SOUTH EAST FOREST RESCUE

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Committee Secretary
Senate Standing Committees on Environment and Communications
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Dear Committee,

Re: Senate Committee Inquiry into The Effectiveness of Threatened Species and Ecological Communities' Protection in Australia

The situation in NSW is critical in a native forestry context. There is clear evidence of systematic significant damage to native forests in southern NSW as a result of government-supervised logging. The logging of mapped old-growth, rocky outcrops, gazetted Aboriginal Place, National Park, FMZs, of Special Protection Zones, inaccurate surveys and damage to threatened and endangered species habitat has occurred in direct breach with legislative instruments and has significantly impacted on matters of national environmental significance, marine water quality and EPBC listed species.

These state regulations have been in place for 14 years, they are simple to follow and yet they are being broken regularly. Citizens cannot take FNSW to court. The NSW EPA is reluctant, even though there is significant environmental damage. The EPA are not capable of robustly regulating and have audited a mere 3% of logging operations over a 5 year period.

As FNSW is state run, state owned and state regulated there is no possibility of halting this destruction. If the Commonwealth hands over regulation to the States there will be nothing to stand in the way of States who are conflicted. The EPBC Act is far from perfect but it represents hard won gains and is at least some measure of protection in non-IFOA areas. We are requesting that you do not support the hand over.

Background

On the South Coast of New South Wales thousands of hectares of native forests are being clear-felled or patch clear-felled every year. The Forestry Commission of NSW, trading as Forests NSW descriptions for these practices vary from 'Single Tree Selection - Heavy' to 'Australian Group Selection' to 'Modified Shelter Wood', yet they all amount to clear-felling or patch clear-felling on the ground. Native forests are being logged at an unsustainable rate. 85% of trees felled are turned into woodchips, either at the Eden woodchip mill or at the various saw mills on the South Coast and then trucked down to the woodchip mill.

To meet wood supply commitments, the native forest held in trust by Forests NSW is being cut faster than it is growing back.[1] Forests NSW have continuously logged over ecologically sustainable limits since the implementation of the Regional Forest Agreements ('RFAs'). There is a dis-connect within the native forest logging and woodchipping interest groups in that they have exerted undue influence to ensure desirable outcomes for profit margins at the expense of the current and future generations of the state. This is immoral.

Forestry operations in areas covered by RFAs should be subject to an independent environmental assessment that is scientifically sound and rigorous. The scientific processes in the RFAs were politically compromised. Established Joint ANZECC/Ministerial Council on Forestry Fisheries & Aquaculture NFPS Implementation Subcommittee (JANIS) criteria for forest conservation were not fully applied. There are large areas of native forest that would have been reserved if the original RFA criteria for forest conservation had been fully applied.

The current NSW government reporting approach adopted is perverse, capricious, and lacking in material substance. This is further indication that the current RFA policy is irrational and must be subject to reform as a matter of urgency. The allegations of openness and transparency of both Forests NSW and the native forest logging and woodchipping interest groups is verging on corrupt.[2] On our analysis Forests NSW have completed 19 out of 64 milestones that were required to be completed within the first five years of enactment of the RFAs, in other words by 2005. The *Draft Report on Progress with Implementation of the New South Wales Regional Forest Agreements* alleges that:

> 'If a milestone was due during the first five years, but was completed by 30 June 2008, it

[1] Performance Audit 'Sustaining Native Forest Operations' Auditor-General's Report, (2009).
[2] *Watt v Forests NSW* [2007] NSWADT 197; *Digwood v Forests NSW* [2009] NSWADT 107; *Nature Conservation Council v Department of Primary Industries (Forests NSW)* [2012] NSWADT 195.

> is discussed as completed (e.g. even if it was completed after the first review period)'.[3]

This statement is erroneous and unsatisfactory in both timeline and content. The extent to which milestones and obligations have been met, the results of monitoring of sustainability indicators, and the performance of the RFAs is 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. This is particularly exampled by the reviews which were due within the first five years from date of enactment, 2003 for the Eden Region and 2006 for the Southern sub-region, and still have not been finalised.

There should be an immediate enactment of clause 8 of the RFAs by the Commonwealth, for which the grounds have been triggered, giving effect to ending the RFAs as the mode of native forest mis-management. The world-class benchmark was set by New Zealand in 2002 where native forest logging was discontinued, and Australia has been tardy and negligent in its attempts at meeting this world standard.

In describing the loss of native forests in Australia the 2011 UN State of the Forests Report provided that:

> 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.[4]

Therefore South East Forest Rescue calls for indigenous ownership or at least co-management of all public native forest, a complete stop on logging of endangered ecological communities, complete transfer of wood product reliance to the plantation-grown 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-afforestation. We assert that urgency is needed in this forest reform.

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[3] NSW Department of Environment and Climate Change, *A Draft Report on Progress with Implementation of the New South Wales Regional Forest Agreements* (2009) 22.

[4] UN Food and Agricultural Organization, *State of the World's Forests*, Rome FAO, 2011, (online) <http://www.fao.org/docrep/013/i2000e/i2000e.pdf>.

MANAGEMENT OF KEY THREATS TO LISTED SPECIES AND ECOLOGICAL COMMUNITIES

It may be stated that along with climate change the biggest threat to listed species on the south coast is the logging and burning of their habitat. The Scientific Committee's figure for NSW species, populations or ecological communities threatened with extinction in 2009 was 1035. In 2012 it has risen to around 1100.[5] This figure, when compared to the 1998 figure of 868 is the most indicative of the effect of logging on our environment.[6]

Change in status of listed taxa in New South Wales is concentrated in subregions along the east coast. 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.[7] All species have as reasons for listing or decline, habitat loss, modification and fragmentation due to road construction, intensive logging and altered fire regimes.[8] SEFR has previously submitted numerous comments and advice to government inquiries and reviews highlighting the situation in native state forests where the loss of these biodiversity assets is routine and systemic.

Loss of Hollow-bearing and Dead-Standing Trees

Key Threatening Processes 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 the impunity of state government policy backing.

The loss of hollow bearing trees has been listed as a Key Threatening Process in New South Wales since 2007.[9] 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 having a severe impact on hollow-dependent fauna into the future.

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[5] NSW Government, Office of Environment and Heritage, 2008 <http://www.threatenedspecies.environment.nsw.gov.au/index.aspx>.

[6] Ibid 2000 and 2003 <http://www.environment.nsw.gov.au/soe/soe2003/chapter6/chp_6.3.htm#6.3.69>; 2006 <http://www.environment.nsw.gov.au/soe/soe2006/chapter6/chp_6.3.htm#6.3.71>.

[7] Department of the Environment, Water, Heritage and the Arts 2009, *Assessment of Australia's Terrestrial Biodiversity 2008*, Report prepared by the Biodiversity Assessment Working Group of the National Land and Water Resources Audit for the Australian Government, Canberra, 111.

[8] Ibid.

[9] *Threatened Species Conservation Act 1995* (NSW) Sch 3 s8, *Loss of Hollow Bearing Trees Key Threatening Process*; Office of Environment and Heritage <http://www.environment.nsw.gov.au/determinations/LossOfHollowTreesKtp.htm >.

The CRA Expert Panel stressed that the persistence and perpetuation of hollow bearing trees is imperative for the survival of forest fauna.[10] 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 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.

Coastal Zone and Marine Protected Areas

It is acknowledged that the NSW coastal zone is an environmentally fragile region under increasing pressure from development, and climate change.[11] It is well recognised globally that land-based pollution contributes a greater percentage to coastal and marine degradation than pollution by maritime sea-dumping and transport.[12] Further it is well recognised that:

[10] Ecologically Sustainable Forest Management Group 'Review of Protective Measures and Protective Measures and Forest Practices - Biodiversity Workshop Southern Region', July 1999, Project No NA45/ESFM, 176-177.
[11] Rothwell, Donald R and Baird R, 'Australia's Coastal and Marine Environment' *Australian Coastal and Marine Law*, (Federation Press, 2011) Ch1; Bates G, *Environmental Law in Australia*, 7th ed, (LexisNexis Butterworths, Australia, 2010); House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, *Managing Our Coastal Zone in a Changing Climate- the Time to Act is Now*, Commonwealth of Australia 2009.
[12] Group of Experts on the Scientific Aspects of Marine Environmental Protection, *Anthropogenic Influences on Sediment Discharge to the Coastal Zone and Environmental Consequences*, UNESCO-TOC: Paris, 1994; Farnsworth K L, and Milliman J D, Effects of Climatic and Anthropogenic Change on Small Mountainous Rivers: the Salinas River Example' (2003) 39 *Global and Planetary Change* 53.

> Land clearance for forestry results in significant increases in catchment run-off. This run-off is a major source of elevated sediment and nutrient loadings in estuaries and coastal waters.[13]

Accounting for 40% of the NSW coastline, spanning a distance of 730 km, the Southern Rivers Region covers 2972 km of ocean, of which 33.3% is within marine protected areas.[14] The region comprises the Batemans and Twofold Shelf bioregions. Many state forest compartments are bordered by a saltwater watercourse and 63 state forest compartments are within the Southern Rivers coastal zone. Forests NSW is in effect both the proponent and the determining authority.

The NSW and Commonwealth governments have adopted diffuse land-based marine pollution strategies.[15] However while private activities that occur in the NSW coastal zone are subject to close scrutiny the NSW strategy provides that 'sources that are already formally regulated, including public forestry operations,' will not be covered by the strategy. Conversely the State of the Catchments Report 2010 provides the NSW government's goal to be that 'by 2015 there is no decline in the condition of marine waters and ecosystems'.[16]

In their submission to the Montaro Inquiry the Australian Network of Environmental Defenders Offices proposed that the main principle which must be granted primary significance in contemplation of all future coastal development is 'first, do no more harm'.[17] Perhaps one way to achieve this and the government's goal could be to adopt the Healthy Rivers Report recommendation on actions considered to be 'those most likely to be necessary and effective' to protect the marine environment, which would be to 'phase out forestry operations that have an adverse impact on lake health'.[18] Ending unviable logging of native forests through regional approaches is an easy possibility. Perhaps this would go some way to fulfilling the objects of the regulatory framework designed to protect the coastal zone.

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[13] Edgar G J, Barrett N S, and Graddon D J, *A Classification of Tasmanian Estuaries and Assessment of Their Conservation Significance Using Ecological and Physical Attributes, Population and Land Use*, Tasmanian Aquaculture and Fisheries Institute, University of Tasmania, Technical Report No 2, (1999).
[14] Department of Environment, Climate Change and Water (NSW), *State of the Catchments 2010*: Marine Waters and Ecosystems, Southern Rivers region, 2010.
[15] Office of Environment and Heritage (NSW), (online) <http://www.environment.nsw.gov.au/resources/water/09085dswp.pdf>.
[16] National Oceans Office 'Impact From The Ocean/Land Interface' (online) <http://www.environment.gov.au/coasts/mbp/publications/south-east/pubs/impact-ocean-land.pdf>.
[17] Australian Network of Environmental Defender's Offices, Submission on the Draft Government Response to the Report of the Montara Commission of Inquiry, 2011.
[18] Healthy Rivers Commission of New South Wales, *Independent Public Inquiry Into Coastal Lakes: Final Report*, 2002.

Species Protection and FMZs

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.

Reserves and State Forest Land

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.[19] FMZs are divided up into eight categories.[20] 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.[21]

Objectives of category IV is stated as being to maintain, conserve and restore species and habitats:

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[19] 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.

[20] Department of Primary Industries (NSW), *Managing Our Forests Sustainably: Forest Management Zoning in NSW State Forests*, Forests NSW Operational Circular (2000); Department of Primary Industries (NSW), *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.

[21] Department of Primary Industries (NSW), *Ecologically Sustainable Forest Management Plan*, South Coast Southern NSW (2005) 25; Integrated Forestry Operations Approvals 'Forest Management Zoning in NSW State Forests' State Forests of New South Wales, December 1999; IUCN definitions of category I to IV: I Strict protection - I(a) Strict nature reserve and I(b) Wilderness area; II Ecosystem conservation and protection (ie National park); III Conservation of natural features (ie Natural monument) IV Conservation through active management (ie Habitat/species management area).

> 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.[22]

Logging operations may not be carried out on land that is classified as Category IV.[23] However in numerous instances boundaries shift and logging occurs. Incursion into these reserves are explained as an accident, for example the logging of mapped old growth in Yambulla state forest where the FNSW worker's GPS ran out of batteries. How is it possible that roads are bulldozed through them and snig tracks are made, when some legislation quite clearly states this is disallowed?[24] The JANIS Report states:

> Although changes may include boundary rationalisations, the CAR reserve system must be predicated on the principle that security of tenure and management intent is fundamental.[25]

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 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.[26] 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.[27] Construction and operation of tracks is defined as a specified forestry activity.[28] Forests NSW must adhere to the Threatened Species Licences Schedule 6 and Schedule 6A.[29] Active management, or regular active intervention, is defined as an overall functioning of ecosystems that are being modified

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[22] *Guidelines for Applying Protected Area Management Categories,* Dudley N [ed], Gland, Switzerland, IUCN, (2008).

[23] Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Eden Region 1999 cl 19(2).

[24] Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Southern Region 2001 cl 10.

[25] *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.

[26] Managing Our Forests Sustainably, above n 20; see *Southern Region Forest Agreement 2002* cl 6 and cl 7.

[27] *Terms of Licence Under the Threatened Species Conservation Act 1995 Eden* Appendix B, ('Eden TSL') cl 5.1(b).

[28] *Terms of Licence Under the Threatened Species Conservation Act 1995 for the South Coast Sub- Region of the Southern Region* Appendix B.

[29] *Terms of Licence Under the Threatened Species Conservation Act 1995 for the South Coast Sub- Region of the Southern Region* Appendix B, ('Southern TSL').

by, for example, removing feral weeds, providing supplementary food or artificially creating habitats.[30]

Forests NSW claim 45, 829ha are excluded from logging in the Eden region and 61, 424ha in the Southern region.[31] 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:
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> * 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.[32]

Forests NSW state they monitor and report using the Montreal Criteria and Indicators identified in the CRA process, and as agreed in the Regional Forest Agreements ("RFAs").[33] While this looks good on paper 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. It seems that logging is defined by Forests NSW as 'active management'. Tantawangalo's special prescription zone was lifted by FNSW and has now been logged extensively.

In any logging compartment snig tracks criss-cross through FMZs, rainforest gullies, Ridge and Headwater habitat, 1st 2nd and 3rd order streams. 'Practicable measures' taken are, when the breach is reported, to spread straw over affected areas. Forests NSW state a snig track is

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[30] *Guidelines for Applying Protected Area Management Categories,* above n 22.
[31] Southern ESFM Plan 2005; Eden ESFM Plan 2005; above n 21.
[32] Department of Fisheries and Forestry (Cth), <http://www.daff.gov.au/__data/assets/pdf_file/0020/58502/rfa-and-the-environment.pdf>.
[33] IUCN Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests, *The Montréal Process,* Third Edition, December 2007 Annex F.

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.[34]

Yurammie Case Study

Yurammie State Forest Compartment 963/965 was considered safe from logging, until it appeared on the Forests NSW monthly Plan of Operations. It was allegedly protected as a Special Prescription Zone, classified as such in 1999 because it was considered to be critical habitat for the Giant Burrowing Frog, it was known koala habitat, because its water catchment capabilities feed the towns water supply and because it fulfilled the CAR criteria for biodiversity.

Yurammie, like many parts of State forests in south eastern New South Wales, has been considered part of the NRS. This NRS is taken to the international negotiating table by Australia to demonstrate its commitment to climate change action, biodiversity conservation and protection. Unfortunately Yurammie has now been logged.

In Yurammie Cpts 963/965 there are records of eight threatened or endangered species. Spotted Tailed Quoll, Giant Burrowing Frog, Golden Tipped Bat, Sooty Owl, Koala, Powerful Owl, Gang Gang Cockatoo and Yellow-bellied Glider. Out of these the Quoll is listed as endangered and the GBF as vulnerable under the EPBC Act.

As there was a koala record within two kilometres of the compartment clause 8.8.12 of the IFOA TSL was triggered. Where clause 8.8.12 is triggered Forests NSW is required to undertake koala surveys, consult with neighbours, conservation groups and animal welfare groups.[35]

Pursuant to the TSLs Forests NSW are also required to undertake pre-logging targeted surveys for the Quoll, owls and Yellow-bellied Gliders.[36] However if there has been a previous reliable survey within two to five kilometres in similar habitat within the last ten years, that was a survey 'equal to or better than' the survey requirements contained in the TSLs, surveys are not required where Forests NSW has chosen to apply Condition 7 b). Clause 7 (b) states:

[34] Forestry and National Park Estate Act 1998 Integrated Forestry Operations Approval for the Eden Region 1999 cl 10(6).
[35] SEFR 'Consultation FNSW Style' <www.youtube.com/motherofdetention>.
[36] *Terms of Licence Under the Threatened Species Conservation Act 1995 Eden* Appendix B, cl 8.8.1 Table 2.

b) Pre-logging and pre-roading surveys are not required for the following species where SFNSW choose to implement the species' prescription, as detailed below.

In many instances Forests NSW chose to apply cl 7(b) for those species, including in Yurammie.

Little is known about the habits of the Giant Burrowing Frog ('GBF') even though there has been study on this species.[37] Forests NSW is to prepare, at the end of each calendar year, commencing 2008, a written report on the results and findings of its survey and monitoring program for the GBF, as carried out in that year, and is to give the Department of Environment and Climate Change a copy of that report. However there seems no documentation to substantiate the claim that these reports exist. In fact the GBF is one of the species Forests NSW has had prescriptions amended for. These amendments were on the strength of studies, reports and monitoring that was yet to be done. The prescriptions for the GBF were inadequate, now made more so by removal of clauses due to these amendments. It could be argued that this alone should trigger the precautionary principle.

If this compartment was set aside as a Special Protection Zone and used in previous reporting, both domestically and internationally to prove compliance to climate change treaties and biodiversity conventions then what are the legal implications of revocation, domestically and internationally? Given most threatened or endangered species occur in Southern and Eden State forests and their habitat has, is or will be logged, the continuing erroneousness of allowing State forest 'reserves' to be included in the NRS verges on the corrupt as FMZs. In our view this is in conflict with international obligations.

Development and Implementation of Recovery Plans

In the Southern and Eden regions there are 19 compartments active in State forest and 46 PVPs which mainly feed the pulp market. All of these contain threatened and/or endangered species. There are 91 forest dependent species of fauna in the region.[38] Once a species has been listed by the Scientific Committee it triggers numerous obligations for habitat

[37] *Environment East Gippsland Inc v VicForests* [2010] VSC 335, [H3]; Penman T D, Lemckert F L, and Mahony M J, 'Applied Conservation Management of a Threatened Forest Dependent Frog, *Heleioporus australiacus'* (2008) 5 *Endangered Species Research* 45; Office of Environment and Heritage (NSW) 'Giant Burrowing Frog *Heleioporus australiacus:* Environmental Impact Assessment Guideline', National Parks and Wildlife Service (2001) <http://www.threatenedspecies.environment.nsw.gov.au/tsprofile/profile.aspx?id=10398 >.

[38] Office of Environment and Heritage (NSW), National Parks and Wildlife Service, Atlas of NSW Wildlife, < http://wildlifeatlas.nationalparks.nsw.gov.au/wildlifeatlas/watlasSpecies.jsp> viewed 19 July 2010.

conservation.[39] 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.

Scientists advocate an approach to conservation based on maintaining ecosystem structure and function, and therefore ultimately protecting more species.[40] Protecting species and diversity enhances ecosystem resilience therefore species are able to maintain their functions and processes.

The object of IFOAs are stated at s 25 of the FNPE Act as 'for the protection of the environment and for threatened species conservation'.[41]

The Scientific Committee's main recommendations to protect hollow-dependent species were to establish appropriate recruitment tree ratios as part of the PNF Code under the NV Act, and adopt appropriate policies for recruitment tree ratios with a stipulated minimum retention density in areas of State forestry operations.[42]

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.[43] Reducing forests to a flat rate of 5 or 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. Further neither a FOP or Harvest Plan can be classed as a species impact

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[39] *Convention on Biological Diversity*, opened for signature 5 June 1992, [1993] ATS 32 (entry into force generally and for Australia 29 December); *Environment Protection Biodiversity and Conservation Act 1999* (Cth); *Environment Planning and Assessment Act 1979* (NSW); *Protection of Environment Operations Act 1997* (NSW); *Threatened Species and Conservation Act 1995* (NSW); *National Parks and Wildlife Act 1974* (NSW).
[40] McIntyre S, Barrett G, Kitching R, and Recher H, 'Species Triage - Seeing Beyond Wounded Rhinos' (1992) 6 (4) *Conservation Biology* 604, 606; Walker B, 'Conserving Biodiversity Through Ecosystem Resilience' (1995) 9 (4) *Conservation Biology* 747.
[41] *Forestry and National Park Estate Act 1998* (NSW) s 25.
[42] *Threatened Species Conservation Act 1995* (NSW) Sch 3 s8, *Loss of Hollow Bearing Trees Key Threatening Process*; Office of Environment and Heritage <http://www.environment.nsw.gov.au/determinations/LossOfHollowTreesKtp.htm >.
[43] 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.

statement.[44] 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.

The NSW Private Native Forestry Code of Practice has been established since 2008 and is currently undergoing review, but no faith is placed in the Code because it is based on a legal fiction in that it provides that if a private logging operator carries out their PNF activities in accordance with the Code then it is deemed to 'maintain or improve' environmental values. However, the PNF operator is not required to do any pre-logging surveys or assessments of biodiversity, unlike in public forest logging operations, so it is unknown what biodiversity is in those private forests prior to an PNF operation occurring.

The regulators misconception of implementation of TSLs prescriptions has ensured that many breaches of licence conditions which have destroyed habitat have gone unpunished. Furthermore FNSW have recommended to DECCW that many prescriptions be nullified. For example the original Eden TSL cl 6.6 Southern Brown Bandicoot *Isoodon Obesulus* provided that 'An exclusion zone of at least 200 hectares must be implemented around each record of the species'. However the amended Eden TSL now has very small buffer zone as evidenced by Nadgee Cpt 62 harvest plan. The SBB is an EPBCA listed endangered species. The amendment was on the proviso of a monitoring survey, however there seems no record of this survey. There is a 2007 species management plan and 2008 and 2009 monitoring reports but no further monitoring reports, nor a review.

For NSW Threat abatement plans (TAPs) have been finalised for the following three key threatening processes:

[44] *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.

Bitou bush and boneseed	This plan aims to reduce the impacts of bitou bush and boneseed on threatened species, populations and ecological communities.
Predation by the red fox (*Vulpes vulpes*)	This plan outlines the impacts of foxes on native animals and sets out the management actions that are necessary to abate this threat.
Predation by *Gambusia holbrooki* (plague minnow)	This plan outlines the impacts of the introduced fish *Gambusia holbrooki* on native animals, particularly threatened frogs, and sets out the management actions that are necessary to abate this threat.

Other pest and weed plans relevant are: *National plan to protect environmental assets from lantana*, and *Biodiversity priorities for widespread weeds.* There are currently 36 key threatening processes listed under the *Threatened Species Conservation Act 1995* (NSW).

A Statement of Intent (SOI) is similar to a Threat Abatement Plan in that it details a threat abatement strategy for a threat that has been listed under the Threatened Species Conservation Act as a key threatening process. It is not, however, a statutory document.

Although an SOI generally focuses on the Office of Environment and Heritage's (OEH) area of responsibility, successful threat abatement relies on an integrated and collaborative approach involving other public authorities, organisations and the community. SOIs identify a number of actions that OEH will implement to manage the threat. These actions fall into one of the Threat Abatement Strategies identified in the Priorities Action Statement. The following SOIs have been prepared:

- Infection of native plants by *Phytophthora cinnamomi*
- Infection of frogs by amphibian *chytrid* causing the disease *chytridiomycosis*
- Priorities for Biodiversity Adaptation to Climate Change

The present protected area network was not designed specifically to accommodate climate change, and the present biodiversity values of the protected area system may not all survive under different climatic conditions. Conservation planning at the landscape scale could

provide opportunities for species to respond to future climate change and the Threat Abatement Plan could address modifications to the present protected area network to account for climate change.

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.[45]

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 clear-felling or patch clear-felling.

[45] Private Native Forestry Code of Practice for Southern NSW 2008, cl 4 Table C.

Management of Critical Habitat Across All Land Tenures

There is not enough habitat recognized as critical in NSW. There are four critical habitat declarations and three recommendations pending.[46]

All known extant areas of the Wollemi Pine and the surrounding habitat in the catchment were declared as critical habitat. This represents some 5,000 ha of the 500,000 ha Wollemi National Park, that is 1% of the Wollemi National Park. For the snail, Stotts Island, which is approximately 165 ha in area was declared a Nature Reserve under the NPW Act on 25 June 1971.

Results of Auditing

Observations from on-ground monitoring provide that 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.

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.[47]

We see on-ground that habitat and recruitment tree selection by Forests NSW 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.

Recent State Developments

Under National Parks management threatened species and endangered ecological

[46] Office of Environment and Heritage (NSW), Critical Habitat Register <http://www.environment.nsw.gov.au/criticalhabitat/CriticalHabitatProtectionByDoctype.htm>.

[47] 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.

communities have withstood the least harm. Though in NSW matters are sliding with the introduction of hunting and horse riding into Reserve lands. Further the logging and woodchipping faction is agitating through other inquiries to open up National Parks for logging under the 'ecological thinning' pretext.

With the recently passed *Forestry Act 2012* state forests will now be managed by the Forestry Corporation. The regulations are yet to be made public. The bill removed the statutory obligation for Forest NSW to preserve and enhance the state's forest resources, instead decentralisation, economic efficiency and profit making are now given equal weight along with compliance with the principles of ecologically sustainable development ('ESD'). Under this legislation, entire state forests could be managed for private profit.

EPBC ACT AND RFAS

In 1999 the Commonwealth formally abdicated its responsibilities for protection of state native forests in IFOA areas with enactment of the *Environment Protection Conservation and Biodiversity Act 1999* (Cth) ("EPBC Act"). Under this Act at Part 4 the Commonwealth refrains from exercising its environmental legislative powers for the duration of RFAs, which is until 2023. Commercial forestry operations that fall under these RFAs were made exempt from the EPBC Act on the basis that environmental assessments had been undertaken, and environmental considerations were contained in RFAs.

However while some assessments were carried out, in many instances there was no assessment of impacts of logging on the environment. 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 ('AGS').[48] This lack of environmental impact assessment gives rise to questions on whether the Part 4 exemptions may be considered inconsistent with obligations under 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.

[48] Mackey B, 'Regional Forest Agreements - Business as Usual in the Southern Region?' (1999) 43 *National Parks Journal* 6; Southern Region Forest Agreement 2002 (NSW) cl 2.4.5.4.

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 degradation,[49] yet forestry practices continue to remain exempt from the EPBC Act and other state legislation in these RFA areas.[50]

The Oceania Report 2009 provides:

> Loss and degradation of habitat is the largest single threat to land species, including 80 percent of threatened species.[51]

The UN State of World Forests Report provides:

> The area of primary forests decreased in all Asia and Pacific subregions in the last decade, despite the fact that the area designated for conservation of biodiversity increased in the same period.[52]

In countries where land degradation and deforestation rates have fallen this outcome has mainly been achieved because those countries have little forests left.[53]

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[49] Stern N, *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>; Cf *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>.

[50] Commonwealth, *National Strategy for the Conservation of Australia's Biological Diversity* (1996).

[51] 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.

[52] *State of the World's Forests*, above n 4.

[53] Ibid; *Convention on Biological Diversity* (Rio de Janeiro, 5 June 1992), [1993] ATS 32 (entry into force generally and for Australia: 29 December 1993; UN Economic and Social Development Division for Sustainable Development, *Agenda 21*, Ch 11, 12,13 and 15, (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, 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) [1994] ATS 2, ('UNFCCC'); *Kyoto Protocol To The United Nations Framework Convention On Climate Change*, opened for signature 11 December 1997, signed for Australia 24 April 1998, [2008] ATS 2, (entered into force generally 16 February 2005, entered into force for Australia 11 March 2008); *Convention for the Protection of the Natural Resources and Environment of the South Pacific*, opened for signature Nov 24, 1986, [1990] ATS 31 (entered into force Aug 22, 1990) ("SREP Convention").

Regulation

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

The state governments are primarily responsible for regulating operations of their state-run agency. In NSW this currently falls under the *Forestry and National Park Estate Act 1998* and Integrated Forestry Operations Approvals ('IFOAs') through the Office of Environment and Heritage ('OEH'). IFOAs are the subordinate regulation to the *Forestry and National Park Estate Act 1998* (NSW) however the *Forestry Act 2012* once proclaimed will be responsible for the IFOAs. There is a specialised regulation unit for forestry, the OEH Environment Protection Agency Crown Forestry Unit.

The Commonwealth government also has a role. The Department of Sustainability, Environment, Water, Heritage, People and Communities ('DSEWPAC') 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, particularly if the breach falls outside the Part 4 exemption.

When the 1998 legislation was introduced the assurances given were that:

> Agencies which currently have enforcement and compliance powers will continue to have those powers and continue to use them to ensure that the licences are adhered to.[54]

Despite acknowledged breaches, there has been one prosecution by the NSW government in the Southern Region since the EPBC Act was introduced,[55] and none actually under the EPBC Act.[56]

The EPBC Act contains provision for offences if there is damage or injury to threatened species or habitat on Commonwealth areas.[57] The EPBC Act provides that it is unlawful to kill or injure, take, harm, trade or move a member of a listed migratory species. The Act also provides for strict liability offences for taking or moving native species if the species is in or

[54] New South Wales, *Parliamentary Hansard*, Legislative Assembly, 12 November 1998, (Yeadon).
[55] Ian Cranwell, DECC EPRG, (2009).
[56] Fisher D E, 'Environmental Planning, Public Enquiries and the Law' (1978) 52 *Australian Law Journal* 13.
[57] *Environment Protection Conservation and Biodiversity Act 1999* (Cth) ss 196, 211-211E, 196B.

on a Commonwealth area.[58] 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
>
> (c) the habitat is in or on a Commonwealth area.[59]

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.[60] It could be argued that native forest logging 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'. It would be difficult to argue that is 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.[61] Therefore, it would follow that these defences are unavailable, as there is not explicit exemption.

State-run logging agencies may argue that breach or damage was an action that occurred as a result of an unavoidable accident,[62] nonetheless there is legal definition of the term 'unavoidable'.[63] 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.[64] However this is an unpersuasive argument.

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[58] *Environment Protection Conservation and Biodiversity Act 1999* (Cth) ss 196A–196E; *Criminal Code* (Cth) 13.3(3).
[59] Ibid s 207B.
[60] Ibid s 197(e)-(f).
[61] Ibid s 197(g)-(h).
[62] Ibid s197(i); Forests NSW 2009 Southern Region Threatened Species Licence Non-Compliance Register, TSL Condition 4.1(f), released October 2010; 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 DECCW to SEFR, 7/06/2010.
[63] *Damnum fatale* 'not able to be avoided, prevented, or ignored; inevitable' Oxford English Dictionary(online) (Oxford University Press, 2010) <http://www.oed.com/>.
[64] *R v Hughes and Ors* (2011) NSW Local Court Batemans Bay, (Ian Barnes, Lee Blessington, Forests NSW); Letter from Nick Roberts CEO Forests NSW to Peter Graham, DSEWPAC, 30/05/2011, on burning of Koala habitat.

Implementation

Effective regulatory systems rely upon enforcement of statutory requirements.[65] If there is minimal enforcement it is trite to state that there is little incentive for compliance.[66] This is borne out by the Independent Review of the EPBC Act's interim report findings on DSEWPAC 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.[67]

The reply a year later from DSEWPAC 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 significant impact on the Smoky Mouse or Long-footed Potoroo.[68]

However there seems no real bar to DSEWPAC investigating forestry activities in RFA areas, 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:

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[65] *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, NSW Local Court Deniliquin; SEFR breaches site (online) <http://www.lisaandtony.com.au/breaches.htm>; NEFA breaches site <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>.

[66] 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.

[67] *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>.

[68] DEWHA (NSW) reply to SEFR, Breaches of the EPBC Act, 3/9/2010.

> 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.[69]

Notwithstanding DSEWPAC's interpretation of enforcement principles,[70] and conflict with NES Impact Guidelines,[71] an important distinction must be made. In *Brown v Forestry Tasmania* ('the Wielangta decision') Marshall J ruled that as Forestry Tasmania had not complied with the RFA it was not exempt from the EPBC Act.

However State-run forestry agencies have read the exemptions to insinuate that forestry operations are exempt from the whole EPBC Act. 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. There seems scarce evidence to show DSEWPAC and OEH has ensured maintenance and implementation of existing regulatory controls. This ensuing lack of enforcement and implementation of regulations and statute provisions possibly sends the signal to agencies and their authorised contractors that may give sustenance to this belief.[72] Therefore significance of ss 38–40 should not be underestimated.

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:

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[69] Intergovernmental Agreement on the Environment 1992, cl 9(10).

[70] 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.

[71] DSEWPAC (Cth), Guidelines for Significant Impact on Matters of NES (online) <http://www.environment.gov.au/epbc/publications/pubs/nes-guidelines.pdf>.

[72] Interim Report of the Independent Review of the EPBC Act, above n 67, 10.10.

> 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.[73]

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.[74] In it were the beginnings of the Commonwealth's official abdication from responsibility over native forests. While seeming 'in response to the *Rio Declaration*' it was in the main following the traditional 'environmental policy' of Australia which stemmed from a cooperative federalism agenda.[75]

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.[76]

The parties also agreed that there would be no adverse effect to any RFA arrangements already in place.[77] 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.

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[73] Ibid.

[74] *National Forest Policy Statement: A New Focus For Australia's Forests*, Commonwealth of Australia 1992, 1995.

[75] Fisher D E, 'Environmental Planning, Public Enquiries and the Law' above n 56; 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*, 7th ed, (LexisNexis Butterworths, Australia, 2010) Ch 5, 105; James Crawford, 'The Constitution and the Environment' (1991) 13(1) *Sydney Law Review* 11.

[76] The Council of Australian Government's *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (COAG 1997) cl 5.

[77] The Council of Australian Government's *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (COAG 1997) cl 10.

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.

> 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 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.[78]

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, protective legislation and third party litigation.[79]

It has been suggested that 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.[80] However it became apparent that the Commonwealth wanted to disentangle itself from involvement in forests. If assumptions are correct this was a deliberate policy of governments to block legal challenges and give the government complete discretion. 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

[78] 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), 6(90), 28(97) 38(113).

[79] *Forestry and National Park Estate Act 1998* (NSW) s 36 exempts 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).

[80] Aidan Ricketts and Nicole Rogers 'Third Party Rights in NSW Environmental Legislation: the Backlash' (1999) 16 *Environment and Planning Law Journal* 2.

[80] Ajani J, *The Forest Wars*, (Melbourne University Press, 2007).

> mainly from the perception by some that harvest rates were unsustainable.[81]

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.[82] 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: [83]

> 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.[84]

Unfortunately the Minister was in direct conflict with the QLD Timber Board. The Minister's 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. Thus legislative exemptions were merely an overlay. As predicted the logging rates have been proved unsustainable and the conflict has remained.

RFA Act

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 and there are no limits on the amount of woodchips which can be removed.

The RFA Act reinforces those provisions of an RFA agreement which require the Commonwealth to compensate a state.[85] Under an RFA when the Commonwealth takes any action to protect environmental or heritage values in native forests, which prevents or limits

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[81] Explanatory Memorandum to the Regional Forest Agreement Bill 2002 (1).
[82] 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*.
[83] Media Release, W Tuckey MP, 'Report does not support QLD RFA proposal' REF AFFA99/130TU, 30 Nov 1999.
[84] *South East Forests Conservation Council Incorporated v Director-General National Parks and Wildlife Service* [1993] NSWLEC 194; 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>.
[85] *Regional Forest Agreements Act 2002* (Cth) s 8.

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.[86]

Section 6 of the RFA Act, combined with Part 4 of the EPBC Act removes forestry operations conducted on land covered by an RFA from being subject to the EIA provisions in the EPBC Act.[87]

Impact Assessment

The EPBC Act provides that EIA requirements do not apply to forestry operations in RFA areas. 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.[88] 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 4 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.

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.[89]

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[86] 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); *Brown v Forestry Tasmania and Others(No 4)* [2006] FCA 1729.

[87] *Regional Forest Agreement Act 2002* (Cth) s6 (4); *Forestry Tasmania v Brown* [2007] FCAFC 186.

[88] *Brown v Forestry Tasmania and Others(No 4)* [2006] FCA 1729.

[89] *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.[90]

This would seem to suggest that state-run agencies may not undertake an action or activity that has, or is likely to have, a significant impact on matters of NES,[91] 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. However under the EPBC Act the Forestry Commission must only comply if the RFA exemptions do not apply. In that case they are obliged to refer those actions under Part 7 of the EPBC Act.

State-run agencies must also have regard to the precautionary principle and must not undertake an activity that would be inconsistent with international obligations.[92] It would follow that, as a state sponsored agency, the state-run forestry agencies must comply with the same provisions as the Minister. 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. Relevantly applicable to s 75 is does the action need approval, that is, is it a controlled action.[93]

As the Part 4 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

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[90] Ibid s 3(2).

[91] Ibid s 146L; *Convention on Biological Diversity*, opened for signature 5 June 1992, [1993] ATS 32 (entry into force generally and for Australia: 29 December); *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) [1990] ATS 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) [1976] ATS 29.

[92] *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.

[93] *Environment Protection Conservation and Biodiversity Act 1999* (Cth) s 391; Queensland Hunter Gas Pipeline project (840km crossing QLD/NSW border) DSEWPAC 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) DSEWPAC EPBC Act Referral Lists (online) <http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referrals;limit=90>.

has been no EIA undertaken for forestry operations in RFA areas the forestry operations are not exempt from Part 9 of the Act.[94]

No EIA

NSW have logged many state forests without conducting an EIA as required by either the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA Act'), or the EPBC Act. The EPA Act was strengthened and amended in late 1991 by the *Endangered Fauna (Interim Protection) Act 1991* ('EFIP').[95] However the *Timber Industry (Interim Protection) Act 1992* ('TIIP') which came into force in March 1992, while extending a moratorium on many forests until proper EIA had been conducted, also exempted the Forestry Commission from the EFIP Act.[96] The TIIP Act suspended the application of Pt 5 of the *Environmental Planning and Assessment Act* (EPA Act) in respect of logging operations being carried out in specified forests. The TIIP Act exempted the Forestry Commission from ss 111 and 112 of the EPA Act. Nevertheless FNSW still were required to produce Fauna Impact Statements ('FIS'). The TIIP was amended in May 1994 to extend to the Eden area however FNSW discontinued much surveying even though they were still required to conducted fauna surveys as preparation for development of a FIS.[97] The *Threatened Species Conservation Act 1995* was enacted in late 1995.[98] The FNPE Act was enacted in 1998. With the enactment of the FNPE Act the TIIP Act was repealed and FNSW were not required to produce FIS or EIA. As analysis of the Southern Sub-region and Eden Region will show there is doubt that the FNSW has complied with any EIA requirements.

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.[99] It was 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

[94] *Environment East Gippsland Inc v VicForests* [2010] VSC 335.
[95] *Endangered Fauna (Interim Protection) Act 1991* (NSW) Assented to 17 December, 1991.
[96] *Timber Industry (Interim Protection) Act 1992* (NSW) 12 March 1992.
[97] *Timber Industry (Interim Protection) Amendment Act 1994* (NSW) Assented to 16 May 1994.
[98] *Threatened Species Conservation Act 1995* (NSW) Assented to 22 December 1995.
[99] 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).

available for harvesting'.[100] 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'.[101] However the Comprehensive Regional Assessment report, showing what was required to be conserved to meet the Joint ANZECC/Ministerial Council on Forestry Fisheries and Agriculture National Forest Policy Statement Implementation Subcommittee ('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.[102] The NSW government ignored this report.

The 'comprehensive' environmental assessment for the Southern sub-region consisted of two environmental impact assessments covering Wandella/Dampier and Badja/Quenbeyan.[103] As there are 24 state forests in the Southern sub-region, and there seems to have been no other EIA undertaken, it would be erroneous to classify that as comprehensive.

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.[104]

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[100] Letter from Nick Roberts CEO Forests NSW to Dan Nikolin, DSEWPAC, 13/05/2011.

[101] 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>.

[102] 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*, above n 25.

[103] *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.

[104] 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.

While EIA processes were quickly adopted by many countries and Australia was no exception,[105] FNSW were less than enthusiastic.[106] The EIA theory at the time suggested 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.[107]

Therefore if assumptions are correct this could give some understanding on why state-run agencies were opposed to EIA. If due process is followed the impacts caused by logging on species and ecosystems would have to be fully examined. 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'.[108]

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'.[109] However 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.

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[105] 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.

[106] *Jarasius 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 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>; *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) <http://www.greenleft.org.au/node/6890>; *Upper Hunter Timbers Pty Ltd v Forestry Commission of New South Wales* [2001] NSWCA 64 .

[107] *Environment Protection (Impact of Proposals) Act 1974*(Cth); *Kivi v Forestry Commission* [1982] NSWLEC; Stephen Jay, Carys Jones, Paul Slinn, Christopher Wood, 'Environmental Impact Assessment: Retrospect and prospect' (2007) 27 *Environmental Impact Assessment Review* 287.

[108] Forests NSW ESFM Plan, Southern Region (2005), 53.

[109] Interim Report of the Independent Review of the EPBC Act, above n 67.

Further AGS has become more prevalent in the Eden and Southern regions and there has been no assessment of AGS. In the *Redgums case* DSEWPAC provided that 'AGS constitutes an intensification of use and its environmental impacts, if any, require assessment and approval'.[110]

CONCLUSION

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. By these exemptions logging and woodchipping interest group needs were accommodated with limited regard to positive environmental outcomes. The exemptions have left forestry areas that fall under RFAs 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 environment to be substantively protected the EPBC Act must apply to forestry operations in RFA areas where they are likely to have impacts on climate, water, 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) combined with the removal of s 6 of the RFA Act.

The Commonwealth admits its responsibility for care of native forests in the COAG Agreement:

> 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.[111]

It is seemingly therefore 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. It would be irresponsible to hand regulation of the environment over to the state governments.

[110] Rose Webb DSEWPAC, letter to Nick Roberts Forests NSW, 01/05/2009.
[111] COAG Agreement, Attachment 1 Part 1, cl 11.

Perhaps 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,[112] in NSW the exemption to third party litigation through s 40 of the FNPE Act, compounded with the effects of climate change.

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 unjustifiable.

Questions posed by commentators when the EPBC Act was enacted have been answered.[113] RFAs have not fulfilled their purpose, the various Acts and delegated legislation has not been adhered to.[114] 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.[115]

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 could perhaps have been avoided, mitigated or acted upon had the exemptions not existed.[116] The recent Government response to the EPBC Act Review has indicated that the Commonwealth is not willing to accept responsibility:

> The government does not agree to the recommendation to change section 38 of the Act, as the existing mechanisms for continuous improvement contained with the

[112] Hammond-Deakin N, and Higginson S, *If a Tree Falls: Compliance Failures in the Public Forests of New South Wales*, Environmental Defender's Office (NSW), Sydney, Australia (2011).

[113] McDonald J, 'Regional Forest (DIS) Agreements: The RFA Process and Sustainable Forest Management' (1999) *Bond Law Review* 295; 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.

[114] 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>.

[115] 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; *Forestry and National Park Estate Act 1998* (NSW) s 36.

[116] Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill Second Reading*, Senate Official Hansard, Tuesday, 22 June 1999, 5898.

RFAs can be used to achieve ecologically sustainable forestry outcomes.[117]

However this responsibility cannot be shirked. As shown the alleged 'green tape' has already been removed from Forest NSW means of assessment in IFOA areas. This has resulted in endangered and threatened species decline. To remove the last vestige of legislation that may be applicable is a step backward in species recovery. The issue is not the EPBC Act's failure to protect species and habitat, it is the failure of the governments to remove the exemptions for IFOA areas and failure to enforce and regulate effectively.

RECOMMENDATIONS

1. The Commonwealth regulatory enforcement mechanisms should be strengthened.
2. Sections 38-40 of the EPBC Act should be repealed.
3. DSEWPAC forestry compliance unit should be given greater funding.
4. The Commonwealth should take full control of regulation of native forest logging,
5. The creation of a genuine comprehensive, adequate, representative and resilient reserve system covering the Southern and Eden Regions of native forests, which would entail the creation of jointly managed national parks.
6. Remedial work by undertaking biodiversity plantings which removes carbon from the atmosphere and stores it in vegetation and soils and recreates wildlife habitat.
7. Real incentives for conservation of private native forest.
8. Properly formulated exit assistance to be provided to support the native forest logging/woodchipping workers to adapt to a true and real ecologically sustainable plantation based industry.

[117] Australian Government Response to the Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Commonwealth of Australia, 2011, Recommendation 38.

APPENDIX A

Endangered Species of the South East Bioregion

Acacia bynoeana Bynoe's Wattle Plant > Shrubs
Aldrovanda vesiculosa Waterwheel Plant Plant > Aquatic plants
Arthropteris palisotii Lesser Creeping Fern Plant > Ferns and Cycads
Astrotricha sp. Wallagaraugh Merimbula Star-hair Plant > Shrubs
Burhinus grallarius Bush Stone-curlew Animal > Birds
Burramys parvus Mountain Pygmy-possum Animal > Marsupials
Caladenia tessellata Tessellated Spider Orchid Plant > Orchids
Calochilus pulchellus Pretty Beard Orchid Plant > Orchids
Calomnion complanatum Plant > Algae, Mosses and Lichens
Carex archeri Archer's Carex Plant > Herbs and Forbs
Carex raleighii Raleigh Sedge Plant > Herbs and Forbs
Calotis pubescens Max Mueller's Burr-daisy Plant > Herbs and Forbs
Calyptorhynchus banksii graptogyne Red-tailed Black-Cockatoo (south-eastern) (+**Cth**)
Chamaesyce psammogeton Sand Spurge Plant > Herbs and Forbs
Correa lawrenceana var. genoensis Genoa River Correa Plant > Shrubs (+**Cth**)
Cynanchum elegans White-flowered Wax Plant Plant > Epiphytes and climbers
Dampiera fusca Kydra Dampiera Plant > Shrubs
Daphnandra sp. C 'Illawarra' Illawarra Socketwood Plant > Trees
Dasyornis brachypterus Eastern Bristlebird Animal > Birds (+ **Cth)**
Dasyurus maculatus maculates Spot-tailed Quoll, Tiger Quoll (SE mainland population) **(+Cth)**
Dillwynia glaucula Michelago Parrot-pea Plant > Shrubs
Distichlis distichophylla Australian Salt-grass Plant > Herbs and Forbs
Diuris aequalis Doubletail Buttercup Plant > Orchids
Diuris ochroma Pale Golden Moths Plant > Orchids
Diuris pedunculata Small Snake Orchid Plant > Orchids
Ephippiorhynchus asiaticus Black-necked Stork Animal > Birds
Eucalyptus imlayensis Imlay Mallee Plant > Mallees (Critically Endangered) (+**Cth**)
Eucalyptus parvula Small-leaved Gum Plant > Mallees
Eucalyptus saxatilis Suggan Buggan Mallee Plant > Mallees
Eucalyptus recurva Mongarlowe Mallee Plant > Mallees (Critically Endangered)
Euphrasia scabra Rough Eyebright Plant > Herbs and Forbs
Galium australe Tangled Bedstraw Plant > Herbs and Forbs
Genoplesium plumosum Tallong Midge Orchid Plant > Orchids (Critically Endangered) **Genoplesium rhyoliticum** Rhyolite Midge Orchid/ Pambula Midge-orchid (+**Cth**)
Genoplesium superbum Superb Midge Orchid Plant > Orchids
Gentiana baeuerlenii Baeuerlen's Gentian Plant > Herbs and Forbs
Grevillea acanthifolia subsp. paludosa Bog Grevillea Plant > Shrubs (+**Cth**)
Grevillea renwickiana Nerriga Grevillea Plant > Shrubs
Grevillea rivularis Carrington Falls Grevillea Plant > Shrubs
Hibbertia sp. nov. 'Menai' Hibbertia sp. nov. 'Menai' Plant > Shrubs
Hoplocephalus bungaroides Broad-headed Snake Animal > Reptiles
Irenepharsus trypherus Illawarra Irene Plant > Herbs and Forbs
Isoodon obesulus obesulus Southern Brown Bandicoot (eastern) Marsupials (+**Cth**)
Lathamus discolor Swift Parrot Animal > Birds (+**Cth**)
Litoria aurea Green and Golden Bell Frog Animal > Amphibians
Litoria castanea Yellow-spotted Bell Frog Animal > Amphibians (Critically Endangered)
Litoria raniformis Southern Bell Frog Animal > Amphibians
Litoria verreauxii alpina Alpine Tree Frog Animal > Amphibians
Lysimachia vulgaris var. davurica Yellow Loosestrife Plant > Herbs and Forbs
Macronectes giganteus Southern Giant-Petrel Animal > Birds
Miniopterus schreibersii bassanii Southern Bent-wing Bat (+**Cth**)
Mixophyes balbus Stuttering Barrred Frog Animal > Amphibians
Monotaxis macrophylla Large-leafed Monotaxis Plant > Herbs and Forbs
Monotoca rotundifolia Trailing Monotoca Plant > Shrubs
Neophema chrysogaster Orange-bellied Parrot Birds (Critically Endangered) (+**Cth)**
Persoonia glaucescens Mittagong Geebung Plant > Shrubs
Petalura gigantea Giant Dragonfly Animal > Invertebrates
Petrogale penicillata Brush-tailed Rock-wallaby Animal > Marsupials

Pimelea axiflora subsp. pubescens Bungonia Rice-flower Plant > Shrubs
Pimelea spicata Spiked Rice-flower Plant > Shrubs
Plinthanthesis rodwayi Budawangs Wallaby Grass Plant > Herbs and Forbs
Pomaderris adnata Sublime Point Pomaderris Plant > Shrubs
Pomaderris cotoneaster Cotoneaster Pomaderris Plant > Shrubs (+**Cth**)
Pomaderris delicata Delicate Pomaderris Plant > Shrubs
Pomaderris elachophylla Lacy Pomaderris Plant > Shrubs
Pomaderris sericea Silky Pomaderris Plant > Shrubs
Pomaderris walshii Carrington Falls Pomaderris Plant > Shrubs (Critically Endangered)
Potorous longipes Long-footed Potoroo Animal > Marsupials (+**Cth**)
Prasophyllum sp. Majors Creek Majors Creek Leek Orchid Plant > Orchids (Critically Endangered)
Prasophyllum affine Jervis Bay Leek Orchid Plant > Orchids (+**Cth**)
Prasophyllum canaliculatum Summer Leek Orchid Plant > Orchids (Critically Endangered)
Prasophyllum petilum Tarengo Leek Orchid Plant > Orchids
Pseudanthus ovalifolius Oval-leafed Pseudanthus Plant > Shrubs
Pseudomys fumeus Smoky Mouse Animal > Rodents (+**Cth**)
Pseudophryne corroboree Southern Corroboree Frog Amphibians (Critically Endangered)
Pterostylis gibbosa Illawarra Greenhood Plant > Orchids
Pterostylis oreophila Blue-tongued Greenhood Plant > Orchids (Critically Endangered)
Pultenaea parrisiae subsp. elusa Elusive Bush-pea Shrubs (Critically Endangered)
River-Rostratula benghalensis Painted Snipe Animal > Birds
Rulingia prostrata Dwarf Kerrawang Plant > Shrubs
Rytidosperma vickeryae Perisher Wallaby-grass Plant > Herbs and Forbs
Solanum celatum Solanum celatum Plant > Shrubs
Senecio spathulatus Coast Groundsel Plant > Herbs and Forbs
Senna acclinis Rainforest Cassia Plant > Shrubs
Syzygium paniculatum Magenta Lilly Pilly Plant > Trees
Thinornis rubricollis Hooded Plover Animal > Birds (Critically Endangered)
Triplarina nowraensis Nowra Heath Myrtle **(+Cth)**
Tympanocryptis pinguicolla Grassland Earless Dragon Animal > Reptiles
Viola cleistogamoides Hidden Violet Plant > Herbs and Forbs
Westringia kydrensis Kydra Westringia Plant > Shrubs (+**Cth**)
Wilsonia rotundifolia Round-leafed Wilsonia Plant > Shrubs
Xanthomyza phrygia Regent Honeyeater Animal > Birds (+**Cth**)
Zieria adenophora Araluen Zieria Plant > Shrubs (Critically Endangered)
Zieria baeuerlenii Bomaderry Zieria Plant > Shrubs
Zieria buxijugum Box Range Zieria Plant > Shrubs (Critically Endangered) (+**Cth**)
Zieria formosa Shapely Zieria Plant > Shrubs (Critically Endangered) (+**Cth**)
Zieria granulata Illawarra Zieria Plant > Shrubs
Zieria parrisiae Parris' Zieria Plant > Shrubs (Critically Endangered) (+**Cth**)

(+**Cth**) denotes Commonwealth EPBC listed species.