



Environmental
Defenders Office

**Submission to the inquiry into the *Environment
Protection and Biodiversity Conservation Amendment
(Regional Forest Agreements) Bill 2020***

19 March 2021

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

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Introduction

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the *Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020 (EPBC Amendment (RFA) Bill)*.

In our view, the rationale for introducing the EPBC Amendment (RFA) Bill is flawed, and the ad hoc amendment to the *Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)* proposed by the Bill is inconsistent with recommendations of the *Final Report of the Independent Review of the EPBC Act*, dated October 2020 (**Final Report**). The *Final Report* proposed a comprehensive package of reforms, including recommendations to improve the interaction between Regional Forest Agreements (**RFAs**) and the EPBC Act.

EDO does not support the EPBC Amendment (RFA) Bill.

EDO has engaged extensively on forestry management issues over the life of the Regional Forest Agreements (**RFAs**), and receives many calls from individuals and community organisations who are concerned about the implementation of RFAs.

In 2011, EDO prepared a report on behalf of the Nature Conservation Council of NSW: *If a Tree Falls: Compliance failures in the public forests of New South Wales*. That report highlighted significant deficiencies in the implementation of the RFAs and management of public forests in NSW.¹

In 2013, EDO offices in Tasmania and Victoria and NSW, published a report *One Stop Chop: How Regional Forest Agreements streamline environmental destruction*.² That report identified that protection of forests' biodiversity and threatened species would be of a higher standard if regulated by EPBC Act than under the RFA regime.

More recent analysis by EDO highlights that current RFAs are no longer tenable.³

The 2020 *Final Report* of the Independent Review of the EPBC Act found that:

“(t)here are fundamental shortcomings in the interactions between RFAs and the EPBC Act. The Review has low confidence that the environmental considerations under the RFA Act are equivalent to those imposed by the EPBC Act...”.

The *Final Report* recommends that RFAs must demonstrate consistency with newly developed National Environmental Standards, and there must be oversight by a newly appointed, independent Environment Assurance Commissioner.

¹ Hammond-Deakin, N. and Higginson, S. (2011) *If a tree falls: Compliance failures in the public forests of New South Wales*, Environmental Defender's Office (NSW) Ltd, Sydney, Australia, available at http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/284/attachments/original/1380667654/110728when_a_tree_falls.pdf?1380667654

² Feehely, J., Hammond-Deakin, N. and Millner, F. (2013) *One Stop Chop: How Regional Forest Agreements streamline environmental destruction*, Lawyers for Forests, Melbourne Australia, available at https://www.envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/One_Stop_Chop.pdf

³ See further Environmental Defenders Office, *Proposed renewal of NSW Regional Forest Agreements (RFAs)*, March 2018 (<https://www.edo.org.au/publication/proposed-renewal-of-nsw-regional-forest-agreements-rfas/>) and *Submission to the 10 year review of the EPBC Act*, April 2020 (<https://www.edo.org.au/publication/submission-10-year-review-epbc-act/>)

Recommendations

1. The *Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020* should not proceed.
2. In light of ongoing concerns about whether RFA forestry operations are achieving the intended environmental outcomes, and these concerns being exacerbated in the wake of the 2019-20 bushfires, the interaction between the EPBC Act and forestry operations carried out under RFAs must be reconsidered.
3. Consistent with Recommendation 15 of the *Final Report* of the Independent Review of the EPBC Act, as part of a legislative package of reforms:
 - a. The Commonwealth should immediately require, as a condition of any accredited arrangement, States to ensure that RFAs are consistent with the National Environmental Standards; and
 - b. In the second tranche of reform, the EPBC Act should be amended to replace the RFA 'exemption' with a requirement for accreditation against the National Environmental Standards, with the mandatory oversight of the Environment Assurance Commissioner.

Summary of Key Issues

Purpose and Context of Bill

The purpose of the EPBC Amendment (RFA) Bill is to amend subsection 38(1) of the EPBC Act. The amendment is intended to address how subsection 38(1) operates to exempt forestry operations covered by RFAs from the requirements of Part 3 of the EPBC Act. Part 3 of the EPBC Act requires approval to be obtained before certain 'actions' are carried out.

The Bill has been explicitly introduced to overcome the 2020 Federal Court decision, *Friends of Leadbeater's Possum Inc v VicForests* (No 4) [2020] FCA 704). In summary:

- In a preliminary determination, the Court found that an RFA forestry operation under the Central Highlands RFA (Victoria) would only attract the exemption from Part 3 of the EPBC Act if the forestry operation was undertaken *in compliance with* the Victorian system of forest management and regulation (*Friends of Leadbeater's Possum v VicForests* (2018) 260 FCR 1). This reasoning can be extended to apply to other RFAs in other jurisdictions.
- In the final decision in the *Leadbeater's* case, the Court found that certain forestry operations undertaken by VicForests were not being, and would not be, conducted in accordance with the *Code of Practice for Timber Production 2014* - in particular the requirement to apply the precautionary principle pursuant to clause 2.2.2.2 of that Code. For this reason, those forestry operations were not protected by the exemption in subsection 38(1) EPBC Act. It was also found that those operations had, or would have, a 'significant impact' on the Greater Glider, the Leadbeater's Possum, or both, and without approval under the EPBC Act, were unlawful.⁴

⁴ We note that this case is under appeal with hearings due to be held in April.

The EPBC Amendment (RFA) Bill has been introduced as a private member's bill by Nationals Senator Bridget McKenzie (not as a Government Bill).

Summary of proposed changes

Section 38(1) of the EPBC Act currently provides:

- (1) *Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.*

Part 3 of the EPBC Act requires approval to be obtained before certain 'actions' are carried out. The EPBC Amendment (RFA) Bill will remove the phrase "*that is undertaken in accordance with an RFA*" from subsection 38(1) of the EPBC Act.

The EPBC Amendment (RFA) Bill will also remove the same phrase "*that is undertaken in accordance with an RFA*" from subsection 6(4) of the *Regional Forest Agreements Act 2002 (RFA Act)*. This is a subsequent amendment. Part 6(4) of the RFA Act 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*".

The Explanatory Memorandum seeks to justify the EPBC Amendment (RFA) Bill by claiming that the decision in *Friends of Leadbeater's Possum Inc v VicForests* (No 4) [2020] FCA 704 contradicts the original intention of the parties to the RFAs. In particular:

- The Explanatory Memorandum states that "the intent of the Commonwealth and Regional Forest Agreement signatory states in relation to subsection 38(1) has always been for it to be interpreted to mean 'any forestry operation that happens in an RFA area'". This view suggests that it is the location of a forestry operation within an RFA region that alone triggers the exemption under subsection 38(1), and that compliance with the RFA is irrelevant.
- The Explanatory Memorandum also states that in "*the recent Federal Court decision (Friends of Leadbeater's Possum Inc v VicForests) Justice Mortimer found this provision to mean that VicForests' forestry operations in question were not conducted (or would not be conducted in future as some were yet to happen) "in accordance with" the Central Highlands Regional Forest Agreement because they had, or would, breach the state Code and therefore lost the exemption under section 38 of the EPBC Act*". That is, the exemption provided by subsection 38(1) does not apply if forestry operations are in breach of an RFA.

The purpose of the proposed amendment to subsection 38(1) is to delete the words "*that is undertaken in accordance with an RFA*" in an attempt to remove the interpretation of the Court in *Friends of Leadbeater's Possum Inc v VicForests*.

Part 2 of the Bill also provides that the amendments are to apply retrospectively "to an RFA forestry operation undertaken before, on or after the day this item commences."

Analysis

We do not consider that the Explanatory Memorandum correctly describes the intent of subsection 38(1) and the operation of the RFAs, or that the proposed amendment to subsection 38(1) is necessary or appropriate. In particular, we note that:

- The Explanatory Memorandum provides no evidence for its claim that “*the intent of the Commonwealth and Regional Forest Agreement signatory states in relation to subsection 38(1) has always been for it to be interpreted to mean ‘any forestry operation that happens in an RFA area’*”.
- An exemption from the requirement to obtain approval under the EPBC Act is contingent upon certain assurance to the Commonwealth that a certain or equivalent standard of environmental protection can be met. Therefore, subsection 38(1) is intended to require compliance with an RFA as assurance for providing an exemption to the requirement to seek approval under the EPBC Act.
- Indeed, this was the position argued by the Commonwealth in *Friends of Leadbeater's Possum Inc v VicForests* (2018) 260 FCR 1, when the Court first considered the circumstances in which the EPBC Act exemption would cease to apply. The Commonwealth submitted – and the Court accepted – that the EPBC Act ‘carve out’ was to operate by reference to two factors: first, that there is an RFA in force; and second, that the particular RFA forestry operation is taken ‘in accordance with’, or ‘consistently with’ that agreement. VicForests on the other hand contended that the exemption applies to *all* forestry operations that fall within the statutory definition of an RFA forestry operation. That is the position being pursued by the EPBC Amendment (RFA) Bill, and one that the Commonwealth argued *against* in *Leadbeater's Possum v VicForests* (2018) 260 FCR 1.
- We do not agree that the court’s interpretation of section 38(1) in *Friends of Leadbeater’s Possum Inc v VicForests* is incorrect. The case was an opportunity to test the operation of subsection 38(1) (albeit with respect to a particular set of circumstances), and the Court construed the proper and intended operation of s38(1), including by reference to the text, context and purpose of the EPBC Act and the RFA Act. The Court’s findings should be accepted.

Not only is the Bill’s interpretation inappropriate, but it is also contrary to the clear need for standards and assurance to underpin EPBC Act reform as identified in *the Final Report* of the Independent Review of the EPBC Act. The *Final Report* made a series of recommendations for reform of the EPBC Act, including specifically in relation to the interaction between the EPBC Act and the RFAs.

In particular, **Recommendation 15** of the *Final Report* of the Independent Review of the EPBC Act recommended:

- a. The Commonwealth should immediately require, as a condition of any accredited arrangement, States to ensure that RFAs are consistent with the National Environmental Standards; and
- b. In the second tranche of reform, the EPBC Act should be amended to replace the RFA ‘exemption’ with a requirement for accreditation against the National

Environmental Standards, with the mandatory oversight of the Environment Assurance Commissioner.

The recommendation proposed by Professor Samuel seeks to establish an assurance requirement and framework to ensure RFAs are consistent with National Standards, and ultimately remove the exemption established by subsection 38(1). In contrast, the proposed Bill actually attempts to reduce standards and assurance from forestry activities in RFA areas. This is in despite of the recognised failures of the RFA accreditation model.

Conclusion

EDO has significant concerns with the ongoing operation of the RFAs, and in particular, the recent roll-over of RFAs in NSW and Victoria, in the absence of evidence that they are achieving the required environmental outcomes. These concerns are exacerbated by the continuation of the RFAs in the aftermath of the 2019-20 bushfires, without pausing to properly assess the impacts of those bushfires and to consider whether it is appropriate to retain the EPBC Act exemption. In these circumstances, the roll-over and ongoing operation of the RFAs is at odds with parallel work being undertaken by the Commonwealth to identify priority species that have been impacted by those fires (including those that are directly impacted by RFA forestry operations), and priority actions in response.

Given the ongoing concerns about the implementation of the RFAs and their ability to deliver environmental outcomes, the interaction between the EPBC Act and forestry operations carried out under RFAs must be reconsidered, and this should occur as part of legislative package of reforms that implement the recommendations of the *Final Report* of the Independent Review of the EPBC Act. We agree with the recommendations of the *Final Report* that clear standards and greater assurance are fundamental elements of any legislative amendment package.

In this context, **EDO makes the following recommendations:**

1. The *Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020* should not proceed.
2. In light of ongoing concerns about whether RFA forestry operations are achieving the intended environmental outcomes, these concerns being exacerbated in the wake of the 2019-20 bushfires, the interaction between the EPBC Act and forestry operations carried out under RFAs must be reconsidered.
3. Consistent with Recommendation 15 of the *Final Report* of the Independent Review of the EPBC Act, as part of a legislative package of reforms:
 - a. The Commonwealth should immediately require, as a condition of any accredited arrangement, States to ensure that RFAs are consistent with the National Environmental Standards; and
 - b. In the second tranche of reform, the EPBC Act should be amended to replace the RFA 'exemption' with a requirement for accreditation against the National Environmental Standards, with the mandatory oversight of the Environment Assurance Commissioner.