and what is worse, could perhaps have been avoided, mitigated or acted upon had the exemptions not existed.³⁶²

This gives rise to questions on whether amendment would be better or worse than the status quo, however the results of the status quo are evident. The government has not ensured the adoption of ecologically sustainable forestry practices, environmental safeguards have not improved and it is clear that the native forest logging industry has been sheltered and cosseted by both the state and federal governments.

Bonyhady asks an almost rhetorical question in the introduction to ‘Mills, Mines and other Controversies’ being what would happen if there were no EIA? The answer is exemplified in the state of native forests in RFA areas, and in the two case studies. The rate of biodiversity loss would escalate, climate change effects would not diminish and land degradation would increase. At least in non-RFA areas there is a stick to wield, no matter how bent. EIA can be pointed to identifying requirements that have not been met. However negative the situation with EIA, it cannot compare to that without. Nevertheless the EPBC Act is in much need of reform.

Perhaps the suggested reforms will not change behaviour, perhaps they will not improve environmental outcomes. Only time will tell once reform has had a chance to be bedded in. However, given the current state of affairs any action that can be taken must surpass the current status quo, where the environment is the casualty and the public are the quarry.

³⁶⁰ For review of the RFAs ‘progress’ see Daines S, Mackenzie S, Stone L, Whan T, ‘Public Comment Submission on the Draft Report on Progress with Implementation of NSW Regional Forest Agreement(s)’ (2009) South East Forest Rescue submission on the Draft Implementation Report RFA review 2009, (online) <<http://www.lisaandtony.com.au/submissions.htm>>.

³⁶¹ For discussion on the effectiveness of the EPBC Act in protecting the environment see McGrath C, ‘Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act’ (2006) 23 *Environment and Planning Law Journal* 165; Macintosh A., and Wilkinson D, ‘EPBC Act – The Case for Reform’ (2005) 10 (1) *Australasian Journal of Natural Resource Law and Policy* 139; s 38 in the EPBC Act is the corresponding section to s 36 in the *Forestry and National Park Estate Act 1998* (NSW).

³⁶² Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill Second Reading*, Senate Official Hansard, Tuesday, 22 June 1999, 5898.

CLIMATE CHANGE

It is somehow wrong to despoil the environment, to act in ways that waste natural resources and wildlife, and to gratify pleasures of the moment at the expense of living creatures who are no threat to us.³⁶³

Millions upon millions of taxpayer dollars were funnelled into consultants and workshops to produce a plethora of reports aiming to provide an ‘up-to-date snapshot’ of the whole issue of native forest conservation and timber production. The timeframe for the CRAs meant that comprehensiveness became a misnomer and the quality of the reports produced left much to be desired from a scientific and social point of view. Besides the fact that all reports begin with a disclaimer that the information therein cannot be relied upon as factual, the key conclusion from the bulk of the reports was that there was not enough scientific knowledge available about forests. For example:

The modelling project has highlighted some significant areas or species where there still exist gaps in quality data. In the future, it is recommend that further effort is put into systematic targeted surveying of these priority species to enable better presence-absence modelling.³⁶⁴

And:

The previous report concluded that the methodology for estimating the effects of logging management on catchment water yield provided a reasonable “best guess” that was unlikely to be much improved even with the expenditure of considerable effort. This statement applies equally well to this study. Within the limitations of current data availability the methodology represents the current best understanding of the different factors that influence water quantity and quality from forested catchments. However, the absolute magnitude of the estimates are subject to considerable uncertainty.³⁶⁵

It is notable that this latter report makes no mention of climate change, even though nine years earlier the Intergovernmental Panel on Climate Change completed its report on the greenhouse effect.

The effects and rate of human-induced climate change have increased dramatically since the RFAs were signed in 1998. Climate change was not considered at all during the CRA process. Further, the significant carbon and water storage aspects of native forests have been inadequately or not addressed at all.

Numerous nationally-listed species in NSW are increasingly threatened by climate change, including species such as the Spotted-tailed Quoll, but the exemptions to the EPBC Act leaves things frozen in time, stopped at 1998, when climate change was not considered.

Climate change will dramatically increase other threats to species in the region, through increased spread of invasive species, increased fire frequency and severity, increased spread of forest dieback, and reduced stream flows. The cumulative impact of all these threats, plus industrial logging operations operating under an exemption to the EPBC Act and the RFAs, have resulted in a major impact on nationally-listed species.

Conditions placed on logging to ameliorate impacts as a result of the RFAs are increasingly inadequate as climate change escalates. Forest authorities accounting and information systems fail to assess the true value of carbon and water resources that are stored in native forests.

Young people from four hundred and fifty nations gathered in Bonn for the UN Talks on Climate Change. Their declaration states:

World leaders and negotiators of the climate deal, our survival is in your hands. We trust that you will take immediate action to stop deforestation, and industrial logging of the world’s biodiverse forests. We are depending on you to protect our forests and provide us with a healthy, ecologically sustainable, low

³⁶³ D’Amato A, ‘What Obligation Does Our Generation Owe the Next? An Approach to Global Environmental Responsibility’ (1990) 190 *American Journal of International Law*.

³⁶⁴ ‘Modelling Areas of Habitat Significance for Vertebrate Fauna and Vascular Flora in the Southern CRA Region’ project number NS 09/EH February 2000 NSW NPWS.

³⁶⁵ ESFM Project: ‘Water Quality and Quantity for the Southern RFA Region’ project number NA 61/ESFM November 1999 Sinclair Knight Merz.

carbon future.

They called for:

- Immediately end deforestation, industrial scale logging in primary forests, the conversion of forests to monoculture tree crops, plantations;
- Protection of the world's biodiverse forests including primary forests in developed countries (e.g. Australia, Canada and Russia) and tropical forests in developing countries;
- Respect for the rights of women, Indigenous peoples and local communities and allow them to lead healthy and sustainable lives whilst stopping deforestation and industrial logging of primary forests in their country, and;
- To not allow developed countries to use forest protection and the avoiding deforestation and industrial scale logging of primary forests in other countries as an offset mechanism for their own emissions.

Galaxy Research conducted a public opinion poll in July 2009. The question was:

The Australian National University has found that Australia's native forests contain a large amount of carbon that would be protected by ending forest clearance. In your opinion, do you agree or disagree that the Rudd government should stop the logging of native forests?³⁶⁶

The results were:

Strongly Agree: 43%	Agree: 35%	Total Agree: 78%	
Strongly Disagree: 3%	Disagree: 11%	Total Disagree: 14%	Don't know/refused: 8%

In 2010 Galaxy conducted another poll. Three in four (77%) Australians want the government to stop the logging of native forests and almost three in four (72%) Australians favoured the Federal Government assisting logging contractors to take redundancies, retrain or move permanently to a plantation based industry.

Given what is now known, and all that is still yet to learn, about native forest ecosystems and about the effects of climate change, the non-enactment of the precautionary principle verges on the criminal.

Maintaining the Forest Global Carbon Pool

The Government's land-use policy frame is fundamentally erroneous. Native forests, the less efficient resource for forestry industry competitiveness, are tagged for wood production with lost opportunities for the job they do best: carbon storage. Plantations, the less efficient and less reliable resource for carbon storage, are tagged for carbon storage with lost opportunities for the job they do best: wood supply.³⁶⁷

Both the State and Federal Governments have expressed the need to have full and frank regard for the urgency of action on climate change. One of the practices that must change is the degradation of the native forest estate.

With Australia's existing plantations able to meet virtually all our wood needs, whether for domestic consumption or export, native forests are available for immediate climate change mitigation.³⁶⁸

Conditions placed on logging native forests to ameliorate impacts as a result of the RFAs are increasingly inadequate as climate change escalates. Forest authorities' accounting and information systems fail to assess the true value of carbon and water resources that are stored in native forests. There is no reporting on total native forest ecosystem biomass, the figures provided are for plantations only. The value of these stored resources in native forests far exceed the royalties received from logging operations, even when carbon is

³⁶⁶ Galaxy Research, Sample: 1100 Australians, 24-26 July, 2009, (online) <<http://www.galaxyresearch.com.au/index.php?page=galaxy-omnibus>>; Galaxy Poll, Galaxy Research- 28/30 May 2010, Job:100502A.

³⁶⁷ Ajani J, 'Australia's Transition from Native Forests to Plantations' above n 298.

³⁶⁸ Ajani J, 'Time for a Coherent Forest Policy - Finally' (2008) Centre for Policy Development, (online) <<http://cpd.org.au/article/time-coherent-forest-policy-finally>>.

conservatively valued at a price of twenty dollars a tonne.

Brendan Mackey et al states:

Forest protection is an essential component of a comprehensive approach to mitigating the climate change problem for a number of key reasons. These include: For every hectare of natural forest that is logged or degraded, there is a net loss of carbon from the terrestrial carbon reservoir and a net increase of carbon in the atmospheric carbon reservoir. The resulting increase in atmospheric carbon dioxide exacerbates climate change.³⁶⁹

And

The remaining intact natural forests constitute a significant standing stock of carbon that should be protected from carbon emitting land-use activities. There is substantial potential for carbon sequestration in forest areas that have been logged if they are allowed to re-grow undisturbed by further intensive human land-use activities. Our analysis shows that in the 14.5 million ha of eucalypt forests in south-eastern Australia, the effect of retaining the current carbon stock (equivalent to 25.5 Gt CO₂ (carbon dioxide)) is equivalent to avoided emissions of 460 Mt CO₂ yr for the next 100 years.³⁷⁰ Allowing logged forests to realize their sequestration potential to store 7.5 Gt CO₂ is equivalent to avoiding emissions of 136 Mt CO₂ yr-1 for the next 100 years. This is equal to 24 per cent of the 2005 Australian net greenhouse gas emissions across all sectors; which were 559 Mt CO₂ in that year.³⁷¹

The report goes on to state:

We can no longer afford to ignore emissions caused by deforestation and forest degradation from every biome (that is, we need to consider boreal, tropical and temperate forests) and in every nation (whether economically developing or developed). We need to take a fresh look at forests through a carbon and climate change lens, and reconsider how they are valued and what we are doing to them.³⁷²

In NSW Forest degradation in 2006 created over seventeen percent of NSW's greenhouse gas emissions.³⁷³ Ending native forest logging would assist in reducing the greenhouse gas emissions of the State.

The clearing of native forests and woodlands and their degradation - mainly through logging - generates a conservatively estimated 18 per cent of Australia's annual greenhouse gas emissions.³⁷⁴

Professor Peter Wood and Professor Judith Ajani indicate that at CO₂ prices of just ten to fifteen dollars per tonne, which is less than the Garnaut Review's recommended starting price for carbon pollution permits, hardwood plantation owners will receive more money from growing carbon than wood.³⁷⁵

In the Garnaut Report 2011, Transforming Rural Land Use, the CSIRO estimated that if native forest harvesting were to cease, there is a technical potential for abatement of 47 million tonnes of carbon dioxide each year from 2010 to 2050.

Australia is very fortunate, by letting previously logged native forests regrow to their natural carbon carrying capacity, the ANU scientists estimate that they would soak up around 7500 million tonnes of CO₂-e over the coming one hundred to two hundred years.³⁷⁶

Native Forest 'Waste' Woodchip Fed Power Stations and Pellet Mills

re•new•able /r{I}'nju:{shwa}bl; NAmE 'nu:/ adj.

³⁶⁹ Mackey B, Keith H, Lindenmayer D, Berry S, 'Green Carbon: The Role of Natural Forests in Carbon Storage, Part 1, A Green Carbon Account of Australia's South-eastern Eucalypt Forest, and Policy Implications' ANU E Press, (2008), online version available at: < http://epress.anu.edu.au/green_carbon_citation.html>.

³⁷⁰ Gigatonne (Gt) equals one billion or 1.0 x 10⁹ tonnes; Megatonne (Mt) equals one million or 1.0 x 10⁶ tonnes.

³⁷¹ Mackey et al, above n 369.

³⁷² Mackey et al above n 369, p 13.

³⁷³ Department of Climate Change 2008 *Australia's National Greenhouse Accounts 2006 State and Territory Greenhouse Gas emissions* p17, the figure is 17.2%.

³⁷⁴ Blakers M, 'Comments on Garnaut Climate Change Review: Issues Paper 1 Land-use – Agriculture and Forestry' (2008).

³⁷⁵ Wood P J and Ajani J, Submission to the Commonwealth Government on the Carbon Pollution Reduction Scheme Green Paper + Addendum, (2008).

³⁷⁶ Ajani J, above n 298.

1. capable of being renewed. 2. (of energy or its source) not depleted when used. 3. [usually before noun] (of energy and natural resources) that is replaced naturally and can therefore be used without the risk of finishing it all: renewable sources of energy such as wind and solar power.³⁷⁷

Background

As stated approximately 35 per cent of greenhouse gases in the atmosphere are due to past deforestation, and an estimated 18 per cent of annual global emissions are the result of continuing deforestation.³⁷⁸ In accordance with the *Rio Declaration*, the *Montreal Process* and the *Intergovernmental Agreement on the Environment 1992*, the *Heads of Agreement on Commonwealth and State Responsibilities for the Environment 1997* stated:³⁷⁹

The Commonwealth has a responsibility and an interest in relation to meeting the obligations under the United Nations Framework Convention on Climate Change, in co-operation with the States, through specific programmes and the development and implementation of national strategies to reduce emissions of greenhouse gases, and to protect and enhance greenhouse sinks.³⁸⁰

Following this a nationally ratified policy on reducing greenhouse gases (“GHGs”) was laid out in the National Greenhouse Strategy 1998 and yet, since these agreements, New South Wales has not furthered mechanisms to assess and arrest Forests NSW forest degradation or to reduce greenhouse gas emissions of native forest logging.³⁸¹ Rather, the increase in hectares of native forest logged and burnt on the south coast over the last two years suggests a ‘red-light’ mentality, the fear that the woodchipping industry has come to the end of its shelf life, driving the felling of forests at an ever increasing industrial rate.³⁸²

These industrial logging practices contribute significant and continuing emissions of carbon dioxide into the atmosphere which reduce the stock of carbon stored in the ecosystem.³⁸³ On the south coast of NSW logging operations in mixed-age, mixed-species forest removes approximately 60% to 90% of existing crown cover.³⁸⁴ In addition to this, road construction and post-logging burning is resulting in extensive accumulated damage to the environment and the atmosphere.³⁸⁵

Carbon neutral?

The accounting now used in Australia for assessing CO₂ emissions drawn from the *Kyoto Protocol* contains a flaw that severely weakens greenhouse gas reduction goals. CO₂ emissions from chimneys of biomass

³⁷⁷ Oxford English Dictionary.

³⁷⁸ Stern N, *The Stern Review on the Economics of Climate Change: Emissions from the Land-use Change and Forestry Sector*, Cambridge University Press, 2006; Houghton J T, ‘Tropical Deforestation as a Source of Greenhouse Gas Emissions’ (2005) in *Tropical Deforestation and Climate Change*, Moutinho and Schwartzman [eds]; see also Intergovernmental Panel on Climate Change, *Climate change 2001: the scientific basis. Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change* Houghton JT, Ding Y, Griggs DJ, et al [eds], Cambridge University Press, [2001]; see also Food and Agriculture Organization of the United Nations (2005) *State of the World's Forests*, Washington, DC: United Nations.

³⁷⁹ The Rio Declaration, *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, entry into force for Australia: 29 December 1993, Australian Treaty Series 1993 No 32; the *Intergovernmental Working Group in Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests (Montreal Process)*.

³⁸⁰ Council of Australian Governments, November 1997, Matters of National Environmental Significance, Attachment 1, Part II (8), (online) < <http://www.environment.gov.au/epbc/publications/coag-agreement/index.html> >.

³⁸¹ In fact, despite these agreements, the State and Federal governments introduced legislation in 1998, the *Forestry and National Park Estate Act 1998* (NSW) and the subordinate Regional Forest Agreements that made logging exempt from environmental impact statements and civil litigation and made no mention of climate change or greenhouse gases.

³⁸² In 2004/05 Forests NSW logged 7592ha, in 2005/06 10 709ha, in 2006/07 13 811ha and 2007/08 14 388: NSW Forest Agreements Implementation Reports 2005/2006, 2006/2007: Upper North East, Lower North East, Eden and Southern regions, Resource and Conservation Unit, NSW Department of Environment and Climate Change NSW, Sydney; Digwood FOI figures 4 Feb, 2008 p; it is stated that FNSW has only 80 000ha as total land tenure in the Southern Region..

³⁸³ Mackey B et al, above n 369; see also *The Stern Review on the Economics of Climate Change*, Summary of Conclusions, (online) <http://webarchive.nationalarchives.gov.uk/http://www.hmtreasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm>.

³⁸⁴ Often residual crown cover is approximately 10% or less, particularly in the Eden region; this is illegal under the Southern Region IFOAs which state contractors must leave 55% of net basal area under Single Tree Selection: see Forests NSW Harvest Plan Compartment 186: Mogo, Batemans Bay.

³⁸⁵ For photographic evidence see (online) < <http://www.flickr.com/photos/southeastforestrescue/>; (online) < <http://www.chipstop.forests.org.au/>; < <http://www.serca-online.org/>; (online) < <http://www.acr.net.au/~coastwatchers/>; (online) < <http://www.fiveforests.net/> >.

power stations when ‘bioenergy’ is used are discounted.³⁸⁶ This accounting erroneously treats all bioenergy as carbon neutral regardless of the source of the biomass, which causes large differences in net emissions. The clearing of long established native forests to burn wood or to grow energy crops is counted as a 100% reduction in energy emissions, despite causing large releases of carbon and despite international protocols against logging of native forests.³⁸⁷

At issue is the methodology that CO₂ released during combustion of biomass equals that taken up during growth and the basing of all GHG calculations on this. Eucalypt forests recovery for removal of CO₂ from the atmosphere can take more than a 100 years.³⁸⁸ On average the recovery rate is 53 years for 75% carrying capacity and 152 years for 90% carrying capacity.³⁸⁹ Currently logging rotations are sometimes barely five years.³⁹⁰ Forests NSW state:

Harvesting cycles vary between native forest types with a typical cycle of 5-30 years for native forest.³⁹¹

Therefore the assumption that there are near-equilibrium conditions (synchrony) in native forest logged by Forests NSW on the south coast is erroneous.³⁹² Forests NSW do not replant after logging native forest, have only 23,000 hectares available for sequestration and rarely do regeneration surveys.³⁹³

For Forest Land, synchrony is unlikely if significant woody biomass is killed (i.e., losses represent several years of growth and C accumulation), and the net emissions should be reported. Examples include: clearing of native forest.³⁹⁴

As ocular evidence suggests, currently on the ground, the native forests logged are not regrowing nor are they being replanted. If the forest regrew and was not logged with such frequency then this theory might hold, and perhaps holds in EU countries where this system was developed, and where the main source of wood is from plantations.³⁹⁵

Also at issue is Forests NSW claim that emissions from actual logging operations is separate and the responsibility of the contractors and therefore Forests NSW have no liability to count them. SEFE claim that the emissions from logging are indirect and they have no liability to count them. The definition of impact and direct and indirect effects of greenhouse gas emissions has been well defined in several jurisdictions of Australian Courts. In the *Nathan Dam* case Black CJ, Ryan and Finn JJ held that ‘impact’ is not confined to direct effects but includes effects that are or would be a consequence of the action.³⁹⁶ In both the *Hazlewood* case and the *Anvil Hill* case it was held that the impacts of Scope 1, 2 and 3 emissions must be considered.³⁹⁷ In *Gray v The Minister* it was held that environmental assessments must also

³⁸⁶ *Kyoto Protocol* art 3 (7).

³⁸⁷ Mackey et al, above n 369; ‘For every hectare of natural forest that is logged or degraded, there is a net loss of carbon from the terrestrial carbon reservoir and a net increase of carbon in the atmospheric carbon reservoir. The resulting increase in atmospheric carbon dioxide exacerbates climate change.’

³⁸⁸ Roxburgh S H, Wood SW, Mackey B G, Woldendorp G, and Gibbons P, ‘Assessing the Carbon Sequestration Potential of Managed Forests: a Case Study from Temperate Australia’ (2006) 43 *Journal of Applied Ecology* 1149.

³⁸⁹ Dean C, Roxburgh S, Mackey B, ‘Growth Modelling of *Eucalyptus regnans* for Carbon Accounting at Landscape Scale’ in Amaro A, Reed D, and Soares P, [eds] *Modelling Forest Systems*, (CAB International 2003).

³⁹⁰ For example Compartment 62 (Sth Brooman) logged in 1972, 1973, 1978, 1982, 1990, 2002, 2009.

³⁹¹ Forests NSW Consolidated Annual Financial Report, Year ended 30 June 2007, pp18-19.

³⁹² Performance Audit ‘Sustaining Native Forest Operations’ *Auditor-General’s Report*, 2009: this statement was made concerning the North Coast RFA areas, Forests NSW had not provided data on the Southern and Eden areas, ‘reviews of yield estimates for the southern region, due in 2004 for Eden and 2006 for Tumut and the south coast, have not been completed’.

³⁹³ SEFR requested these surveys from Forests NSW and received a five line five column table that stated there had been four surveys conducted but there was no documentation, pers com to author from Daniel Tuan, Forests NSW Batemans Bay; see the aptly titled Sustain Greenhouse Gas Consultation Paper Submission, Forests NSW, Nick Cameron, 1/5/2008.

³⁹⁴ 2006 *IPCC Guidelines for National Greenhouse Gas Inventories*, Vol 4: Agriculture, Forestry and Other Land Use, Chapter 2: Generic Methodologies Applicable to Multiple Land-Use Categories, 2.4; the figures used for boreal forests in the IPCC document are from research published in 1998 which has now been superseded by more current data (online) < www.ipcc-nggip.iges.or.jp>.

³⁹⁵ 2006 *IPCC Guidelines for National Greenhouse Gas Inventories*, above n 394; in Germany and throughout most of Europe foresters are employed to count and measure at dboh every tree in the plot.

³⁹⁶ *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 134 LGERA 272 at 288; see also *Re Australian Conservation Foundation* [2004] VCAT 2029.

³⁹⁷ *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029; *Gray v the Minister for Planning* [2006] NSWLEC 720.

consider the emissions from the use of the product.³⁹⁸ Of course these findings were made in their particular statutory contexts.

Carbon accounts for industrialized forests must include the carbon emissions associated with land use and associated management, transportation and processing activities.³⁹⁹

Forests NSW also claim there is a lack of full scientific data on land use change and this makes it difficult to calculate GHG emissions. Although it seems widely acknowledged that Land Use Change and Forestry accounting is difficult and uncertain, given the great deal of data, including LandSat images and records kept in Arc View, ESRI and Forests NSW own office records on past compartments logged, it would seem this argument is *alio intuitu*.⁴⁰⁰ Article 3 of the *Kyoto Protocol* states at (3) that ‘The greenhouse gas emissions by sources and removals by sinks associated with those activities shall be reported in a transparent and verifiable manner...’

The total CO₂ emissions caused by native forest logging on the South Coast for 2006/07 were computed to be 26 383 239tCO₂e.⁴⁰¹ On these figures it is estimated that for every hour of energy generated more than 8000 tonnes of CO₂ would be released.⁴⁰²

The SEFE woodchip mill is situated in Eden at Twofold Bay. Twofold Bay provides important habitat for endangered and threatened marine life, cetaceans and migratory birds. Many bird species are listed under JAMBA or CAMBA and known to occur in the area.⁴⁰³ The SEFE land is foreshore land that also adjoins the Ben Boyd National Park, Towamba River and Twofold Bay estuary. It is an iconic tourist destination for whale watching. Twofold Bay is the only ocean embayment in the Twofold Shelf bioregion and the area has recently been declared a Marine Park.⁴⁰⁴ Tourism on the South Coast in 2009 provided \$1.9 billion dollars in revenue.⁴⁰⁵

The economic downturn in the export woodchip market signalled that perhaps there was hope for the protection of the remnant native forest of the south east.⁴⁰⁶ Prices for woodchips dropped, mills in Japan

³⁹⁸ Rose A, ‘*Gray v Minister for Planning: The Rising Tide of Climate Change Litigation in Australia*’ (2007) 29 *Sydney Law Review* 725; if calculations were made on the cardboard that is made, used, then thrown away, from the woodchips of native forests, then the totals of GHG calculations would be much higher.

³⁹⁹ Mackey et al, above n 369.

⁴⁰⁰ For example Forests NSW has logged 182 528 hectares of native forests in the south east alone since 1990; it is possible to compare Google Earth images with past LandSat images.

⁴⁰¹ Data is from Forests NSW Implementation Report 2004/05 and 2006/07, 2006/07 Forests NSW Harvest Plans; ESRI; Digwood FOI info 2009; ocular evidence; on Forests NSW data it seems one vehicle uses 110L per year.

⁴⁰² This is more than 6.4 times the amount of CO₂ released from burning coal to produce the same amount of energy.

⁴⁰³ *Japanese Australian Migratory Bird Agreement* Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment (Tokyo, 6 February 1974) Entry into force: 30 April 1981 *Australia Treaty Series* 1981 No 6; *Chinese Australian Migratory Bird Agreement* Agreement between the Government of Australia and the Government of the People’s Republic of China for the Protection of Migratory Birds and their Environment (Canberra, 20 October 1986) Entry into force: 1 September 1988 *Australia Treaty Series* 1988 No. 22; the hooded plover (*Thinornis rubricollis*) and the shy albatross (*Diomedea cauta*), black-browed albatross (*Diomedea melanophrys*), sooty albatross (*Phoebastria fusca*) and pied oystercatcher (*Haematopus longirostris*) beach stone curlew, bush stone curlew, humpback whales (*Megaptera novaeangliae*) southern right whales (*Eubalaena australis*) and blue whales (*Balaenoptera musculus*) as well as other cetaceans including dolphins and pilot whales, the short-tailed shearwater (*Puffinus tenuirostris*), Australian reef egret (*Egretta sacra*), white-bellied sea-eagle (*Haliaeetus leucogaster*) and grey plover (*Pluvialis squatarola*) little tern (*Sterna albatross*), black bittern (*Lybrychys flavicollis*), sooty oystercatcher (*Haematopus fuliginosus*), pied oystercatcher (*H longirostris*), sanderling (*Calidris alba*) and lesser sand plover (*Chardris mongolus*). Fish such as black cod, seahorses, benthic organisms, poseidon seagrass populations and habitat; the power station will have two process water requirements. Boiler make-up water will be required to replace blow-down water at the rate of 1 – 1 ½ % of the steam flow rate, or about 275 litres per hour and sea water will be used to dissipate the heat and be pumped from a point on SEFE’s wharf, through the heat exchanger and returned to the sea some 15 – 20 degrees warmer; Giant Kelp has receded to Tathra because of warming ocean temperature levels, Dr Alan Miller.

⁴⁰⁴ Breen D A, Avery R P, and Otway N M, *Broadscale Biodiversity Assessment of Marine Protected Areas in the Batemans Shelf and Twofold Shelf Marine Bioregions* (2005) Final Report, NSW Marine Parks Authority; an ocean embayment is a semi enclosed bay that is a transitional zone between estuaries and the oceans, which provides habitat for communities of both environments.

⁴⁰⁵ Employing 58 463 people, a higher than average proportion of the workforce; Tourism NSW, Travel to South Coast NSW region, Year ended March 2009, (online)

<<http://corporate.tourism.nsw.gov.au/Sites/SiteID6/objLib18/South%20Coast%20NSW%20TOTAL%20REGION%20YE%20Mar%202009.pdf>>; O’Neill J, *Review Into Tourism in NSW: Final Report for the Premier of NSW 2008*, (online)

<http://www.atec.net.au/review_into_tourism_in_nsw_john_o_neill_ao.pdf>; this is compared to a total of 285 native forest industry employees (chipmill, sawmill, loggers, jinker drivers) and FNSW \$232 million dollars in the red.

⁴⁰⁶ Possibly due to the GFC, a number of hardwood and softwood plantations coming on line and a disease in Canada that forced the mass culling of trees creating a glut on the market; the introduction of the amendments to the *Lacey Act* in America has already had a significant

closed and the Eden chipmill closed for three weeks, reopening on a four day timetable.⁴⁰⁷ Then came the news that SEFE had submitted a development proposal to Bega Valley Shire Council for a wood pellet factory, to be built on the site of the chipmill, fuelled by 'waste'. The proposed site is less than three kilometres directly south of Eden on the other side of Twofold Bay.

SEFE allege the pellet factory is considered to be carbon-neutral technology when compared to other systems that burn fossil fuels and have minimal greenhouse gas emissions but as the woodchipping industry has a high GHG emission output and this power station will emit more GHGs than a coal fired power station, neither the industry nor the power station can be classed as carbon neutral.⁴⁰⁸

Climate change and pollution mitigation measures are currently great matters of public interest. Given the evidence on climate change, the adverse impacts of native forest logging's GHG emissions, the effect on water supply, the loss of biological diversity, the loss of ecological integrity and the pollutants wood-fired power stations emit, it would therefore be difficult to argue that a wood fired power station will have positive environmental outcomes and certainly does not fit the definition of zero emission technologies.

Public Interest

The alleged premise of the pellet factory is that it is a form of renewable energy, and will help the government targets at least-cost. As there are only labour and transport costs the least-cost philosophy has been superficially applied. With closer investigation it seems the subsidisation of the woodchipping industry is the hidden enabler. Without these subsidies biomass is not competitive with other fossil-based technologies because of high capital cost and large logging and transportation emissions.⁴⁰⁹

Australia is only now, slowly, coming in from the cold. After eleven years of ridicule from international quarters the government has the chance to gain international respect if the right decisions are made. The governmental practice of decrying Indonesia's illegal logging while sanctioning illegal logging in Australia has not gone unnoticed by the rest of the world.⁴¹⁰ Thus it appears that the governmental sanctioning of native forest logging endorses the huge amounts of GHG emissions released.⁴¹¹

Until Australia and in particular NSW, remove the civil litigation exemptions from legislation, use separate accounting practices for native forest and plantation estates, conduct both pre and post-harvest audits, prepare environmental impact statements for the compartments and discontinue clearfelling practices, the native forest industry will continue to operate outside the law.⁴¹²

impact on the import of woodchips in that country, importers are now required to declare species, country of origin, value and volume of the plant or plant products see *Amendments to the Lacey Act from H.R.2419 2008* (US), Sec 8204, *The Lacey Act*, Chapter 53 of Title 16, United States Code, ss3371 - 3378.

⁴⁰⁷ ABARE Australian Forest and Wood Products statistics, March and June Quarters 2009; there was a seven per cent fall in the value of woodchip exports, which fell below \$1 billion, the volume of woodchip exports also fell, with a decrease of 15%; < http://www.abare.gov.au/publications_html/news/news/news.html >; yet the rate of logging did not decrease.

⁴⁰⁸ In SEFE's original proposal to Bega Valley Shire Council they stated the project would not emit any GHGs.

⁴⁰⁹ See Santisirisomboon J, Limmeechokchai B, Chungpaibulpatana S, 'Impacts of Biomass Power Generation and CO₂ Taxation on Electricity Generation Expansion Planning and Environmental Emissions' (2001) 29 *Energy Policy* 975; Palmer K, and Burtraw D, 'Cost-Effectiveness of Renewable Electricity Policies' (2005) 27 *Energy Economics* 873; Spinellia R, Ward S M, Owendec P, 'A Harvest and Transport Cost Model for Eucalyptus spp. Fast-growing Short Rotation Plantations' (2009) 33 *Biomass and Bioenergy* 1265; see also Commission of the European Communities, Brussels, 7.12.2005 COM(2005) 627 Final Communication from the Commission 'The Support of Electricity from Renewable Energy Sources' {SEC(2005) 1571}: this analysis sheds light on international effectiveness of biomass energy see < http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc>; Forests NSW sell logs to SEFE a \$6.90/tonne and \$12.85/tonne; the NSW and Victorian governments subsidised the Eden chip mill by approximately \$8 million in 2006-2007; SEFE made a \$9 million profit as declared on their 2006/07 ASIC disclosure; of note last financial year FNSW state they lost \$4.1 million before tax, SEFE stated they made a \$4.4 million dollar profit.

⁴¹⁰ Australia won the Fossil Award in 2009; see also *Forestry Commission v Daines* 1/12/2009 Denilquin Local Court.

⁴¹¹ "The laws of nature that account for the global carbon cycle operate irrespective of political boundaries, therefore, a unit of carbon emitted due to deforestation and forest degradation in Australia, the United States, Canada or Russia has exactly the same impact on atmospheric greenhouse gas levels as a unit of carbon emitted from deforestation and degradation of forests in Indonesia, Papua New Guinea, the Congo Basin or Brazil" Mackey et al, above n 369.

⁴¹² See *Forestry and National Park Estate Act 1998* (NSW) ss 38-40.

If the definition of renewable technologies are that they do not release greenhouse gases and utilise zero carbon resources then, as the industrial patch clearfelling of the south east is the antithesis of renewable, to continue to class native forest logging as carbon neutral seems willfully negligent and transparently disingenuous.⁴¹³

PRIVATE NATIVE FORESTRY

Despite much scientific knowledge about the value of healthy forests as habitat conservation and carbon sinks, native forests in New South Wales can be logged with approval in varying ways depending on land tenure.⁴¹⁴ Conservationists have for some time lobbied strongly for conservation of both public and private lands, effective regulation and regulatory response to native vegetation degradation and land clearing, and advocated for stronger legislation governing native forest management.⁴¹⁵

Over-logging of public forests has seen private forests, once envisioned as reservoirs of conservation, targeted, particularly in Northern regions, to supplement government wood supply agreements. Fortunately traditional distinction of conservation on land tenures within the wider community is changing. Due to increasing public knowledge on climate change it is understood there needs to be considerably more conservation, both on public and private land.⁴¹⁶

Both State and Commonwealth legislative instruments regulating conservation have thus far proved inadequate to meet international and scientific benchmarks of nature conservation. The statutes and delegated legislation is inadequate and there is lack of compliance and enforcement.

In New South Wales logging on private land is allowed through the NV Act's delegated legislation, the Private Native Forestry Code of Practice ("PNF Code").

Improving and Maintaining?

Under the PNF Code broadscale clearing for purposes of private native forestry 'improves and/or maintains environmental outcomes' if it complies with requirements of the Code.⁴¹⁷ The PNF Code provides that any area cleared must be allowed to regenerate and not subsequently cleared 'except where otherwise permitted'.⁴¹⁸ A landowner can also seek development consent to undertake private native forestry outside provisions of the Code under the *Native Vegetation Act 2003* (NSW) ("NV Act").⁴¹⁹ Landowners must prepare a property vegetation plan ("PVP"), then a Forest Operation Plan ("FOP") which must contain

⁴¹³ Woolf T and Biewald B, 'Efficiency Renewables and Gas: Restructuring as if Climate Mattered' (1998) *Electricity Journal* January/February 64.

⁴¹⁴ Steffen W, Burbridge A A, Hughes L, Kitching R, Lindenmeyer D, Musgrave W, Stafford Smith M and Werner P A, *Australia's Biodiversity and Climate Change: a Strategic Assessment of the Vulnerability of Australia's Biodiversity to Climate Change*, A Report to the Natural Resource Management Ministerial Council commissioned by the Australian Government, CSIRO Publishing, (2009); see Park H, *Biodiversity: Regulatory Frameworks Briefing Paper 3/2010*, New South Wales Parliamentary Library Research Service (2010).

⁴¹⁵ For one example of lobbying of government to enact regulations on private land see National Park Association, <<http://www.npansw.org.au/web/journal/200604/logging.htm>> viewed 23 July 2010.

⁴¹⁶ See Galaxy Poll, Galaxy Research- 28/30 May 2010, Job:100502A, three in four (77%) Australians want the government to stop the logging of native forests, almost three in four (72%) Australians favour the Federal Government assisting logging contractors to take redundancies, retrain or move permanently to a plantation based industry.

⁴¹⁷ For a comprehensive background and critique see Prest J, 'The Forgotten Forests: the Environmental Regulation of Forestry on Private Land in New South Wales between 1997 and 2002' Phd Thesis, Centre for Natural Resources Law and Policy, University of Wollongong, (2003), available at (online) <<http://ro.uow.edu.au/theses/413>>; under the *Native Vegetation Conservation Act 1997* (NSW) regional committees were formed, to produce regional vegetation management plans allegedly to designate areas of high conservation value; the *Native Vegetation Act 2003* (NSW) did not come into effect until 2005.

⁴¹⁸ *Private Native Forestry Code of Practice for Southern NSW 2008* Introduction p1.

⁴¹⁹ *Private Native Forestry Code of Practice for Southern NSW 2008*; the Silvicultural Guidelines state it is 'heavily based' on Florence RG, *Ecology and Silviculture of Eucalypt Forests*, CSIRO Publishing, Melbourne, 2004, which was prepared for use with the *Native Vegetation Conservation Act 1997*, yet there is no mention of climate change or its effects in this work; Florence stated in his 1984 thesis "When an mature, mixed eucalypt-rainforest community is felled and the debris burned, massive Acacia regrowth may develop very rapidly from soil-stored seed" in Florence R G, and Marsh J P, 'Soil Factors Limiting the Establishment and Vigour of Spotted Gum Regrowth' (1984) Department of Forestry, ANU Research Project.

recorded locations of any listed populations or endangered ecological communities.⁴²⁰

While the FOP must contain details of flora and fauna management actions, it is not required to mention impacts logging will have on those species. Further, if there are records of species in adjoining areas of public land, species can be ignored for FOP preparation if it can be demonstrated that species have been protected and conditions of the relevant TSLs or IFOAs have been met.⁴²¹

The PNF Code provides that if there are not enough hollow bearing trees, that extra recruitment trees from the 'next cohort' must be retained, so total numbers of hollow bearing and recruitment trees retained in each two hectare area is 20.

As discussed earlier in this report the loss of hollow bearing trees has been listed as a Key Threatening Process since 2007.⁴²² A lengthy discussion of conservation measures to maintain hollow bearing trees has been discussed since 1999.⁴²³ There has been a priority action statement produced for this KTP, yet habitat to recruitment tree ratio in the PNF Code is still one to one.⁴²⁴ This is despite the Expert Panels findings.⁴²⁵

Rotation time definitions in the PNF Code seem parlous and seem dependent on a basal area count to assess the stocking rate of the stand.⁴²⁶ Of note is the inclusion of the out-dated native forest logging industry catchphrase 'promote regeneration through disturbance'.⁴²⁷ This terminology is in conflict with much scientific knowledge. Many scientists doubt the success of what is called 'natural seeding' after logging for eucalypt species.⁴²⁸ If this argument held true there would be no burgeoning issue of lack of supply.⁴²⁹

It seems on analysis that prescriptions for habitat protection and conservation contained in the PNF Code are inadequate. Due to lack of available data it is difficult to know whether prescriptions are being met on private land.⁴³⁰ Given that requirements for species 'protection' under the TSLs or IFOAs are not being met on public land, due to non-compliance of legislation and delegated legislation, if logging has occurred on

⁴²⁰ Listed under schedules of the *Threatened Species Conservation Act 1995* (NSW) and in the Listed Species Ecological Prescriptions for Southern NSW Forests.

⁴²¹ *Private Native Forestry Code of Practice for Southern NSW 2008* cl 2.1; the PNF Code also contains provisions for Australian Group Selection ("AGS") despite the finding that this patch clear felling has significant impact on species and their habitat.

⁴²² *Threatened Species Conservation Act 1995* (NSW) Sch 3 s 8; see OEH (online)

< <http://www.environment.nsw.gov.au/determinations/LossOfHollowTreesKtp.htm>>.

⁴²³ See 'Review of Protective Measures and Protective Measures and Forest Practices - Biodiversity Workshop Southern Region' Ecologically Sustainable Forest Management Group, July 1999, Project No. NA45/ESFM p176-177.

⁴²⁴ *Threatened Species and Conservation Act 1995* (NSW) s 74 and s 90A; a threat abatement plan sets out recovery and threat abatement strategies that must be adopted for promoting the recovery of each threatened species, population and ecological community to a position of viability in nature and for managing each key threatening process.

⁴²⁵ Review of Protective Measures, above n 423; see also Goldingay R, 'Characteristics of Tree Hollows used by Australian Birds and Bats' (2009) 36 *Wildlife Research* 394; see also Gibbons P, Lindenmayer D B, 'Issues Associated with the Retention of Hollow-Bearing Trees Within Eucalypt Forests Managed for Wood Production' (1996) 83 *Forest Ecology and Management* 245.

⁴²⁶ Lindenmayer D B, Franklin J F, Fischer J, 'General Management Principles and a Checklist of Strategies to Guide Forest Biodiversity Conservation' (2006) 131 *Biological Conservation* 433.

⁴²⁷ Bizarrely the PNF Code provides at cl 3.3: The minimum stand stocking...must be achieved within 24 months of a regeneration event; and at (2) In this clause, regeneration event is a harvesting or thinning operation.

⁴²⁸ See Fischer J, Lindenmayer D B, 'The Conservation Value of Paddock Trees for Birds in a Variegated Landscape in Southern New South Wales: Species Composition and Site Occupancy Patterns' (2002) 5 *Biodiversity and Conservation* 807.

⁴²⁹ Bauhus J, McElhinny C, and Alcorn P, 'Stand Structure and Tree Growth in Uneven-Aged Spotted Gum (*Corymbia maculata*) Forests: Some Implications for Management' (2002) 75 *Forestry* 451, 'only a small proportion of trees are growing at an acceptable rate'; the forests in the Southern region have been targeted for woodchip production as there is a predominance of Spotted gum, Stringybark, Silvertop Ash and Brown Barrel forests. This is because they are blonde wood. Spotted gum is particularly targeted as it is a softwood. 10-15 years after heavy logging a quarter of a compartment will have no Spotted Gum regrowth at all, and in the remaining area any Spotted Gum will be relatively weak and usually dominated by more vigorous Acacias. Where Spotted Gum seedlings become established, they lack the early vigour of Acacia and other shrub species. The more vigorous Acacia regrowth often overwhelms eucalypt seedlings, because unlike the hard-coated Acacia seed, eucalypt seed will only remain viable for a short time in the soil, probably no more than 6-12 months.

⁴³⁰ The *Annual Report on Native Vegetation 2008* provides that in New South Wales in 2008, 2060ha of land was legally cleared under approved private Harvesting Plans, while overall there was a total reduction of over 48 193ha of 'native woody vegetation'; *NSW Annual Report on Native Vegetation 2008*, Department of Environment Climate Change and Water, p2; a condition of the *Native Vegetation Regulations* at s12: The Minister is to make publicly available on the Internet: (a) the Global Positioning System ("GPS") coordinates of the location of land that is the subject of a development consent or PVP that provides for broadscale clearing of native vegetation on the land; of note is that the reporting of private native forestry on the regulators website is grossly inadequate, the map coordinates for PVPs are erroneous and there are no figures for actual logging events or area logged; if calculated on the PVP register for Southern 1097ha were logged in 2010, however without data, analysis is impossible, this is indicative of the secrecy that surrounds PNF.

adjoining State forest land it would be difficult to argue that species have been protected.⁴³¹

A comparison of public and private forestry codes shows the PNF Code is modelled on the IFOAs that allegedly apply to public State forests which fall under RFA areas. Under IFOAs many severe breaches are being classed as ‘technical’ by the regulator. This is often without the regulator viewing the breach. While the regulator has instigated proceedings on land clearing enacted without approval there seems to be some reticence to enforce compliance of the PVPs.⁴³²

Issues for auditors hinge on access. Gaining access to audit public State forest can be difficult for non-government auditors. Gaining access to audit private forest logging operations is nearly impossible. A breach with proof of actual harm is not leading to civil penalty or injunction, what chance a breach without proof. While some law is better than none, if law is inadequate and not backed up with appropriate regulatory response it is dormant law.⁴³³

Logging Endangered Ecological Communities

The erroneous statement that broad scale land clearing can in any way be improving environmental outcomes, particularly in the context of logging endangered ecological communities (“EECs”), is indicative of the whole native forest logging industry publicity spin. If the point of listing a community is that it is endangered then to allow logging in endangered ecological communities seems in complete conflict with everything known about biodiversity, climate change and the link to forest degradation. It is also in tension with other legislative instruments.

For example the Guidelines breach the EPBC Act by opening up federally listed EECs for logging in areas both inside and outside RFA regions.

Logging can occur in endangered ecological communities as part of an approved ‘Ecological Harvesting Plan’ if approved by OEH.⁴³⁴

Commercial logging does not ‘maintain or improve’ the environment under any circumstances - it is a recognised threat to the environment. This erroneous assumption would hold if ‘environmental outcomes’ are furthering species to extinction and increasing degradation of native forest.

Logging under so called Ecological Harvest Plans will not improve forest structure of the Endangered Ecological Community, particularly when it is 80% of the total EEC. This is more Forests NSW spin on an already flawed piece of delegated legislation. The Guideline refers to ‘thinning’ operations, but there is already a ‘thinning’ pathway under Property Vegetation Plans (“PVPs”). In the Southern and Eden regions the term thinning is synonymous for clearfelling or patch clearfelling.

The authors are absolutely opposed to the PNF Guidelines. We call for their immediate withdrawal. The PNF Code opens a massive loophole in the native vegetation laws and further entrenches the ‘cut and run’ mentality of the native forest logging industry.

⁴³¹ Of interest the ‘business as usual’ approach by State forestry is causing some concern among landowners post logging, the main concerns seem to be badly eroded snig tracks and the amount of debris left behind; for a Queensland example see Ryan S, Taylor D, ‘A Methodology for Private Native Forest Extension in South East Queensland’ (2001) The Regional Institute, (online) < <http://www.regional.org.au/au/iufro/2001/ryan.htm> >.

⁴³² See *Director-General of the DECC v John Rae* [2009] NSWLEC 137; *Director-General, Dept of Environment and Climate Change v Calman Australia Pty Ltd; Iroch Pty Ltd; GD & JA Williams Pty Ltd t-as Jerilderie Earthmoving* [2009] NSWLEC 182; *Director-General of the Department of Environment and Climate Change v Hudson* [2009] NSWLEC 4; *Department of Environment and Climate Change v Olmwood Pty Limited* [2010] NSWLEC 15.

⁴³³ Gunningham N, ‘Environmental Auditing: Who Audits the Auditors?’ (1993) *August Environmental and Planning Law Journal* 229 “If the audit is conducted, particularly internally, by the firm’s own employees, then the internal auditors may come to share the same corporate goals”.

⁴³⁴ *Private Native Forestry Code of Practice for Southern NSW 2008* cl 4 Table C.

NATIONAL RESERVE SYSTEM

Many articles have been written expounding the robustness of Australia's National Reserve System ("NRS"). While that might be true in respect to other reserves, few have commented on the erroneousness of allowing State forests to be included. Erroneous because many State forest reserves in New South Wales have been, are or will be logged.

Given what is current scientific knowledge on links between forest degradation and greenhouse gas emissions and given these reserves are used to meet Australia's obligations internationally the logging seems dispositive to international treaties and agreements.

What is most concerning is that it seems FNSW are going to begin logging Crown Land even though this land tenure has been considered through the CAR process as part of the NRS.⁴³⁵ This information was released as soon as the outcome of the NSW State election was known. Of course this follows on from current practice of logging FMZs.

Most areas of State forest contain reserves, forest management zones ("FMZs") that are part of the NRS. Areas allegedly protected in State forest have been sourced from Rare Ecosystem areas, Old Growth and Species Exclusion Zones.⁴³⁶ FMZs are divided up into eight categories.⁴³⁷ Special Protection Zones ("FMZ1"), Special Management Zones ("FMZ2"), Harvest Exclusion Zones ("FMZ3A"), and Special Prescription Zones ("FMZ3B") being the main categories relevant to native forest logging. These are formal and informal reserves that are allegedly not available for logging. FMZ1 areas are stated as being equivalent to International Union of Conservation and Nature ("IUCN") Protected Area categories I, II, III, IV and VI. These have been declared under Section 21A of the *Forestry Act, 1916* (NSW). FMZ2 and 3A are classified as above. 3B areas are stated as being equivalent to IUCN category IV.⁴³⁸

Objectives of category IV is stated as being to maintain, conserve and restore species and habitats:

Category IV protected areas aim to protect particular species or habitats and management reflects this priority. Many category IV protected areas will need regular, active interventions to address the requirements of particular species or to maintain habitats.⁴³⁹

Logging operations may not be carried out on land that is classified as Category IV.⁴⁴⁰ However in numerous instances boundaries shift and logging occurs. Incursions into these reserves are explained as an accident.

How is it possible that roads are bulldozed through them and snig tracks are made, when some legislation quite clearly states this is disallowed?⁴⁴¹ The JANIS Report states:

Although changes may include boundary rationalisations, the CAR reserve system must be predicated

⁴³⁵ Forests NSW Compartment 2422 Tallaganda State Forest Harvest Plan, 2011.

⁴³⁶ *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Eden Region 1999* cl 19(1)(a) any area that is, or is within, an area of State forest declared to be a special management zone under the *Forestry Act 1916*; or (b) any area that is, or is within, an area classified as Forest Management Zone 2 or 3A in accordance with the Forest Management Zoning System.

⁴³⁷ Managing Our Forests Sustainably: Forest Management Zoning in NSW State Forests, Forests NSW Operational Circular (2000); see also ESFM Plan Ecologically Sustainable Forest Management Plan, South Coast Southern NSW (2005), FMZ 1 Special protection, harvesting excluded; FMZ 2 Special management, harvesting excluded; FMZ 3a Harvesting excluded; FMZ 3b Special prescriptions unavailable for harvest; FMZ 3b -Special prescriptions available for harvest; FMZ 4 General management unavailable for harvest; FMZ 4 General management available for harvest.

⁴³⁸ ESFM Plan Ecologically Sustainable Forest Management Plan, South Coast Southern NSW (2005), p25; the FMZs are defined in the *Integrated Forestry Operations Approvals* as being according to the "Forest Management Zoning in NSW State Forests" (State Forests of New South Wales, December 1999) above n 437; IUCN definitions of category I to IV are stated as being: I Strict protection [Ia) Strict nature reserve and Ib) Wilderness area]; II Ecosystem conservation and protection (i.e., National park); III Conservation of natural features (i.e., Natural monument) IV Conservation through active management (i.e., Habitat/species management area).

⁴³⁹ *Guidelines for Applying Protected Area Management Categories*, Dudley N [ed], Gland, Switzerland, IUCN, (2008).

⁴⁴⁰ *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Eden Region 1999* cl 19(2).

⁴⁴¹ *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Southern Region 2001* cl 10.

on the principle that security of tenure and management intent is fundamental.⁴⁴²

This is the on-paper situation:

The tenure of a Reserve is considered to be secure if Parliamentary action by either the Commonwealth, a State or a Territory Government is required to revoke the Reserve. Specific FMZ areas ‘negotiated’ in the Comprehensive Regional Assessments (“CRA”) process require joint agreement of the Minister for the Environment, Minister for Planning, the Minister for Forestry and the Minister for Mineral Resources and public consultation before boundaries can be changed.⁴⁴³ Snigging and construction of roads in and through certain exclusion zones is only permitted with prior written approval of the National Parks and Wildlife Service.⁴⁴⁴ Construction and operation of tracks is defined as a specified forestry activity.⁴⁴⁵ Forests NSW must adhere to the Threatened Species Licences Schedule 6 and Schedule 6A.⁴⁴⁶ Active management, or regular active intervention, is defined as an overall functioning of ecosystems that are being modified by, for example, removing feral weeds, providing supplementary food or artificially creating habitats.⁴⁴⁷

Forests NSW claim 45, 829ha are excluded from logging in the Eden region and 61, 424ha in the Southern region.⁴⁴⁸ On FMZs the ESFM Plans state:

The net result is that overall, approximately 89,871 ha (45%) of State forests will be excluded from harvesting disturbance and will comprise 16% of the CAR reserve system in the South Coast Sub-region.

The net result is that overall, approximately 45,829 ha (23%) of State forests will be excluded from harvesting disturbance and will comprise 17% of the CAR reserve system in the Eden Region.

On State forests in the Eden region the Department of Agriculture Fisheries and Forestry states:

The CAR Reserve System covers approximately one third of the entire region and about 56 per cent of the region’s public land. Significant additions to dedicated reserves include:

- * The link between Tantawanglo and Yurammie State Forests which provides a corridor from the escarpment to the coastal forests;
- * important koala habitat in Murrah State Forest.⁴⁴⁹

Forests NSW state they monitor and report using the Montreal Criteria and Indicators identified in the CRA process, and as agreed in the RFAs.⁴⁵⁰

The reality is Forests NSW have, are and will log these FMZs. For example the whole of Yurammie was classified 3B, now it has a small Special Management Zone. Tantawangalo SF 2432/33/34/35 had a Special Prescription Zone for water. These compartments were able to be logged because FNSW staff had ‘a conversation’ with Bega Valley Shire Council (water) and lifted the SPZ.

⁴⁴² *Nationally Agreed Criteria for the Establishment of a CAR Reserve System for Forests in Australia*, A Report by the Joint ANZECC / MCFFA National Forest Policy Statement Implementation Sub-committee, 1997.

⁴⁴³ Managing Our Forests Sustainably, above n 437; see *Southern Region Forest Agreement 2002* cl 6 and cl 7.

⁴⁴⁴ *Terms of Licence Under the Threatened Species Conservation Act 1995 Eden* Appendix B, (“Eden TSL”) cl 5.1(b).

⁴⁴⁵ *Terms of Licence Under the Threatened Species Conservation Act 1995 for the South Coast Sub- Region of the Southern Region* Appendix B.

⁴⁴⁶ *Terms of Licence Under the Threatened Species Conservation Act 1995 for the South Coast Sub- Region of the Southern Region* Appendix B, (“Southern TSL”).

⁴⁴⁷ *Guidelines for Applying Protected Area Management Categories*, above n 439.

⁴⁴⁸ Southern ESFM Plan 2005; Eden ESFM Plan 2005; above n 438.

⁴⁴⁹ Department of Fisheries and Forestry, see < http://www.daff.gov.au/_data/assets/pdf_file/0020/58502/rfa-and-the-environment.pdf>.

⁴⁵⁰ Annex F, Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests *The Montréal Process* Third Edition, December 2007; there are seven Criterion indicators - Conservation of biological diversity; Maintenance of forest ecosystem health and vitality; Conservation and maintenance of soil and water resources; Maintenance of forest contribution to global carbon cycles; Legal, institutional and policy framework for forest conservation and sustainable management.

This is evidenced by the Tantawangalo SF Cpt 2432/2434/2435 Harvest Plan which states:

Forest Management Zone 3bC (Catchment) exists over Coupe 1 of Compartment 2432, and all of Compartment 2434 and 2435 as indicated on the Harvesting Plan Operational Maps.

However:

The Forest Management Zone 3bC (Catchment) area within Coupe 2 of Compartment 2434 and Coupe 1 of Compartment 2435 forms part of the net harvestable area for this harvesting operation.

We would refer you to SEFRs breach reports on these compartments, of which all breaches were upheld by the Office of Environment and Heritage.

It seems that logging is defined by Forests NSW as ‘active management’. In any logging compartment snig tracks criss-cross through FMZs, rainforest gullies, Ridge and Headwater habitat, 1st 2nd and 3rd order streams.⁴⁵¹ ‘Practicable measures’ taken are, when the breach is reported, to spread straw over affected areas. Forests NSW state a snig track is not classified as a road and therefore does not require an EPL licence. Forests NSW also allege if roads are approved by the regional manager they do not require any other approval.⁴⁵²

CONCLUSION

The disclaimer at the beginning of most of the documentation of Forests NSW is apt:

While every reasonable effort has been made to ensure that this document is correct at the time of printing, the State of NSW and the Commonwealth of Australia, its agents and employees, do not assume any responsibility and shall have no liability, consequential or otherwise, of any kind, arising from the use of or reliance on any of the information contained in this document.

‘Reasonable effort’ for establishment of fact has not been taken by the drafters of Forests NSW documentation. All criteria in every report reviewed are lacking in up-to-date verifiable scientific data, or in fact any data, to support any of the claims.

It is difficult to see how broadscale clearing of native forest can equate to improving environmental outcomes.⁴⁵³ Or how a logging event can be defined as regeneration.

Due to failure to enact principles of ESFM, principles of inter-generational equity in meeting objectives seem in doubt. Further due to current logging practices it is difficult to argue that maintaining environmental values at or above target levels can be achieved. Given current knowledge on causes and effects of climate change it would be difficult to argue that continuance of logging could maintain these levels given the amount of environmental harm caused. Certainly with regard to climate change and extinction of species it would be very difficult to argue that logging was ‘for the common good’.

⁴⁵¹ Decline in ‘woody vegetation’ was stated as being 9,683ha in 2004/2006 and 18,246ha in 2006/2007; NSW Woody Vegetation Change 2004 to 2006 Report, NSW Government Department of Natural Resources; NSW Woody Vegetation Change 2006 to 2007 Report, NSW Government Department of Natural Resources.

⁴⁵² *Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Eden Region 1999* cl 10(6); there is a ‘tick-a-box’ form that Forests NSW workers are required to fill out if extra roads are needed, although this seems to have fallen off the radar in recent times; in 2008 there was a total reduction of woody vegetation of over 48,000 hectares throughout NSW; The *Annual Report on Native Vegetation 2008*, Department of Environment, Climate Change and Water; conversely the NSW State of the Environment Report 2009 states ‘until now, land clearing has been the major threat to the extent and condition of native vegetation in New South Wales, but over the past six years the overall area of woody vegetation has remained stable’; on the south coast in 2004/05 Forests NSW reportedly logged 7592ha, in 2005/06 10 709ha, in 2006/07 13 811ha. The total area of logged native forest in 2007/2008 on the south coast was 14 388ha; Digwood FOI figures 4 Feb, 2008 p2; NSW Forest Agreements Implementation Reports 2005/2006, 2006/2007: Upper North East, Lower North East, Eden and Southern regions, Resource and Conservation Unit, NSW Department of Environment and Climate Change NSW, Sydney.

⁴⁵³ *Private Native Forestry Code of Practice for Southern NSW 2008* p1; see Gibbons P, Briggs S V, Ayers D, Seddon J, Doyle S, Cosier P, McElhinny C, Pelly V, Roberts K, ‘An Operational Method to Assess Impacts of Land Clearing on Terrestrial Biodiversity’ (2009) 9 *Ecological Indicators* 26.

Thus far legislative instruments regulating conservation have proved inadequate to meet standards of nature conservation. Regulatory response has proved inadequate to deter offenders. The combination of non-compliance, inadequate legislation and lack of appropriate regulatory response could ensure that extinction of species is a certainty.

On the south coast the distinction between conservation in protected areas in public ownership and conservation on privately owned land is becoming wider as more private native forestry is undertaken. It seems, while there is no guarantee of survival in the coming years, there is more chance for species if they are resident in National Parks, threats of habitat being consumed by 'reduction burns' aside.

Political will is crucial to improving forest law compliance and ensuring that measures taken have positive outcomes for conservation that are long-lasting. As there has been little compliance and continuous over-logging, the only positive outcome for conservation would be to end native forest logging. The challenge now for public native forest conservation is to pressure political will to transfer all State owned land to National Parks co-managed with traditional owners.

The anticipation is that, with increasing knowledge of the link between climate change and forest degradation, landowners and Government will cease logging of native forest. Until then species that cannot speak or defend themselves are reliant on political will and the care of developers, farmers, loggers and multinationals.

FINDINGS

- That the Forest Agreements, RFAs, IFOAs and other legislation did not consider the critical issues of climate change or water and are therefore inadequate instruments to determine forest management.
- The Regional Forest Agreements and IFOAs are severely inadequate to protect forest species and forest habitats. The conservation targets of almost all nationally-listed fauna species and many nationally-listed flora species were not achieved and substantial additional conservation action is still required to meet minimum benchmarks. Using the NSW government's own conservation analysis and data produced during the CRA, it is evident that only one of the twenty nationally-listed forest fauna species met their conservation targets after the RFAs, and many nationally-listed flora species have fallen dramatically short of their targets. The number of threatened and endangered species has risen since the RFAs were signed and many threatened and endangered flora and fauna species are at extreme risk from current logging operations. Current logging practices do not adequately protect Australia's native flora and fauna. The threat of native forest logging must be considered a matter of national significance.
- In the south east of NSW, that fall under the Eden and Southern RFAs, the annual net areas logged have rapidly increased and yields have fallen. In other words, the industry has to log ever greater areas to maintain the same levels of production. Demonstrably unsustainable timber volumes were committed for twenty years, and these even extend beyond the term of the RFAs. The 'FRAMES' industry modelling system used to derive these volumes substantially over-estimated available timber volumes. Consequently, after the twenty year period of the RFAs, there will be a dramatic short-fall in timber. Royalties in South East NSW are now less, in real terms than they were fifteen years ago and Forests NSW is making less in royalty revenue than it expends in managing woodchipping operations. The industrial logging practices in Australia's native forests by Forests NSW, VicForests and Forestry Tasmania are unsustainable, economically, culturally and environmentally.

- Private lands were not assessed as part of the RFAs, but they are being logged with very weak regulation at an alarming rate under an EPBC Act exemption. Current prescriptions and legislation to protect biodiversity on private land are extremely inadequate.
- The almost complete consensus of public opinion is the requirement to leave the land in a better state than it was found, and to eliminate or drastically reduce all native forest logging immediately. In concurrence with the Garnaut Report, the Stern Report and the Mackey Report, action to avoid further deforestation should be an urgent priority. Accordingly, if no action is taken, the health of native forests and therefore biodiversity will be severely detrimentally affected.
- The RFAs have not been properly implemented, review timeframes have not been met and key components like EIA have not been conducted. The conditions on logging under legislative regimes, on which the RFAs rely to deliver 'ecologically sustainable management', are inadequate, frequently breached and very poorly enforced. In addition, third party appeal rights have been removed in NSW and there is no avenue for the community to enforce the law directly, despite the transparent failure of the NSW Government to enforce it properly itself. There should be no exemption for RFA forestry operations which are demonstrably unsustainable, for which key agreements relating to sustainability reviews have been ignored and/or wood supply contracts signed outside the timeframe of the RFAs.
- There can be no support for exemptions for particular activities or areas, unless there is genuine duplication of assessment requirements, and it is guaranteed that best practice assessment will occur.
- If Forests NSW can prove it has adhered to the RFAs and IFOAs management obligations then the RFAs and IFOAs must be inadequate and flawed instruments with which to protect the environment and the communities interests. If, on the other hand, the RFAs and IFOAs are found to be delivering positive environmental outcomes then Forests NSW must be found to be mismanaging the native forest estate to a serious degree.
- Forests NSW, VicForests and Forestry Tasmania has shown themselves to be complete economic and environmental failures. The RFAs have not been found to be durable, the obligations and commitments that they contain are not ensuring effective conservation, and suffer chronic under-performance in the achievement of critical action milestones.
- There are significant economic, environmental and social benefits to support ending native forest logging and to ensure a swift transition of logging operations into the existing plantation estate.
- As it is not possible for the Commonwealth to enter into agreements which bind the legislative and executive arms of government native forest logging under the RFAs and delegated legislation is unlawful.
- Further the legislators have not enacted the legislation, the regulators have not regulated and the workers are not complying, therefore clause 8 of the RFAs has been triggered. This is giving effect to ending the RFAs as the mode of native forest management and the end to native forest logging as a whole.
- The RFA regime has already effectively postponed inevitable environmental protection measures for ten years. As a matter of urgency these measures can no longer remain in limbo. State and Federal

Governments needs must have full and frank regard for the urgency of action on climate change and biodiversity protection by ending the rampant degradation of the native forest estate.

In light of these findings South East Forest Rescue calls for indigenous ownership of all public native forest, a complete stop on logging of EECs, the complete transfer from native forest wood product reliance to the plantation timber industry and salvage recycled hardwood timber industry, a single authority for national native forest stewardship and an immediate nation-wide program of catchment remediation and native habitat re-forestation.

RECOMMENDATIONS

- **The creation of a genuine comprehensive, adequate, representative and resilient reserve system covering the Southern and Eden Regions of native forests.**
- **The creation of Indigenous/State jointly managed national parks.**
- **The protection of all extant native forest on public land, with real incentives for conservation of private native forest.**
- **Exit assistance to be provided to support the NSW native forest/woodchipping industry to adapt to a true and real ecologically sustainable plantation based industry.**

Brief List of EPBC Listed Species in South East Public Forests Under FNSW Tenure

<i>Burhinus grallarius</i>	Bush Stone-curlew
<i>Neophema chrysogaster</i>	Orange-bellied Parrot
<i>Miniopterus schreibersii bassanii</i>	Southern Bent-wing Bat
<i>Litoria raniformis</i>	Southern Bell Frog
<i>Synemon plana</i>	Golden Sun Moth
<i>Hoplocephalus bungaroides</i>	Broad-headed Snake
<i>Litoria booroolongensis</i>	Booroolong Frog
<i>Mixophyes iteratus</i>	Southern Barred Frog, Giant Barred Frog
<i>Pseudophryne corroboree</i>	Southern Corroboree Frog
<i>Tympanocryptis pinguicollis</i>	Grassland Earless Dragon
<i>Anthochaera phrygia</i>	Regent Honeyeater
<i>Calyptorhynchus banksii graptogyne</i>	Red-tailed Black-Cockatoo (south-eastern)
<i>Dasyornis brachypterus</i>	Eastern Bristlebird
<i>Lathamus discolor</i>	Swift Parrot
<i>Burramys parvus</i>	Mountain Pygmy-possum
<i>Dasyurus maculatus maculatus</i>	Spot-tailed Quoll, Spotted-tail Quoll, Tiger Quoll (southeastern mainland population)
<i>Isodon obesulus obesulus</i>	Southern Brown Bandicoot
<i>Potorous longipes</i>	Long-footed Potoroo
<i>Pseudomys fumeus</i>	Koonoom, Smoky Mouse
<i>Heleioporus australiacus</i>	Giant Burrowing Frog P
<i>Litoria aurea</i>	Green and Golden Bell Frog
<i>Litoria littlejohni</i>	Littlejohn's Tree Frog, Heath Frog
<i>Pseudophryne pengillyi</i>	Northern Corroboree Frog
<i>Petrogale penicillata</i>	Brush-tailed Rock-wallaby
<i>Potorous tridactylus tridactylus</i>	Long-nosed Potoroo (SE mainland)
<i>Pteropus poliocephalus</i>	Grey-headed Flying-fox
<i>Wikstroemia australis</i>	Kurrajong
<i>Correa lawrenceana</i> var. <i>genoensis</i>	Genoa River Correa
<i>Diuris lanceolata</i>	Snake Orchid
<i>Eucalyptus imlayensis</i>	Imlay Mallee
<i>Eucalyptus recurva</i>	Mongarlowe Mallee
<i>Genoplesium rhyoliticum</i>	Pambula Midge-orchid
<i>Grevillea wilkinsonii</i>	Tumut Grevillea
<i>Pomaderris cotoneaster</i>	Cotoneaster Pomaderris
<i>Prasophyllum affine</i>	Jervis Bay Leek Orchid, Culburra and Kinghorn Point Leek-orchids
<i>Correa bauerlenii</i>	Chef's Cap Correa
<i>Pomaderris gilmourii</i> var. <i>cana</i>	Grey Deua Pomaderris
<i>Prasophyllum affine</i>	Jervis Bay Leek Orchid
<i>Pterostylis gibbosa</i>	Illawarra Greenhood
<i>Triplarina nowraensis</i>	Nowra Heath Myrtle
<i>Correa lawrenciana</i> var. <i>genoensis</i>	Genoa River Correa
<i>Eucalyptus imlayensis</i>	Imlay Mallee
<i>Plinthanthesis rodwayi</i>	Budawangs Wallaby Grass
<i>Zieria adenophora</i>	Araluen Zieria
<i>Zieria parrisiae</i>	Parris' Zieria

Protecting the smoky mouse in Nullica State Forest

From the Summer 2006 edition of Bush Telegraph Magazine.

Spare a thought for the poor smoky mouse: As if it hasn't got enough to contend with watching out for natural predators such as dingoes, sooty owls, quolls and the odd snake, it also has foxes and cats on its case as well.

This tiny endangered rodent, which weighs between 45 and 90 grams and measures a diminutive 85 to 100mm, is such a specialist in where it likes to live that it appears in only a handful of places in Victoria, New South Wales and the ACT.

"In southern NSW the smoky mouse prefers ridge-top habitats which are dominated by heath species," said one of its main protectors in NSW, Chris Slade.

Chris is Forests NSW southern region ecologist based at Eden, and he is about to give the smoky mouse another helping hand with the assistance of the Game Council NSW and its licensed hunters.

Nullica State Forest north-west of Eden, which is one of the few places in NSW the mouse lives, is planned to be part of a targeted program to help eradicate feral animals such as foxes and cats.

The mouse's habitat is off limits to hunters at present, and it is also protected by harvesting prescriptions which prevent logging in the habitat area.

The project being developed may see Game Council approved and licensed hunters working closely with Forests NSW in a targeted predator control program to complement the current fox baiting and cat trapping programs.

"We know there are a substantial number of feral cats in the area from the work conducted with sand pads and other observations," Chris said.

"A hunting program may well provide us with an additional tool to control feral animals that are putting further pressure on an already small smoky mouse population."

Howard Spencer

Public Affairs & Media, Coffs Harbour



The smoky mouse is found in Nullica State Forest near Eden on the far south coast, one of just a handful of sites in NSW, Victoria and the ACT. Photo copyright Linda Broome

