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SENATE

STANDING COMMITTEE ON ENVIRONMENT,
COMMUNICATIONS AND THE ARTS

Reference: Operation of the Environment Protection and Biodiversity Conservation Act 1999

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**SENATE STANDING COMMITTEE ON
ENVIRONMENT, COMMUNICATIONS AND THE ARTS**

Wednesday, 18 February 2009

Members: Senator McEwen (*Chair*), Senator Birmingham (*Deputy Chair*), Senators Boswell, Ludlam, Lundy, Pratt, Troeth and Wortley

Participating members: Senators Abetz, Adams, Arbib, Barnett, Bernardi, Bilyk, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Collins, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Hefernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlum, Ian Macdonald, Marshall, Mason, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood and Xenophon

Senators in attendance: Senators Birmingham, Lundy, McEwen, Pratt, Troeth and Wortley

Terms of reference for the inquiry:

To inquire into and report on:

Operation of the Environment Protection and Biodiversity Conservation Act 1999

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Committee met at 10.06 am**STOKES, Mr Michael, Senior Lecturer, Law School, University of Tasmania**

Evidence was taken via teleconference—

CHAIR (Senator McEwen)—I declare open this public hearing of the Senate Standing Committee on Environment, Communications and the Arts in relation to its inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999. The committee's proceedings today will follow the program as circulated. These are public proceedings. The committee may also agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

With those formalities over, I welcome everyone here today. So that we give everybody an opportunity to participate in this, I indicate that I intend to go to Senator Troeth first for questions and then Senator Birmingham. Senators Wortley and Pratt, as you are participating by teleconference, if you have questions, can you indicate that after those two senators have asked their questions so that I know that you have questions.

I would like to welcome formally Mr Michael Stokes. Thank you very much for appearing by teleconference today. The committee has received your submission as submission No. 54. Do you wish to make any amendments or alterations to your submission?

Mr Stokes—No.

CHAIR—Would you like to make a brief opening statement before we go to questions?

Mr Stokes—Certainly. First of all, although I am a senior lecturer in the Faculty of Law at the University of Tasmania, what I am saying, of course, is my own personal view rather than the view of the institution. What I want to make a short submission about is, first of all, the EPBC Act and its relationship to RFA forestry, and then, secondly, some administrative matters with respect to withdrawing and resubmitting a proposal.

In my opinion the EPBC Act and the RFA Act as currently interpreted—and I stress 'currently interpreted'—do not establish a credible system of regulation in matters such as biodiversity, which are clearly matters of Commonwealth concern under the EPBCA. In *Wilderness Society Inc. v Hon. Malcolm Turnbull, Minister for the Environment and Water Resources (2007)*, I think the Federal Court made an error in its interpretation of section 38 of the EPBCA, which

exempts RFA forest operations, at least in some situations, from the approval of the minister under part 3 of the EPBCA. I think the Federal Court made an error when it held that forestry is undertaken in accordance with an RFA essentially if it occurs on land which is subject to an RFA. I do not think that is a supportable interpretation. The better interpretation would have been 'undertaken in accordance with', meaning complies with the RFA. So when forestry complies with the RFA then it is outside the EPBCA; when it does not then it falls under the EPBCA and EPBC Act permission would be required. That seems to me to be a much more sensible interpretation and more consistent with what was actually intended.

I know a lot of people, particularly on the green side of politics, would probably like all forestry brought initially under the EPBCA, but I do not think there is any good reason for doing that. First of all, you could not have a system where every forest coupe that was to be logged had to get permission, because that would be an enormous administrative undertaking and impose huge delays and costs on the forest industry. If you just had broad EPBC Act assessment of forests which were likely to be logged sometime in the future—broadacre assessment—then really you would just be duplicating what should have happened already under the RFA, and there would be no reason to doubt that it has not happened. So I do not think there is any reason to bring the whole thing under the EPBCA, but where there is real evidence that the regional forest agreement was ignored I think the EPBC Act should apply, because at the moment there is really no Commonwealth sanction at all for where forestry takes place in breach of an RFA. So there is a real lack of regulatory teeth there. My opinion is that not having those regulatory teeth very much harms the forest industry, because the forest industry is in a position where it can always be presented as a bit of a rogue industry because the regulation is so weak, particularly at the Commonwealth level.

There are a few problems with bringing forestry outside the RFA under the EPBCA. The major problem would be that if you do that then you are imposing liability for the breach of the RFA on the foresters themselves, whereas, of course, at the moment the RFA is simply a Commonwealth-state agreement and there is no obligation on individuals to comply with that agreement—it is a Commonwealth-state matter. The problem might be that the real responsibility for breach of an RFA lies with the particular state concerned, not with a forest operator. If amendments were introduced to implement what I am suggesting, you would probably need to create at the same time a defence of compliance with the state regulation so that where the fault is state failure to implement the RFA then individual foresters are not be liable.

The second thing I wanted to talk about is the situation which almost arose in the Gunns case, with the withdrawal and resubmitting of a proposal. Under section 170 of the EPBCA, a proponent of an action may withdraw a referral at any time before the minister makes a decision to permit or refuse that proposal, under part 9. In *The Wilderness Society v Minister for the Environment and Water Resources*, the court decided that this provision allows a proponent to withdraw and then resubmit the proposal. If the proponent resubmits, the minister would have to reconsider whether the action was controlled and make a fresh decision with respect to the level of assessment.

I do not think that conclusion makes sense, for two reasons—and, again, I would argue that the act should be amended to deal with that. The first reason is that it allows the system to be manipulated. After having made the decision that an action is controlled and needs to be assessed

in one way rather than another, the minister has really very limited powers to reconsider those decisions; there is nothing in the act which allows a reconsideration. And I think there are good reasons for that. It prevents a proponent coming back and seeking a review of the decisions in the hope of gaining some more favourable outcomes, and I do not think the power to withdraw and then resubmit a referral should be available to enable a proponent to effectively force a review of the decision on the minister—which is very close to what happened in Gunns.

Of course there may be legitimate and good reasons for withdrawing and then resubmitting. But I do not think the power to withdraw and resubmit should be unlimited and should not be available to, in effect, force the minister to reconsider earlier decisions. The other point about this is that administratively it makes no sense because it allows a proponent to stop the clock and restart the process afresh at any time. That is silly, because there could already have been hearings or other expensive procedures; a lot of money and time could already have been spent on the assessment, all of which would be wasted.

So how do we handle the situation? What I wanted to suggest was that, were a proposal to be withdrawn and substantially the same proposal resubmitted, say, within a certain time period—one year, two years or whatever—then earlier decisions about whether it is a controlled action and about the method of assessment should stand. So you would simply go back into the process at the point where you left. That would allow a proponent to withdraw and resubmit, while ruling out the possibility of abuse and avoiding the expense of forcing earlier decisions to be reconsidered.

You might require that the costs of re-establishing the process might be imposed on the proponent, particularly where there were no good reasons for withdrawing in the first place. But I think the other advantage of this is that it would prevent what happened in the Gunns case where, really, a state—Tasmania—scuppered a Commonwealth approval process by closing down the RPDC. It was not just a state process at that point—it was a Commonwealth one as well—and I do not think the state should have been able to unilaterally close it down. If Gunns wanted to withdraw from the process, as they did, then that should have ended the assessment. I am wondering whether either the bilateral agreements or the act should be amended so that state behaviour of that sort would be considered a breach of the bilateral agreement, leading to a review of the agreement or perhaps even loss of accreditation for state processes, because I thought that that was really an abuse of the process. Any amendment ought to make it clear that such intervention—that sort of unilateral closing down of a joint Commonwealth-state assessment—would be likely to lose the state its accreditation.

So that is really what I wanted to say as an opening statement.

CHAIR—Thank you very much, Mr Stokes. Have you made a submission to the independent review of the act?

Mr Stokes—No, I have not.

CHAIR—I think the committee may be interested in particular in your two ideas about allowing legislative amendments to prevent the restarting of assessments, and also about the breach of the RFAs. Have you committed those to amendments to the act that might be useful for us to have a look at?

Mr Stokes—No, I have not attempted to draft any amendments. I was speaking from notes, and I can certainly send you and probably the independent review the notes that I have, but I did not attempt to actually draft any provisions. I would not say that I am a very skilled legislative drafter.

CHAIR—Okay. That is fine. If you did happen to do that then I am sure that the committee would be interested to have a look at it.

In your written submission you mention, with regard to the RFAs, that a simpler idea would be that the RFA act should be amendment to make it an offence to carry out logging in breach of an RFA, and you say:

Although simpler, this proposal may fall foul of constitutional difficulties.

What constitutional difficulties?

Mr Stokes—I do not think you can do it across the board, because I am not sure that the Commonwealth has any across-the-board power with respect to forestry, land use or anything like that. If it were restricted to matters of Commonwealth concern, as the Environment Protection and Biodiversity Conservation Act is, I think the constitutional difficulties could be avoided. But any general provision to make the RFA enforceable probably would run into problems of lack of power; although, maybe we could use the corporations power in those circumstances because very many forest operators will be incorporated—that seems to be the catch-all power these days.

CHAIR—You mentioned cost recovery; how do you see that working?

Mr Stokes—It could be either a discretionary power or an automatic power, particularly where it is felt that a proponent withdrew from a process without any good reason and then resubmitted. There will be administrative costs in that, I would imagine, even if you restart the process at the point where it was stopped. To discourage that sort of behaviour a very typical legal sort of device would be the imposition of costs.

CHAIR—Have you thought about cost recovery not just for re-submittals but also for assessments anyway?

Mr Stokes—I have not really thought about that. When we are talking about cost recovery here, I am thinking probably of the administrative costs to the Commonwealth rather than the costs to other parties. Maybe the proponent should bear a percentage of the administrative cost, but then, of course, you would have the immediate argument that perhaps members of the public who put in submissions should also bear a percentage of the cost. I think there are real difficulties there and I have not really considered that question.

Senator TROETH—Mr Stokes, on the first page of your submission, the fourth paragraph down says:

In my submission, s 170C of the Act, which permits a proponent of a referral of an action for assessment and approval to withdraw the referral, should make it clear that a proponent ... does not have an unqualified right to re-refer the proposal.

You have implied it without actually stating it, I think, but what are the deficiencies in that section which make it easier for the proponent to do that?

Mr Stokes—There is no bar to doing that, and certainly in *The Wilderness Society v Minister for Environment and Water Resources* the Federal Court implied that there was an almost unlimited right for a proponent to withdraw and to then resubmit and effectively start the whole process again. Administratively, I think that is not very sensible. I also think there is a clash with the provisions that limit the power of the minister to reconsider the decision. So, effectively, it provides a device for forcing a reconsideration, but there is no power under the act to do that directly.

Having drafted amendments to that if I had been in the Federal Court I do not think I would have reached the conclusion they did, because they just did not consider the lack of power to reconsider. I do not think that you can sensibly limit the power to withdraw and then reconsider, but you make it clear that if a person does withdraw and then resubmits in, say, one year or two years—whatever is the time period that you may decide—the process restarts at the point at which they left off. So if the minister has already made a decision that this is a controlled action, there would not be any review of that and you would just simply accept the earlier decision. If the minister has made a decision that the assessment will be by public inquiry, you would be stuck with that decision as well. I think the way around it is that there is no reconsideration of what has already been done, rather than trying to limit the right to withdraw and resubmit, which will be very tricky because some withdrawals are perfectly justified, above board and legitimate and should not be stopped. It will be very difficult to draw the boundary between. So I think what you do is prevent the proponent gaining an advantage from withdrawing and resubmitting.

Senator TROETH—Thank you. You have also mentioned the use of either a time limit preventing re-referral of substantially the same proposal, or limiting the minister's ability to consider a re-referral. Obviously, the definition of 'substantially the same' would be pivotal in such an amendment, so how do you believe 'substantially the same' should be defined?

Mr Stokes—I took those ideas out of state planning legislation, where quite often you cannot resubmit substantially the same proposal. You are quite right, there has been a lot of litigation about when a proposal is 'substantially the same'. I do not know that we can define 'substantially'. The important thing from the EPBC Act is that what is being proposed is fairly similar, and the impacts are likely to be similar—nothing has really changed with respect to those impacts on the environment, because that is what we are concerned about here.

Senator TROETH—Okay, thank you.

Senator BIRMINGHAM—Mr Stokes, thank you for your evidence today. I think Senator Troeth has covered most of the issues that I wanted to examine with you. However, just to go back to your first point, and the broad issue around the types of exemptions given to forestry industries under the act, it seems that you have suggested on the very first page of your submission some amendments to section 38 of the act. Could you talk us through those two proposals quite clearly and what impact you believe they would have.

Mr Stokes—As I mentioned in my opening statement, I do not think it makes any sense to try to bring the whole of forestry, where Commonwealth matters are concerned, under the EPBC

Act, for two reasons. If you just had broad EPBC Act assessment of broadacre forestry, or you are duplicating what should have been done already under the regional forest agreement legislation and system, that makes no sense. If you looked at particular coups and required permission for them then the administrative burden and time delays would be a bit unworkable. What I was suggesting was that the legislation make it clear—which I thought was the correct interpretation when reading that—that where there is no compliance with the RFA, where you have forestry not in compliance, then it falls under the EPBC Act. So you are actually putting Commonwealth teeth into compliance with the RFA. If there is no compliance then it will effectively be an offence under the EPBC Act. I modified that a bit with what I said today, because I said that, if the lack of compliance is a state problem, it is unfair of course to impose the responsibility and the liability on the forest operator. So I suggest that the way around that is that you have a defence where there is key compliance with state regulatory requirements but they are not implementing the RFA properly.

Senator BIRMINGHAM—So it is your contention, picking up from what you are saying there, that the types of changes you are proposing would actually bring the act into line with its original intent and that the court misinterpreted the intent, if not the letter of the act?

Mr Stokes—Yes. To get technical, in my opinion the Federal Court almost failed statutory interpretation 101, because they rather read ‘undertaken in accordance with an RFA’ as meaning ‘undertaken on land which is subject to an RFA’. That interpretation effectively duplicated words from the definition of RFA forestry. If you look at the EPBC Act, the definition of RFA forestry is the definition in the RFA agreements themselves, and they define RFA forestry as forestry on land subject to the RFA. So if you read RFA forestry in accordance with the RFA as meaning ‘forestry undertaken on land subject to the RFA’ you are simply duplicating what is already in the definition of RFA forestry. What is wrong with that as a pure exercise in statutory interpretation is that you should read every word as having significance, not as being unnecessary or simply duplicating something else.

Their interpretation, which simply read those words as duplicating what is already in the definition of RFA forestry, I do not think was open as an interpretation. The other obvious interpretation of those words ‘undertaken in accordance with’ is ‘undertaken in compliance with’. So the amendments I am suggesting, I think, are really consistent with the words of the section as they are now. I simply think the Federal Court got it wrong, so I am suggesting a correction of that with what I suggest might be an additional amendment today to make it clear that where the failure is a state failure rather than a forest operator’s failure that should be a complete defence of the forest operator.

Senator PRATT—Following up on the Federal Court and their interpretation of ‘undertaken in compliance with’, to what extent is this a problem across regional forest agreements in other states in terms of the extent of non-compliance to which we might have an issue here under the act?

Mr Stokes—There are continual claims in Tasmania that forestry is being undertaken in breach of the agreement and the agreement is not being properly implemented et cetera. There is very little ongoing machinery to make sure that the states are compliant. The problem is one of perception. Whether or not there is a problem in actuality, I am not sure. But the problem with perception, I think, is fairly serious because it enables all the critics of the forest industry to say,

‘You are not compliant, there is no real machinery to ensure you do comply, and the states are in bed with you.’ There is a real suspicion in Tasmania that the state is very much in bed with Gunns, summed up in graffiti I once saw which was ‘Vote 1 Gunns: cut out the middleman’. I think if there was a real system of Commonwealth regulation and oversight of the RFAs then it would do a great deal to erase that and the forest industry would not continually be involved in this public relations battle that it is continually losing.

Senator PRATT—I am interested in it due to the fact that it is pretty clear to me that the reputation of the RFA in Tasmania is problematic. I am just trying to work out what implications, if any, there are for other states.

Mr Stokes—I am not too certain of the situation in other states, I must admit. I have been closely following the Tasmanian situation, which is fairly easy for me to do here, but I am not really au fait with exactly what is happening in other states.

Senator PRATT—I have not picked up on anything that would demonstrate that level of problem. Nor can I see, though, what you are suggesting as creating problems for those other jurisdictions.

Mr Stokes—I have even suggested to the forest industry here: ‘Look, you should push something like this because if you get a system which is obvious and transparent, Commonwealth oversight of the administration of forestry in Tasmania, then you are going to take away a weapon which your opponents will use to continually bash you. You do not want rogues in the industry.’ I have been trying to persuade the forestry industry here that it is in their interest to argue for effective and credible Commonwealth oversight of the RFAs, but I am not getting very far.

Senator PRATT—Thank you.

CHAIR—As there are no further questions, thank you very much, Mr Stokes, for your submission to this inquiry and for taking the time to give evidence to the committee today. We appreciate that very much.

Mr Stokes—Thank you.

[10.35 am]

GILBERT, Mr Shane, Strategic Adviser, National Association of Forest Industries

HANSARD, Mr Allan, Chief Executive Officer, National Association of Forest Industries

CHAIR—Welcome. The committee has received your submission as submission No. 56. Do you wish to make any amendments or alterations to your submission?

Mr Hansard—No, Madam Chair.

CHAIR—Would you like to make an opening statement before we go questions?

Mr Hansard—With the committee's leave, yes. We have distributed a package to you, and we would like that to be taken into account in relation to your deliberations.

CHAIR—Thank you.

Mr Hansard—On behalf of the National Association of Forest Industries, we welcome the opportunity to address the committee this morning. NAFI has made its submission to the committee and stands ready to answer any questions members may wish to ask today. Before we get to that point, however, it will come as no surprise to senators that NAFI and Australia's regional communities that have a strong forest industries presence are very concerned about the terms of reference of this inquiry. It states:

... the effectiveness of Regional Forest Agreements, in protecting forest species and forest habitats where the EPBC Act does not directly apply;

It is useful to put NAFI's concerns in context. Division 4, section 38, part 3 of the EPBC Act 1999 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA. In this case, a regional forest agreement has the same meaning as the Regional Forest Agreements Act 2002. As the EPBC Act 1999 is in fact deliberately fettered by the Regional Forest Agreements Act 2002, it is therefore important to cite section 6 of the RFA legislation insofar as section 6(4) provides:

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

Put simply, this conjunctive legislative framework is working in Australia's national interests. It is providing the necessary forest conservation while delivering much needed investment, jobs and services in regional Australia, in Australian towns and cities and in every Australian household that relies on the use of forest products. It is also providing in part the certainty the forest industry needs to deliver by the year 2020 \$19 billion worth of new forestry investment and 16,000 new jobs mainly in regional Australia and to abate over 20 per cent of Australia's greenhouse gas emissions. The policy framework the industry requires is detailed in the NAFI Strategy entitled *Playing a greater role in Australia's future: a strategy for the development of*

Australia's sustainable forest industries. With the committee's leave, I now wish to table a copy of the NAFI strategy for the benefit of the committee.

You will see that the NAFI strategy's first policy recommendation is for the Australian governments to reaffirm their commitment to regional forest agreements. Any departure from the current policy will negate the investment certainty the RFAs provide. It is also instructive for the committee to note that the conjunctive relationship between the RFA and the EPBC statutes is the product of the Keating government's national forest policy statement as ratified by COAG in 1992. Senators may recall that the NFPS came about during the then unprecedented parliamentary blockades and protests by timber unions, timber communities and forest industries marching in step for the national interest and a fair go.

It is also useful to remind the committee that the conjunctive legislative relationship between the RFA and the EPBC Act was recently tested by Senator Brown in the Wielangta matter and heard by the full bench of the Federal Court. In May last year the full bench of the Federal Court affirmed that the regional forest agreements provide adequate protection for forest species and habitats in accordance with the provisions of the EPBC Act.

NAFI wishes to make two final points about the EPBC Act and current advocacy of the Australian Greens and extreme environmental groups to include prescribed burning in the EPBC Act as a matter of national environmental significance. As significantly, the Australian Greens and the environmental advocacy also want to lock up Australia's native forests for their carbon value. Such an outcome would be an unmitigated disaster for Australia and the world's tropical forests. Indeed, the current federal environment minister's own department is attributed in the press as saying that the department has received a submission to include prescribed burning in the EPBC Act, and a decision on that submission is due by late 2010. Coincidentally, for those who did not notice, this is just before the next federal election and during the election year for Victoria, Tasmania and South Australia.

To include prescribed burning would mean the federal environment minister would become a land manager. This indeed raises constitutional issues and, as we have witnessed just a week and a half ago in Victoria, it will add to the current regulatory burden in relation to bushfire management. It would also mean the Australian government will assume a duty of care for prescribed burning in Australia's RFA forests. I simply ask the committee: when will we ever learn to accept the facts about forest fire management and prevention?

Finally, to cease logging in Australia's native forests, as advocated by the Australian Greens and environmental groups would see the demand for 12.5 million cubic metres of round wood and tens of thousands of Australian's jobs transferred to international markets. Australia's demand would be met by logging an additional 100,000 hectares a year of tropical forests in countries such as Indonesia, Brazil and the Congo, where there is illegal and in many cases unsustainable logging. Australia deserves better than this. New thinking is required, and we are the world's best leaders in sustainable forest management. We must put the nation's interest first, second and third. Thank you.

CHAIR—Thank you very much.

Senator TROETH—I think you have already answered this, Mr Hansard, but a number of submitters have suggested that land clearing and actions affecting climate change—for instance, through the removal of vegetation carbon stores—should be triggers for referral under the act. Do you agree with that?

Mr Hansard—We think the regional forest agreement process has set up an appropriate process for the management of production forests in Australia. Additional triggers such as that will only add complexity and create a problem of uncertainty for our industry going forward. It is unnecessary in relation to the RFA regions. There are strict guidelines in relation to the removal of trees and the preparation of land for forestry under the RFA, and these guidelines are independently audited by the state governments.

Senator TROETH—So, apart from the amendments which I note that you have suggested later in the submission, you are reasonably happy with the operation of the EPBC Act as it stands?

Mr Hansard—As it applies to the RFAs.

Mr Gilbert—The question you have raised also takes the industry into the CPRS issue. Some common sense has to prevail here. Already the government's objectives in relation to its obligations under the Kyoto protocol and its eventual successor are being manifested in the CPRS legislation. To have a trigger under the EPBC Act for yet another layer of examination, assessment and approval between Minister Garrett and Minister Wong is not necessarily a healthy situation in terms of efficient regulation. We ask this committee to examine that with a view to the government's world view that it needs to reduce regulation for markets to operate properly—in this case, in relation to the CPRS. We do not see a need to have the environment minister looking over the shoulder of the climate change minister.

CHAIR—Are there any aspects of the EPBC Act that NAFI has issues with or has made recommendations to change?

Mr Hansard—We do have a number of issues related to the EPBC Act. One issue is the approvals process, particularly in relation to major projects. It seems strange to us that we have major projects that will deliver positive benefits to Australia, particularly in times of recession, yet the approvals process seems to be very lengthy and prolonged. Because of these delays, international investors must be looking at Australia and wondering what sorts of processes we have here in relation to the development of major projects.

CHAIR—What major projects are you talking about?

Mr Hansard—At the moment, I am talking about the Gunn's approval process. That has been going on for a number of years. The extension of the approvals process by the environment minister will mean that that project will have been on the books for something like 10 years before it gets final approval. For our industry, which is a long-term investment driven industry that provides long-term benefits to communities in rural Australia, that is a very difficult situation to have.

Mr Gilbert—I would like to add to that answer. It is a very serious issue. The Gunn's pulp mill, which is a signature sustainable investment in Australia—indeed, the world investment community is also looking at how it is being treated—will win the gold medal for the longest approval process for something like this, and that is not something that Australia wants to win. Can I make this point to senators to consider in relation to this matter: the RFAs came about in a certain way, and the reason why they have stuck is that there has been a long history of conflict which led to many instances of blockades around this parliament and conflict in regional committees—and so the NFPS was born.

Importantly, and why it has held together, is that there was an upfront, transparent process prior to signing off on regional forest agreements. Hundreds of millions of dollars of taxpayers' money was invested in those processes in the 1990s. People have forgotten all this. When you look at the EPBC Act and you say, 'How can we end up with a situation where there are already provisions for bilateral agreements between the Commonwealth and the states on environmental approval processes but we have yet another 26 months to go for a signature approval?' we have to ask: is this act working in the right way? And it is not.

I would say to you that the model that is being used in the RFA process and which has ended up in the legislation of integrated, upfront assessments of all the environmental issues between the Commonwealth and the state that are of concern ought to be dealt with once and once only by those two levels of government. The decisions should be made and made quickly, or in a reasonable amount of time, so that those environmental issues are properly considered.

This sort of thing is happening in Australia at a time when we need investment and jobs more than ever—more than in the 1991 recession. We are now faced with yet another 26 months of hydro-dynamic studies. If that process had been done in an integrated fashion, these things would have been identified and put on the table and those studies could have been done, at the request of both the Commonwealth and the state. That is what we would say.

The RFA model has worked. It has worked well. It has delivered a lot of investment and jobs in regional Australia. The environmental act does not impose triple bottom line obligations for the environment minister to consider social and economic issues. That is taken to mean that any decision the minister takes he takes to the federal cabinet to get a view on those matters from the relevant economic and industry ministers. But to give the minister the power here and to end up in a convoluted and protracted environmental assessment process for signature projects in this country is not in our interest.

Mr Hansard—Could I add that we also have concerns in relation to the way that the management of national parks is dealt with under the act. If you draw a comparison to the regional forest agreements, as I said earlier in answer to Senator Troeth's question, we have a very strict regime that we follow in relation to forest management, and that is independently audited. So our production forests are managed and audited independently in that way. We draw the contrast to national park forest management, which is ticked off by the minister. Environmental plans for national parks are ticked off by the minister under the act. We note that, although those plans come up, they really are not independently audited. There is no check on whether those plans are met. They are not held accountable for the delivery of parts of the plan such as prescribed burning and fuel reduction in national parks. That is in contrast to the way that our production forests are managed under the RFA legislation.

CHAIR—One of the concerns that some submitters have put to this inquiry is that there is an issue, perhaps, with the amount of resources available to monitor the implementation of RFAs. That has caused concern about whether RFAs are in fact being implemented as they should be, and one of the suggestions is that there should be some element of cost recovery from the proponents of actions. Have you got a view about that?

Mr Hansard—I draw your attention to the resources that are put into national park management. The IUCN did a report on national park management around the world, and I can table for the committee the appropriate parts of their report. It basically put us level with Third World countries on the basis of rangers per hectare managed. National parks have a far lower number of managers or rangers per hectare than the forest industry has, yet these areas contain the majority of our forests and our high-value forests.

Senator PRATT—With respect, I do not think that that answers the question.

CHAIR—I was just about to say that, Senator Pratt. I am talking about proponents of actions perhaps funding the approval processes.

Mr Gilbert—For part of my career, I was a general manager of state forests for New South Wales. Let me assure that what has happened with the regulatory continuum in relation to forestry is that it has increased, and increased very significantly. State forest agencies used to be very powerful entities at the state government level. They, by and large, other than in the state of Tasmania but even there as well, have become part of larger natural resource management agencies and really act as corporations within those entities. In addition to that, there is regulatory oversight already provided under state laws, normally through an environment law. If you are considering proposing that the act be amended to include a national oversight regulatory body funded by the proponent, I would have to ask why when there is already one there at the state level. And you would have to demonstrate how it would interface with the existing regulatory framework.

I was listening to the previous witness's answer when he was asked this very question. He could not come up with one example where the system has failed badly. There are always incidents at the margin. But the answer that you got from that particular witness showed that there has not been one example. The regulatory framework is already there. It is very expensive already. It is already contributing to the bottom line financial position of state forest agencies, because the cost of complying with the regulation that is already imposed upon them under existing state laws reduces their operating capacity because it is so high. It is very difficult for them to get ahead and make a decent profit to reinvest back into the business that they are running on behalf of the taxpayers in the states.

CHAIR—Senator Pratt, did you want to follow up on that?

Senator PRATT—With respect, I do not think that the previous witness considers himself an expert in what is going on in other states. I can accept what you are saying at face value, but that might be contested by other witnesses, if not the witness before us. I have a further question that does dwell on the evidence giving by the previous witness. You have made quite clear that if forests are subject to the RFA then they should not also be subject to the EPBC Act. The point raised by the previous witness was this: if activities in a particular forest, whether it is by a

proponent or by a state government, do not meet the criteria set by or they do not comply with the Regional Forest Agreement Act 2002, then in those circumstances it should be subject to the EPBC Act. If you can prove compliance, then clearly that should provide you with protection from regulation under that act. Would you like to comment on that, please?

Mr Gilbert—That provision is already there under state law. If the—

Senator PRATT—We are not talking about state law; we are talking about federal law.

Mr Gilbert—To the extent that you had a state not being compliant with a state law, the parliament of that state would hear about it. To the extent that that existed already, then the federal parliament would also take notice of what happens in a state parliament. And that has not occurred.

Senator PRATT—So you would submit that there is adequate protection and if a regional forest agreement is not complied with then there would be actions taken under each respective state's environment laws?

Mr Hansard—Could I also add that, if there were parts of the regional forest agreement that were not complied with, as I said before—for example, the codes of practice were not met—there is an independent auditor that audits that in relation to forest management practices. If a company breaches those codes of practice there are very significant fines in relation to that. So there is a mechanism already in place to ensure that the requirements of the RFA are met at the state level—and quite severe requirements.

Mr Gilbert—If I can add to that, the reason why the EPBC Act was fettered—and indeed the Export Control Act and the heritage statute were fettered—was a consequence of an RFA coming into existence. To get to that point the taxpayers of this country paid hundreds of millions of dollars in a comprehensive regional assessment to examine a dozen matters of environmental significance in relation to those forests. So, for the RFA legislation to fetter three statutes—two others in addition to the EPBC Act, which is the subject of this inquiry—through the federal parliament was not an issue that was arrived at lightly, nor was it arrived at without significant consequence—and, indeed, a reduction in forest resources available.

I would say to you that, if you were to start to put powers into the EPBC Act which could then start to unravel what was done with the national forest policy, this would be the first parliament since that national forest policy was agreed at COAG in 1992 to want to change the national forest policy. As we know, forestry is a very controversial policy jurisdiction. I do not have to remind senators what has happened in the past when politicians have waded into regional forest agreements and the national forest policy. It has been met with quite stiff opposition, because the existing policy framework works—it works well—and it works in the national interest. You would have to make a very significant case why any of it has to be changed. It was a Labor initiative. In my earlier career I designed the National Forest Policy Statement. I was here when the whole matter was taken through the federal cabinet. I know the dynamics as to how this came about. Having said that, I would say to you right now: if you were to empower the EPBC Act to start to unravel the NFPS by having regulatory oversight—in effect, nationalise environmental issues—then you are giving scant regard to the role of the states and very scant

regard to regional communities, which now have some measure of certainty to go on and create the jobs and investment that they so rely on.

CHAIR—You mentioned the independent review mechanism under the RFAs. Has it ever been invoked and is it able to be invoked by a third party—for example, an environmental group?

Mr Hansard—It is independent. The way they are set up varies depending on the state, but basically you have an independent authority that reviews forest practices and therefore is independent—and that is the way it should be. On the basis of their assessment in relation to the codes of practice, they make assessments as to whether the companies have adhered to the codes. It works quite effectively because it is independent. The way that they audit is quite thorough. As I said, if there is a breach, it is quite a serious matter and it is a legal matter.

CHAIR—But can someone bring a breach to the attention of the independent authority?

Mr Hansard—It has been done, I think, yes.

CHAIR—Do you know where?

Mr Hansard—I am not sure, off the top of my head.

CHAIR—Regulatively or legislatively, is it possible for a third party to notify a breach and then that has to be acted upon?

Mr Hansard—I think breaches can be notified to the authority. As I said, the authority structure varies between states, so I am not fully aware of those particular arrangements.

Mr Gilbert—If I may add to that, I am aware of those. The answer is yes. In the case of New South Wales, if in this instance Forests New South Wales, which is the forestry corporation, is in breach of sustainable forest management guidelines and if that is identified and reported to the environment agency that has an oversight role, Forests New South Wales is called to account and fines are imposed depending on the nature of the breach. It is already happening at the state level. If you were to say, through this process, ‘How do you fit with that?’ I would say there would have to be a case to justify why the current system at the state level is not working, when in fact it is. There are plenty of instances where there have been minor breaches and the bodies have been called to account, as they properly should be.

They are not deliberate breaches; they just sometimes happen. A state manages the forests on behalf of the people of that state. Contractors come in and do a lot of the operations. In some states there is still a separation of responsibilities between the state forests agency and the contractors. In other states the state manages the lot. Where a contractor makes a mistake and fells a tree into a creek and then pulls it out of that creek, that is a breach. So that gets reported and we take it into account. It is like every other business and it is particularly like driving a car: if you breach the road rules you get fined. This is where this thing is. But we all understand that forestry is a quite emotive political issue, and that is why it seems to get the additional attention.

Senator PRATT—What should happen if the state is the one that is responsible for breaching regional forest agreements?

Mr Gilbert—The state gets fined under the environment law, and that has happened. Ultimately the state is responsible for the contractors operating on state land.

Mr Hansard—What is really being proposed here takes us back to the process that existed before the RFAs and before the EPBC Act where, unfortunately, every coupe that was to be logged for woodchip exports had to go through this very arduous process of assessment. It created tremendous angst for all parties concerned. It created a situation where there was very low investment in the forest industries because of the way it was done. It created a situation where you did not have good environmental outcomes because you were looking on a coupe-by-coupe basis, rather than looking—as you should in relation to environmental management—at the full regional picture. One of the reasons why the national policy statement was set up and the regional forest agreements were set up was to overcome this type of process. So I would be very concerned if a proposal were to be put forward to go back to those days. Those of us who can remember them would definitely not want to go back to those.

Senator PRATT—I do not know that that is what was being suggested. I think it was more about what happens when an RFA is not complied with and therefore if you have an area of noncompliance what action it should be subject to. You have said quite clearly that it is a state responsibility, because that is where it is largely being followed up currently and anything else is duplication. I do not think we were talking about replacing the RFA Act with the EPBC Act, as you have implied.

Mr Gilbert—Thank you, Senator, and I think I understand better your question now that you have added to it. You have to understand that regional forest agreements are just that: they are agreements between the states and the Commonwealth. To the extent that a state is out of step with agreements there are already provisions in the agreements for the Commonwealth to discuss such matters with the state. Obviously, that is given effect through the powers of the Regional Forest Agreements Act 2002. It is in much the same way as I do not think it is a good proposition to have an environment minister looking over the shoulder of a climate change minister in terms of a climate change trigger or indeed a water trigger where you get the same increase in regulation. We simply do not see the need, given that the current system is working, for the environment minister to be looking over the shoulder of the forestry minister in relation to RFAs.

Senator BIRMINGHAM—Thank you, Gentlemen, for your time and evidence today and for the submissions and details that you have provided. I would like to step back a little bit. You have certainly heard most of the evidence of the previous witness, some of which has been canvassed. As I understand it, some of his suppositions reflect those of prior witnesses to this inquiry as well. In particular I will quote from very early on in his submission where he says, in reference to the Wilderness Society case:

It extends the exemption given to forestry and associated industries from assessment as controlled actions by exempting them from the requirements of the Act whether or not they are complying with Regional Forest Agreements.

So it is your contention that that is a misinterpretation of the Federal Court's ruling?

Mr Gilbert—Yes, and if the committee would like to call down that judgment you could see for yourselves.

Senator BIRMINGHAM—Okay. That is a supposition that is fairly core to a lot of evidence that different parties have given to this inquiry. I wonder if you would like to elaborate a little on why you believe it is a wrong interpretation of the court's ruling.

Mr Gilbert—We believe the court has properly assessed the relationship between the EPBC Act and the RFA legislation absolutely correctly, and this judgment reflects that. All the code of forest practice in Tasmania and the other existing regulatory statutes were complied with. It was found that that system does satisfy the state's responsibilities under the RFA, consistent with the agreement with the Commonwealth. From that point of view, the objects of the regional forest agreement were met. If you were to put to us more detail in relation to a particular matter, we could comment on that. But clearly the court has looked at this matter in relation to the conjunctive relationship between the two statutes which affect forestry at the national level.

Senator BIRMINGHAM—So you believe that the court's findings found that the forestry operations were being conducted, to quote from the various acts, 'in accordance with the RFA'.

Mr Gilbert—Yes. There is other case law. You only have to go back to the 1990s. In those days the conservation movement used to take on the action minister annually in relation to the issuance of woodchip export licences. I used to appear for the relevant resources minister in those matters. On each occasion the resources minister was found to have complied exactly with the statutory framework and obligations placed upon him. When we get into a court setting, the propositions that are put by the plaintiff have to be established in fact. There can be no higher test of that than in a court, and I have got to say to you that this matter was considered by the full bench of Australia's Federal Court.

Senator BIRMINGHAM—Obviously the assessment then becomes the key thing, and that has been explored by other senators to a certain extent. Forgive my ignorance, but how much do the assessment processes vary between states?

Mr Hansard—For the regional forest agreements?

Senator BIRMINGHAM—Yes.

Mr Hansard—They were very comprehensive and they really depended on the nature of the RFA involved. I was involved with all 10 regional forest agreements. To my memory there were more than 50 detailed research reports done for the regional forest agreements, including comprehensive assessment of environment values, comprehensive assessment of economic values and comprehensive assessment of social values. So they were extremely comprehensive; in fact they were world leading. I think this is something that people have forgotten. When we established the regional forest agreement process with the comprehensive assessment process that we had underpinning it, we were world leaders in relation to the way we were dealing with the balance between conservation, communities and industry. And we still are. That is the benefit of the regional forest agreement. It has confidence in relation to the essential balance that we have to have there. These assessments were done by the government. These were government-led assessments, so they were very thorough and they basically provided a very comprehensive

framework to then basically plan out the use of forests in the regions to ensure that we had a comprehensive, adequate reserve system and a sustainably-managed forest system for the industry. Those two things then, importantly, met the long-term requirements of the communities that were reliant on those forests.

Mr Gilbert—If I could add to that. We have brought along what constitutes a regional forest agreement to give it some meat and meaning for the senators, and I will just very quickly run through it so you can satisfy yourself as to what is actually involved in reaching an agreement. It says, at law:

- (a) the agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions:
 - (i) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;
 - (ii) indigenous heritage values;
 - (iii) economic values of forested areas and forest industries;
 - (iv) social values (including community needs);
 - (v) principles of ecologically sustainable development;
 - (b) the agreement provides for a comprehensive, adequate and representative reserve system;
 - (c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions;
 - (d) the agreement is expressed to be for the purpose of providing long-term stability of forests and forest industries;
- and, finally:

(e) the agreement is expressed to be a Regional Forest Agreement.

So to get to the end point you have got to go through all that. Both of us here have been around this whole process, and I have to say to you that from designing the national forest policy, which still stands as Australia's forest policy, to getting to this point of regional forest agreements took years and hundreds of millions of dollars to satisfy each of those requirements of a regional forest agreement. A regional forest agreement is not just an industry agreement; it is the people's agreement, and it is the people, through the parliament, who have been satisfied that once all those tests have been applied and satisfied the agreement can be put into place. And there has not been one government since 1992 that has chosen to change one word of the national forest policy statement.

Senator BIRMINGHAM—Thank you for that information; it is all very helpful. In regards to the ongoing operation of RFAs and the assessment that forestry operations are occurring in accordance with the act, do all RFAs have provisions for an independent audit?

Mr Hansard—There are provisions in the act for a review at intervals, as all acts have—so that is the process. In relation to assessment, I think it needs to be recognised that forestry is very much a dynamic process, and we have adaptive management in place all the time. We are improving the way we are doing things all the time in relation to the way we deal with the forests.

Mr Gilbert—Senator, if I could also take you to section 10(7) of the RFA statute 2002, which says:

RFA annual report means an annual report about the achievement of milestones under an RFA—

the sorts of milestones I read out to you earlier—

during one of the first 5 years of operation of the RFA.

It also provides for review reports, which means:

... a report of the 5 yearly review of the performance of an RFA.

So independent reviews are a statutory requirement.

Senator BIRMINGHAM—I will leave that there because I am mindful of the time. There is one other issue you raised that I wanted to quickly explore, and it is in regard to the example of the prescribed burning application that has been made to the minister. Do you have concerns about the process of assessment that is likely to occur for that application?

Mr Gilbert—Yes.

Senator BIRMINGHAM—Would you like to elaborate on those concerns?

Mr Gilbert—Yes. I think Mr Hansard described our concerns in his opening statement. Firstly, we found out about this through the media. I think we find out about it on 12 February, when an article appeared in the *Australian* newspaper.

Senator BIRMINGHAM—And, frankly, if not for the desire by all newspapers to publish bushfire related stories, you probably would not have found out about it then either.

Mr Gilbert—You are probably right. There are other matters we could say about that, but we will not, because we are very courteous. The spokesperson for that department did indicate that the minister has received a public submission, that the minister has authorised his department to actively consider it and that the department's time frame for a response to that submission is in 2010, which is also the election year for the federal government and three state governments. We would have liked to have been informed that the minister was considering such a matter, given the relationship of that matter to the RFA legislation, upon which half of this industry—the native forest industry—makes its valuable contribution to the Australian community. It directly affects it.

In his opening comments, Mr Hansard made the very important point that there is a constitutional issue here: should the environment minister move to nationalise bushfire management, which seems to be the effect of this, he also is approving state bushfire management plans, including prescribed burning, and that really puts the environment minister in the realm of a land manager. The realm of a land manager also carries accountability, and that accountability carries a duty of care. That means that the taxpayers of Australia are opened up, through that action, to examinations of the minister's decision and the effect of that decision and his actions and whether or not duty of care was breached. Put simply: the Commonwealth could be open to class actions, as is the case in Victoria immediately past those bushfires. We have to ask ourselves: do we need to do it? That is the first point.

CHAIR—I am sorry to interrupt you, but can I just go back a bit. The article in the *Australian* to which you refer, isn't it the case that that application to consider prescribed burning is a process that is prescribed under the act and that the minister is merely following what is already in the act? It is not a predetermined decision and the time line is prescribed in the act as well.

Mr Gilbert—Yes. That is true. It comes down to how you administer the act as a minister, as an executive member of a government. I would have thought that we as an industry, representing hundreds of thousands of people employed in this industry, might have had an interest in the matter and would have liked to have been able to put our views to the minister at the same time as others were. That has not been the case.

CHAIR—I presume the minister will follow the prescription under the act to deal with this application.

Mr Gilbert—And normally that would involve informing those entities that have an interest in the matter of the existence of this issue on foot by the minister. We have not been informed.

CHAIR—Okay.

Mr Hansard—There is an operational aspect to this and we have touched on this in relation to the earlier discussion in relation to the EPBC Act and the operation of the RFA. What could potentially happen here is a situation where the minister is approving plans for prescribed burning. Again it comes back to this overlay of regulation where, under the RFA at the moment, that is taken care of and is operated in an appropriate way. What this could potentially do is again create a situation where these essential practices are not conducted. Unfortunately, what we may have is fuel build-up in a similar situation to what we have seen in relation to fuel build-up in Victoria, in national park areas, and that is something that we would not want to see.

Senator BIRMINGHAM—By highlighting the election time lines, as you have, it says to me that you believe the process for consideration of such applications is too easily influenced by political motivations. Surely that is a fundamental flaw in the act if that is the case.

Mr Gilbert—It's a democracy.

CHAIR—As there are no further questions, I thank Mr Hansard and Mr Gilbert from NAFI for appearing before us today. We appreciate your submission and the additional information that you provided to the committee today. Thank you for taking the time today to appear before us.

Mr Hansard—I thank the committee.

Proceedings suspended from 11.24 am to 11.35 am

BAXTER, Mr Thomas Ian, Lecturer, School of Accounting and Corporate Governance, University of Tasmania

Evidence was taken via teleconference—

CHAIR—Welcome. Thank you very much for being available to the committee via telephone conference. The committee has received your submission and it is numbered 65. I note that you have sent us an updated submission as well. Perhaps you could highlight the differences between those submissions for the committee.

Mr Baxter—Thank you for the opportunity. My updated submission expands slightly on the earlier one, particularly around pages 8 and 9 where I added some extra detail regarding the High Court's decision in the Wielangta case. On page 8 and a little more on page 9 I added some reference to the RFA Act, particularly the subsection 6(4), which is another provision I think should be removed in association with the recommendations I have made regarding the EPBC Act. I have made some comments there about what appears to be too much reliance on states at least by the Commonwealth in its enforcement of RFAs. There is reference to that on page 9 of my submission.

CHAIR—Thank you for bringing that to our attention. Would you like to make a brief opening statement before we go to questions?

Mr Baxter—Certainly. As you can see from the start of my submission, I have focused very much on the RFA aspect of the inquiry's terms of reference. Page 2 summarises the amendments to the EPBC Act and the deletion of subsection 6(4) of the RFA Act—changes I think are warranted. I then detail my reasons for those recommendations: firstly, in relation to the objects provisions of the EPBC Act; secondly, in relation to sections 38 through 42—the RFA section; and, thirdly, focusing on subsection 75(2B), which takes the RFA exemption further. Essentially, it says that when the minister is making project based, controlled action decisions under the act, he must not take into account any adverse impacts of any RFA forestry operation. In my view, section 75(2B) should also be deleted. I have explained in my submission how that operated in the case of the Tasmanian pulp mill matter which led to then Minister Turnbull approving the construction and operation of the pulp mill for 50 years and being prevented by that section from considering any of the impacts of forestry operations to the supply wood to the mill. He did not, and arguably was not able to, consider the impacts of those forestry operations on protected matters under the act, be they nationally listed threatened species or other matters of national environmental significance.

As I say, I have added a little bit, particularly around page 9, in relation to the enforcement of RFAs. That came after I read the submission by the Commonwealth Department of Agriculture, Fisheries and Forestry where they seem to say, and I quote from the end of their submission:

As the states are the on-ground managers, they are directly responsible for implementing RFA provisions and hold all relevant management plans and compliance mechanisms.

That sounds to me as if the Commonwealth is essentially relying on the states to police themselves when it comes to the enforcement of RFAs. I believe that is a Commonwealth responsibility and there is a risk that if the Commonwealth is relying too heavily on the states there will be inadequate enforcement.

The thrust of my submission is that the RFAs themselves, and I have focused particularly on the Tasmanian RFA, which we are most familiar with, as a result, particularly, of the variation to the Tasmanian RFA agreed by then Premier Lennon and Prime Minister Howard in February 2007. As a result of that variation to the RFA, which I am happy to expand on, and also the court decisions in the Wielangta case, the Tasmanian RFA in particular provides essentially no protection for threatened species, threatened communities or forest ecosystems as it currently stands. Hence I have recommended that those RFA exemptions be repealed, which would then open the way for, for example, a strategic assessment under the EPBC Act of forestry operations which could then take into account contemporary requirements regarding biodiversity protection and other matters such as climate change impacts of forestry logging and burning which were not taken into account when the RFAs were developed.

That is the thrust of my argument and I am happy to take questions on any of that.

CHAIR—Thanks, Mr Baxter. With regard to changing an RFA, can you elaborate on the process? I know you have referred to that amendment to the Tasmanian one. Is it just done by agreement between a Premier and a Prime Minister? What is the mechanism?

Mr Baxter—That is certainly what occurred in the variation to the Tasmanian RFA. To summarise that, there was a court decision by a trial judge in the first instance in the Wielangta case. Justice Marshall found that in the circumstances of Wielangta —

CHAIR—I understand that. I am curious about whether there is some mechanism in the RFA itself that enables it to be changed just by agreement between the state and the Commonwealth or is there some process that has to be gone through legislatively or regulatorily.

Mr Baxter—As I understand it, there must be a process that was gone through but essentially it was a signature of the Prime Minister and the Premier. There was certainly no public consultation regarding the terms of the amendment, and as a consequence there was no independent scientific assessment. So essentially it is a contractual agreement given legislative force by the RFA Act but it is an agreement between the Commonwealth and the state. In this case the then Premier and Prime Minister signed a variation to the agreement which, as I have explained in my submission, had drastic implications in terms of what the agreement legally meant. There was no public consultation before that occurred. Indeed, it was clearly the intention of the Commonwealth and state in making that change to override or circumvent a judicial decision which at that time was subject to appeal. When application for special leave was made to the High Court, Justice Kirby said that when governments change the law they normally preserve the position of litigation which is pending before the judicial branch. But there was not any such preservation of rights in that case.

CHAIR—You say in your submission

In my view, the best way to protect nationally listed threatened species would be to delete sections 38 to 41 of the EPBC Act.

Other submitters have said that that would just make forestry in particular horrendously expensive and unwieldy. What is your view on that?

Mr Baxter—My view is that what it would do is put the forest industry on the same footing—a level playing field, if you like—as every other industry in Australia. Obviously I can understand why the forest industry essentially does not want to have to deal with the EPBC Act, but other industries have to. As the Wielangta case demonstrates, there is a problem at the moment in terms of environmental protection. In that case the facts and the findings of fact by the trial judge stand, in the sense that those forestry operations in Wielangta, a small area on Tasmania's east coast, which are significantly impacting on three endangered species, were not carried out in accordance with the Tasmanian RFA. In other words, the operations were not even meeting the RFA requirements and therefore did not have the protection of the EPBC exemption. Those factual findings were not ultimately overturned, because the subsequent full court took the view that the trial judge got the law wrong. The state and the Commonwealth changed the RFA to effectively remove any obligation to protect threatened species and instead they simply agreed that Tasmania has protected threatened species, contrary to the findings of the trial judge.

There is a problem, though, and I would argue that it is a problem in terms of Australia's international obligations. Under article 8 of the Convention on Biological Diversity, for example, Australia has signed up to various international obligations, and I do not believe we are meeting those at the moment because of this exemption. So, whilst I can understand that the forest industry want essentially just to be governed by the RFA regime, I do not believe that provides the necessary level of environmental protection that is required of Australia under international conventions. Certainly in 2009 I think we do need a review, or an opportunity to look through the lens of the EPBC Act which implements those obligations, for the forestry regime. As I have said, other industries—for example, offshore petroleum exploration—have undertaken strategic assessments pursuant to the EPBC Act. They have gone through that process and as a result have a regime which seems to work fairly well for them. So I cannot see why the forest industry should not do the same thing.

CHAIR—Have you made a submission to the independent review of the act?

Mr Baxter—Yes, I have made a submission. In fact, I think I said in the covering letter that my updated submission to you now largely mirrors what I have said to that independent review.

Senator TROETH—Good morning, Mr Baxter. During this inquiry, the committee has been provided with a number of proposals which, while they retain the RFAs, seek to increase the scrutiny of forest operations. The National Association of Forest Industries has just assured us that already, under the EPBC Act, regarding RFAs there is unparalleled scrutiny of the forests and their operations. Given that the RFAs take into account the social, economic and community aspects of every single proposal, what would be your reasons for doing away with RFAs?

Mr Baxter—I would not necessarily do away with RFAs but I would say that the mere presence of an RFA should not provide an exemption from the EPBC Act—and that is the current state of play. Certainly the current provisions in section 38 through to section 42 in

conjunction with the court decisions—for example, the Wielangta case—now provide an exemption from the EPBC Act. I have no doubt that the RFAs did take into account the community, social and economic interests, but I do not believe that the RFAs adequately considered environmental protections, and the court's findings in the Wielangta case provide one example of that. So I do not believe that Australia's laws in relation to forestry operations adequately protect matters of national environmental significance as is required under our international obligations. I do believe that there is a need, as I say, to remove those provisions so that the forest industry is on the same footing as other industries.

There are plenty of mechanisms, and I have mentioned, for example, the strategic assessments under part 10 of the EPBC Act, which could be undertaken to provide a broad-scale assessment of the forestry industry. That would then provide a mechanism, as other industries have used. If the RFAs are up to scratch, if they do provide the level of protection that NAFI say they will, then there should not be a problem in subjecting them to a strategic assessment under the EPBC Act.

Senator TROETH—My other question concerns the need for limits on the right of a proponent to re-refer a withdrawn proposal. It has been suggested that there should be either a time limit preventing re-referral of 'substantially the same proposal' or a mechanism which would limit the minister's ability to consider that. Would you agree with that and how would you define 'substantially the same proposal'?

Mr Baxter—Yes, I would agree with that. I do believe there is a problem currently, and that was exemplified in the pulp mill case in Tasmania where essentially the proponent, Gunns Ltd, had a proposal for its pulp mill which was being assessed by an accredited assessment process—a Tasmanian process undertaken by the Tasmanian Resource Planning and Development Commission, which the Commonwealth had accredited as the appropriate level of environmental assessment. The Tasmanian bilateral agreement actually refers to this integrated impact assessment undertaken by the RPDC and gives it quite a high level of equivalence under the EPBC Act. It says that it is equivalent to an environmental impact statement. What happened is that Gunns Ltd withdrew from the state process. They got fast-track legislation passed by the Tasmanian parliament, they withdrew their proposal from the Commonwealth and resubmitted what was essentially, I think nearly exactly, the same proposal saying, 'We want a new process. We've pulled out of the accredited assessment that the Commonwealth minister had previously determined was appropriate.' The Commonwealth minister, Minister Turnbull, then agreed to an assessment on preliminary documentation.

The net result was that Gunns pulled out of the process which the Commonwealth had set initially—the accredited assessment, the integrated assessment by the Tasmanian RPDC—resubmitted the same project and received in return a much lower level of assessment, that being assessment on preliminary documentation. That does seem to me to open a way for, if you like, forum shopping. If you are not happy with how your assessment is going, you can pull it out and put it back in. Maybe that opens the possibility of waiting for a new minister to be in the position. It seems to me to be a problem. As much as anything else, a lot of the work that has been done by the Commonwealth department is wasted when that occurs. So I do believe that a clause as you have suggested would be appropriate. I am not sure how one would define 'substantially the same'. It may be enough to use the words 'substantially similar' or words to that effect. I would leave that to the legislative drafters.

Certainly, once a minister has made a decision as to how a project should be assessed then, in my view, that should be the process. Unless something drastically changes in the nature of the project itself, that initial assessment decision should be followed through. The fact that in this case—particularly for such a large controversial project that is so much in the public eye—the proponent, Gunns Ltd, was effectively able off its own bat to withdraw its project and put the same project back in and obtain a reduced level of assessment under the EPBC Act is, to my mind, indicative of a problem.

Senator WORTLEY—I have some questions. Thank you for your submission, Mr Baxter. I would just like to ask a couple of questions in relation to the submission that we have received from the National Association of Forest Industries and to seek your comment on that—in particular in reference to the full bench finding for the Wielangta case. They state that:

The finding also confirms that the RFAs provide adequate protection for forest species and habitats in accordance with the sentiments of the EPBC Act, even where the Act does not directly apply.

Mr Baxter—As to that, I would essentially refer to Forestry Tasmania's own senior counsel in the application before the High Court. What he said—and I have quoted that on page 8 of my updated submission—is that Forestry Tasmania lost on the facts and on the law before the first judge at trial but then won on the law before the Federal Court of Appeal.

As I say, essentially the trial judge (who heard over 30 days of evidence, visited sites and heard from many witnesses—scientific experts et cetera) made findings of fact that, firstly, there were three species being significantly impacted and, secondly, that the operations were not in accordance with the Tasmanian RFA.

The full court basically decided that he got it wrong on the law on the second point and that the forestry operations were in accordance with the RFA. But, in so doing, what they largely found—and this is summarising a complex court judgment—was that the RFA does not in fact require actual protection of species, that essentially the processes which the RFA has considered, namely having a comprehensive, adequate and representative reserve system and having management prescriptions, is sufficient.

I do not believe that NAFI are correct if they have told you that that is equivalent protection to what is available under the EPBC Act. I demonstrate that by reference to the word 'protect'. There was initially a requirement in the Tasmanian RFA to protect. In the High Court judges' transcript on page 8 of my submission you can see that Justice Hayne quoted clause 68 of the 1997 Tasmanian RFA, which required that the state agrees to protect priority species through the CAR reserve system and by applying relevant management prescriptions. To essentially paraphrase the rest of the first paragraph, he said Forestry Tasmania denied that implementation of the system or prescriptions was the agreed method of protecting relevant species and denied that it was necessary or appropriate to embark upon an inquiry about their efficacy. As the judge said, the full court of the Federal Court accepted the respondent's argument. The fact that there was a CAR reserve system and management prescriptions was enough for the full Federal Court.

The obligation initially was there to protect the species. Then, as the High Court said, the RFA was varied in 2007. That was following the trial judge's decision but before the full court appeal. The RFA was varied, and clause 68 now reads that 'The Parties agree that the CAR Reserve

System and the application of management strategies and management descriptions do protect rare and threatened flora and fauna species in forest communities.’ So they changed the RFA. Clause 68 previously said, ‘The State agrees to protect species’. It now says the Commonwealth and state ‘agree that’ species are protected. As I said, that is, on the face of it, a change on paper, which effectively removes any obligation to protect. Now it is simply that state and Commonwealth ‘agree that’ species are protected, despite the earlier finding of the trial judge to the contrary and, as I say, effectively circumventing his decision without any public consultation or independent scientific assessment.

Senator WORTLEY—I have one further question in relation to the NAFI submission again, particularly in relation to a statement they have made. They said:

If the EPBC Act were to apply in addition to the RFAs, a situation of conflicting and resource intensive policy and regulatory duplication would arise. The EPBC Act guidelines would lead to the impost of added and unnecessary regulation without any additional environmental benefit.

Mr Baxter—I disagree with that. If they are saying on the one hand that the RFAs already provide a level of protection equivalent to the EPBC Act, then it is not immediately clear how having to also comply with the EPBC Act would be conflicting and additional obligations. As I say, many industries have to deal with multiple pieces of regulation; it is not uncommon. The forestry industry has a special exemption not only from the EPBC Act but also under section 6 of the RFA Act, which I have quoted on page 9 of my updated submission, also from the Export Control Act and other export control laws. If NAFI are saying that essentially forest practices are already meeting EPBC Act levels of protection, I do not believe that is correct. But if it were, it should not be a difficult process for the industry to have to consider and comply with the EPBC Act.

To finish off in relation to the Federal Court decision, it seems to me that what we now have is less protection for species that may be impacted by forest operations than prior to the Wielangta case, because we have the full court decision saying that the legal requirement for RFAs is not to actually protect species but simply to have these procedures in place. On top of that we also have the variation to the Tasmanian RFA. So the combined impact of those is, if you like, a double whammy in terms of protection for forest species and habitats. In my view, it does render at least the Tasmanian RFA of very little value, because all it really does is provide a legal certification saying that the Commonwealth and state agree that threatened species are protected.

Senator WORTLEY—Thank you for your time, Mr Baxter.

CHAIR—While we are discussing the word ‘protect’, you in your submission and a number of submitters to this inquiry have recommended that the committee recommend the objects of the act be changed to delete the words ‘provide for’ and instead put into the objects of the act that it should protect the environment. Realistically, will that have any implication or impact in the enforcement of the act that you can share with us? Also, in terms of the issue with regard to RFAs, if the EPBC Act objects were changed, would that have any impact on the RFAs?

Mr Baxter—To take the first issue, the words which preface various of the objects of the EPBC Act are very significant in a legal sense. I explained earlier in my submission why that is the case. Essentially, at law, this comes from the Wielangta case, where you can see that the

Commonwealth put a strong argument that the phrase ‘provide for’ does not mean ‘require’ and it does not mean ‘establish’, in a legally enforceable manner. As the judge said—and I have quoted this on page 4 of my submission:

All that is relevantly required, according to the Commonwealth, is that the RFA establishes a structure or policy framework which facilitates or enables the creation or maintenance of a CAR Reserve System ...

Essentially the Commonwealth said that saying ‘provide for’ protection is much less than if you said ‘provide’ protection. The judge accepted that argument and, as a matter of law, that is certainly the position that now stands. By saying ‘provide for’ something, they refer to an earlier case where there is an analogy given with a school site. You provide for a school site by looking forward and planning accordingly. You provide a school site by actually making it available. So, essentially, I would submit that the words ‘provide for’—or that phrase—are weasel words really. It waters down what should be a strong aim in the objects of this act to actually protect, or actually conserve, as the case may be.

So, certainly, it would be a simple legislative amendment. As I have said, it would be one improvement simply to remove the word ‘for’ so that it became ‘provide’ protection—that would be stronger than ‘provide for’—but I would say just get rid of ‘provide’ altogether and have the objects of this act being actual protection and actual conservation. Whether the act then goes and manages to achieve that is another question. But I think that, at least in the objects of the act, they should aim higher, hence the recommendation to remove those words.

CHAIR—If your recommendation was taken up would that have any impact on RFAs?

Mr Baxter—I do not think it would, directly, in the sense that if it were simply an amendment to the EPBC Act objects then that would not directly impact on the RFA. In the case I have referred to, similar words were in the RFA; section 4 of the RFA Act defines an RFA as being an agreement that ‘provides for’ a CAR reserve system and ‘provides for’ ecologically sustainable management. So the judge found that because the agreement only had to provide for a CAR reserve system, it did not actually have to deliver it in practice. There is similar wording in the RFA Act and that is something that could be looked at separately. But at this stage my recommendation in relation to the EPBC Act is that if you took out the words ‘provide for’ then that would strengthen the objects of the EPBC Act, but I do not believe it would directly impact on the RFA Act, being separate legislation.

Senator BIRMINGHAM—Given your understanding of the operation of the EPBC Act, if an applicant were, say, proposing to build a winery processing facility under the act—just a processing facility with no attached vineyards or the like—would there be any scope in the assessment, were such a facility to be considered a controlled action, for that assessment to consider the impact of grape growing in the region?

Mr Baxter—Although it would have to be assessed on a case-by-case basis, I think the definition of ‘impact’ in the act would be the critical point here. There was a decision in the Nathan Dam case, for example, where it was proposed to build a dam and the court held that, in considering the impacts of that dam, it should not just look at the impact of only building the dam and stopping the water itself but also it was necessary to consider, if you like, the downstream impacts—what development would be facilitated by the construction of the Nathan

Dam. Following that decision, the definition of ‘impact’ was amended in the EPBC Act. As a consequence I think that will now govern the situation you were referring to. So that is a legal question going to the application of the definition of ‘impact’ in the act in a particular case.

I suppose my argument from a common-sense perspective is that, if building a processing facility was going to result in or lead to a significant expansion of the vineyards which would not otherwise occur, then it seems logical when you are assessing the impact of the winery to consider the consequential impacts that will occur. In terms of an environmental impact assessment, it does seem logical to me to assess all the impacts of a proposal. And my concern in the pulp mill case is that, due to section 75 subsection (2B), the minister essentially covered his eyes to, or was expressly prevented by subsection 75(2B) from considering any adverse impacts of any RFA forestry operations, which may be locked in for 50 years, when approving the pulp mill. It just seems logical common sense to consider those impacts before approving \$2 billion worth of construction of a pulp mill and subsequent operation for the next 50 years, thereby locking in forestry operations. At that point in time surely the Commonwealth should assess and consider at least the impacts of those forestry operations that will be locked in on nationally listed threatened species, for which the Commonwealth is responsible.

Senator BIRMINGHAM—Thank you, Mr Baxter. I understand clearly where you are coming from there.

CHAIR—Thank you very much, Mr Baxter, for your submissions to the inquiry and for taking the time to appear before the committee today. We appreciate it very much.

Mr Baxter—Thank you very much for your time.

[12.13 pm]

MATTHEWS, Mr Ian Charles (Private capacity)

CHAIR—I welcome Mr Ian Matthews. Thank you very much for agreeing to talk to us today. The committee has received your submission as submission No. 34. Did you wish to make any amendments or alterations to your submission?

Mr Matthews—No. I would just like to add that I have a private forest reserve on my property that was established for the protection of an endangered beetle called Bornemissza's stag beetle. This species has been recently listed under the EPBC Act and its classification is 'critically endangered'. When I made my submission it was only listed as a 'threatened species' under the Tasmanian Threatened Species Protection Act. Also in my submission I quoted the Wielangta case, and I went on to reflect on how that affected the private reserve on our property. That has happened since. That is all. I will refer to that when I speak to you.

CHAIR—Thank you. Did you wish to make an opening statement?

Mr Matthews—Yes. The point I would like to clarify is the anomaly now because of the Wielangta case. It appears to me—and I am not a lawyer of course—that the EPBC Act applies on private land or forest but it simply does not apply anymore on state forest, because the full bench at the appeal stated that the EPBC Act 'does not apply to forest operations in RFA regions and the regime applicable in those regions is found in the RFAs themselves'. Of course, there is a problem with that because the people that govern the RFA are the government business Forestry Tasmania and the Forest Practices Authority, which is essentially—well, I do not know exactly what it is, but everyone is paid by the government so one can assume it is just like another bureaucracy, which is what the Threatened Species Unit is also. Basically, everyone is on the government payroll. So what happens is that intelligent people become pressured to make decisions that favour logging in state forests because it is the will of the government to do that. It is also the will of both governments to do that. That is a critical point, I think.

It surely was also the will of the Commonwealth government when they passed the EPBC Act to protect species from extinction. As far as I can see, from my personal experience, there is no guarantee of that at all. It means that species can be pushed to extinction through the regional forest agreement through prescription management. I highlighted in my submission the case of a coupe less than a kilometre from me, GC148A, where I provided two rounds of independent expertise, from Dr Peter McQuillan and from Dr George Bornemissza, who is the gentleman the stag beetle species is named after. He is a highly respected research fellow; he was a CSIRO scientist and he was responsible for introducing the dung beetle to Australia. But when that information was provided to the Forest Practices Authority it was ignored. When I got a letter from Forestry Tasmania, from Hans Drielsma, he made no reference at all to the fact that I provided that information. He just quoted the usual bureaucratic line, basically.

My real beef is that if you are going to have an EPBC Act that is relevant in Tasmania, then if it is going to apply to private land it also needs to apply to state forest, or it does not apply to either. It is definitely the case that it does not apply, that it is irrelevant, and that is because of

what happened at Wielangta, even though the original decision which led to Justice Marshall saying that logging could not occur in Wielangta was never overturned. The fact that species were endangered was never questioned. They just accepted that that would happen. If you do not have the scientific information and you can usually, if you clear habitat, make a species extinct. It is not that difficult to do if you do not know much about it—if you understand that I am saying. If scientifically you do not understand much about the lifestyle of threatened species, which are listed under the EPBC Act, and you continue to clear-fell or selectively log areas and just set aside wildlife habitat clumps for them, to assume that they will recolonise the forest as it regrows is not science.

I will not say anymore now. If you have my submission before you, I do not know if all the senators have read it but perhaps they might like to ask me questions about it.

CHAIR—Yes, I am sure we will have some questions.

Mr Matthews—One point I did make in the submission is that when I put in the private forest reserve that was actually done under the regional forest agreement because it was done through the Private Forest Reserves Program, through the state and federal governments, and it was signed off by both ministers. There was financial compensation for that. Forestry Tasmania, to their credit there, did recognise this.

I was surrounded by about six logging coupes. I have roughly 200 acres and I am totally surrounded by state forests. To the west and to the north, Forestry Tasmania put in place an informal reserve which is about 73 hectares. The private reserve is about 50 hectares, so that made 120 hectares. I went to their conservation department and they sent up their conservation officer—at the time, it was Jeff Meggs. He brought two foresters with him. We spent a whole day walking all around the property, and he drew up lines on a map and submitted it. It is still only an informal reserve though. It can still be selectively logged. There is always provision to go in and bulldoze a fire break—especially since the terrible tragedy that has happened in Victoria. You have to do that to protect the reserve if there is a fire. There is always provision to do those things, if you understand me. It does not exclude them, if you know what I mean.

I believe that Forestry Tasmania did recognise that there was a need for a reserve, but they never followed it up with much else. They seem to think that they can log willy-nilly. I have had two coupes logged fairly close to me. I do not know what their plans are in the future, especially now that Bornemissza's stag beetle has been declared as endangered under the EPBC Act. I do not know what their reaction to that will be and how they will manage the forest around where I live. With the recent fires and the royal commission in Victoria, I do not know how that will impact on Tasmanian forests. I do not know whether they will bring in any controlled management, if you know what I am saying.

Because my neighbour is Forestry Tasmania and because I am totally surrounded by state forests and because I have a private forest reserve and because I have threatened species that have just been listed under the EPBC Act, I am very keen to know how that sits under the law. I am legally obliged to protect this threatened species, yet because Forestry Tasmania is covered by an RFA there is no legal requirement under the EPBC Act for them to do so. So there is a clear conflict there. I hope you understand what I am saying.

When they assess threatened species when they log a coupe, they simply do surveys. People come out; there is one person or maybe two. If they are not sure, they might consult the Threatened Species Unit and seek another opinion. But when you provide them with an opinion from another source—say, Dr Peter McQuillan and Dr George Bornemissza—it is always ignored. And I do not think that is right, because scientific opinion has to be peer reviewed for it to be relevant. You cannot have the one authority deciding this, because they have to provide quotas to the company that takes the logs—which is, in effect, Gunn's. Because they require so much tonnage from the state forests, they are under pressure to provide that tonnage. If there are threatened species involved then they will manage by proscription—by just tying up more habitat clumps and carrying on, if you see what I am getting at. It is an issue in Tasmania that unfortunately has never really been resolved, although I know that governments have tried desperately to try to resolve it. I think I will leave it at that. I do not know what else I can add to that, apart from what is in my original submission.

CHAIR—Thank you very much, Mr Matthews. It is a very interesting situation. Since the stag beetle was declared a threatened species, have you been approached by anyone to do anything differently?

Mr Matthews—No, it has only recently been listed as critically endangered. Because this has happened after all the reserves were put in place, I have not heard from forestry. I have only heard informally that there are no plans to do any more logging in the next three-year plan. That is all I have heard. I should add that in the regional forest agreement, which was signed 1997, the Bornemissza stag beetle was not included in the regional forest agreement. There is a section in the regional forest agreement called attachment 2 where they list species requiring recovery action. The Simpson's stag beetle was listed as requiring recovery action, but of course the Bornemissza stag beetle was not listed there simply because it had not been described.

I think that at that stage it would have been with the taxonomist in Italy, who was studying it, and then that study would have been peer reviewed and then it would have been declared the Bornemissza stag beetle after the man who discovered it, if you see what I mean. I am not quite sure exactly when that happened. It was probably in 1996 and by that stage the RFA would have been written. So my argument was: if Simpson's stag beetle requires recovery action and the Bornemissza stag beetle was not known about but is even more restricted, then surely that requires recovery action as well. That is why when the Bornemissza stag beetle was brought before the EPBC Act, the scientific committee identified it as critically endangered because it is so restricted. It is very simple: you cannot recover a species if you keep chipping away at its habitat, can you? It is as simple as that. If we came to Tasmania and bulldozed Battery Point, for instance, then all the people would have to find somewhere else to live—it is that simple. If we bulldoze areas where endangered species live, we cannot assume that they will recolonise the place. So there you go.

Senator TROETH—You have said on page 2 of your submission:

There is no independent scrutiny in law that exists for threatened species.

Whom would you suggest would be independent if you don't consider a state or federal government to be that? The question of financing and sustaining an independent committee would be quite onerous, I expect, for anyone but government to do.

Mr Matthews—I understand what you are saying but there are people in Tasmania. I quoted Dr Peter McQuillan who works for the University of Tasmania and is head of the Environment and Geographic Department. He is an entomologist and his expertise is creepy-crawlies, if you like, for want of a better word. I also used Dr George Bornemissza who is a retired research fellow from the CSIRO. I understand your point. It is not that easy to finance except through government, I realise this perfectly. The only way you could do it would be to use people like this or retired people in their field of expertise to try to give an independent opinion.

The problem on the mainland may be quite different from Tasmania's. The personnel you need move between the threatened species, the Forest Practices Authority or Forestry Tasmania. Forestry Tasmania has got enormous power in Tasmania because it has the government business enterprises that a minister is in charge of and, basically, if it is the will of the government to log forests industrially, as they do, then that is what they do. It is easy to say that we can vote them out, but the opposition has got the same ideas so it does not make any difference. Both do the same things, so you vote for people on a number of issues.

So my answer to that question would be to use people that are out there that are actually independent and not part of these authorities. I am not saying that you should create a new authority but of course if you did then they would have to have independent powers so as not to be interfered with or pressured by—

Senator TROETH—I think I understand the particular nature of Tasmania given its economic dependence on the forest industry—whether or not you would agree with that—but it would be rather unfair of us at federal level to be making changes to a Commonwealth law that would then affect the rest of the country as well.

Mr Matthews—What you would have to do then is alter the way the EPBC Act applies in the regional forest agreement. That is the only way—and I am not a lawyer—I can think that you could do it. I understand what you are saying. It is a tricky issue. I know people that have complained about not being able to do things on private land if there are threatened species there because the EPBC Act can trigger objections and hold their developments up et cetera. The forest industry is definitely very important to Tasmania and people like me are more than happy to have a forest industry. But industrial scale logging on such a vast scale will undoubtedly threaten species and make them extinct. There is absolutely no question about it. I am originally from England and I know from my friends over there that once you tear everything down then you cannot put the pieces back together again. What we have to do is try to balance these things out.

Senator PRATT—Just to clarify, you have a private property adjoining a state forest?

Mr Matthews—Yes, that is right.

Senator PRATT—Is your property subject to the RFA or to the EPBC Act?

Mr Matthews—It was established under the regional forest agreement as a private forest reserve. It has a conservation covenant on it which is legally binding. The agreement states that if there are external threats to the private forest reserve then I can go to the minister and say what those external threats are. I did that once when they logged a coupe next to the property which

bordered the east and the south of my property. But I have given up on ministers because you do not get a genuine response, to be honest with you. You just get the usual bureaucratic stuff thrown at you. Of course that coupe was logged.

I do not know where I stand, whether with the EPBC Act or the RFA. Because the private forest reserve was created under that agreement and the conservation covenant was placed on the property, I am assuming that the EPBC Act would apply to it, but I actually do not know. It is not classified as state forest—do you see what I am getting at? The Wielangta case simply highlighted what happens in state forests; it did not say anything about what happens on private land at all. So one can only accept that the EPBC Act does apply to our private land.

Senator PRATT—That does seem a little incongruent given the other arguments in relation to the EPBC Act not applying to regional forest agreements.

Mr Matthews—Yes, of course it does. The whole thing is now that the Bornemissza stag beetle is critically endangered. The conservation officer who worked at the time for Forestry Tasmania, Jeff Meggs, also gave evidence in the Wielangta case and, if you read it, Justice Marshall was a bit dismissive of that evidence even though Dr Meggs has prepared a number of papers on stag beetles. I have only met him a couple of times but I said to him that I had the opportunity to put some land aside. I was actually asked to—that is the whole point. There is an old report in 1999 by a lady called Karen Richards who prepared a report for the Forest Practices Authority and also Forestry Tasmania. I am not sure whether she was at university when she did it—

CHAIR—Mr Matthews, we need to be careful about what we say here with regard to potential adverse comments.

Mr Matthews—I realise that, because you took that piece out of the submission. But it is covered by parliamentary privilege, I was told in an email. I am not going to say anything about it except that in her report it was recommended that the property at Terrys Hill Road, which is my property, be purchased for protection of the Bornemissza stag beetle. What I am trying to say there is that I was actually approached to have this land set aside. So when I was approached I went to Forestry Tasmania, because I realised I was surrounded by six logging coups and I thought that there was absolutely no point in my putting in 50 hectares if I was going to be logged all around.

Jeff came up and looked at it and said, ‘We will look at it. That is ridiculous. You cannot expect a private landowner to give up 50 hectares of land to protect a threatened species, if they are surrounded by logging operations.’ So it is logic and of course Forestry must have understood that it was logic and we had no disagreement about it.

They came back and they did set aside 73 hectares in an informal reserve. The only beef I had with them was about logging the coupe the other side—that was all—and in a private letter between Jeff Meggs internally to the district forester, which I was given, when they logged the coupe, he said that the logging of this coupe, GC150A, was inconsistent with the plans for Bornemissza stag beetle. Once again, the pressure to do it is so great that it just gets done. So how you figure out how to protect critically endangered and threatened species in a state forest

while private landowners also have private reserves and how that applies to the RFA is the reason, surely, that this inquiry should be able to make recommendations to fix the problem.

Senator PRATT—With respect to that, clearly you have highlighted the role that private landowners are playing in protecting species. If you were looking at the stag beetle and planning to protect it, is there a particular bias towards asking private property owners to do it because the RFA areas are kind of exempt from the EPBC Act?

Mr Matthews—I do not know, to be honest with you. But I should highlight that the private forest reserve has monetary compensation paid and it is taxpayers' money. The taxpayers have contributed even though it is nowhere near the value of the land. They have contributed something to have that reserve created because it is in the interests or the greater good, so that we do not push species to extinction. Australia has a bad record with extinctions, because it is a very harsh land, I guess, and so I think we should be more careful how we do things here.

CHAIR—Thank you very much, Mr Matthews, for your submission to this inquiry and for taking the time to give evidence before us today. We appreciate your time and effort very much.

Mr Matthews—Thank you very much and good luck with it.

CHAIR—I would like to thank all the witnesses for their informative presentations. Thank you also to Hansard and Broadcasting and to the secretariat for their support.

Committee adjourned at 12.39 pm