

**Australian Government Solicitor – Questions on Notice – Environment Protection and Conservation Amendment (Regional Forest Agreements) Bill 2020 inquiry - Senator McKenzie**

The *Environment Protection and Biodiversity Conservation (Regional Forest Agreements) Bill 2020* amends the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and *Regional Forest Agreements Act 2002* (RFA Act) to provide that forestry operations covered by a Regional Forest Agreement (RFA) are exempted from Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999*. The amendments are:

- a. EPBC Act: Subsection 38(1) – omit “that is undertaken in accordance with an RFA”, and
  - b. RFA Act: Subsection 6(4) – omit “that is undertaken in accordance with an RFA”.
1. Has the AGS provided legal advice to the Department of Agriculture, Water and the Environment (DAWE) on this Bill?
  2. Did AGS provide legal advice to the DAWE in the preparation of the Department’s submission to this inquiry?
  3. Has the AGS provided advice to Minister Ley or Assistant Minister Duniam on the legal implications of the Justice Mortimer decision in *FoLP v VicForests*?

**AGS response: The answer to each of Questions 1-3 is ‘Yes’. We have consulted with DAWE and they were content for us to disclose this information.**

4. Is it the AGS’s legal opinion that there is ambiguity regarding the interpretation of s38 (1), in particular, the wording “in accordance with an RFA”, as a result of Justice Mortimer’s decision?
5. Had the words proposed by the amendment been omitted in both Acts prior to Justice Mortimer’s ruling, would the ruling have been able to be made that VicForests’ forestry operations were no longer “in accordance with an RFA”?

**AGS response: Questions 4 and 5 appear to ask AGS to provide legal advice to the Committee. We refer to the general position that the Government’s legal advisers do not provide legal advice to the Parliament: see para 4.8.3 in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (February 2015).**

6. A DAWE factsheet<sup>1</sup> on RFAs published in 2015 contains the statement:

*Forestry operations in an RFA region are not subject to part 3 of the Environment Protection and Biodiversity Conservation Act 1999 or the requirement to licence wood exports under the Export Control Act 1982, thus removing the Australian Government from day-to-day forest management in recognition that:*

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<sup>1</sup> <https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/forestry/australias-forest-policies/rfa/rfa-overview-history.pdf>

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- *comprehensive regional assessments, conducted before each RFA was signed, addressed the economic, social and environmental impacts of forestry operations*
- *the CAR reserve system and ecologically sustainable forest management protect the environment*

- a) Is this statement correct, in particular the first part that says “Forestry operations in an RFA region are not subject to Part 3 of the EPBC Act”?

**AGS response:** To the extent that Question 6(a) asks AGS to provide legal advice to the Committee, we refer to the general position that the Government’s legal advisers do not provide legal advice to the Parliament: see para 4.8.3 in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (February 2015).

To the extent that Question 6(a) relates to administrative or policy matters, those are matters for the responsible Department. We note, in this respect, that DAWE’s answer to the Committee’s question ‘IQ21-000036’ addresses the above statement in the DAWE fact sheet.

- b) Does this statement reflect the Commonwealth’s intended interpretation of s 38 (1)?

**AGS response:** The Commonwealth’s intended interpretation of s 38(1) is a matter for the responsible Department.

7. If this Bill is passed, would:

- a. The original intention of RFAs be restored given the ambiguity created by Justice Mortimer’s ruling?
- b. The Australian Government remain able to continue its oversight to uphold environmental outcomes in accordance with the EPBC Act?

**AGS response:** To the extent that Questions 7(a) and (b) ask AGS to provide legal advice to the Committee, we refer to the general position that the Government’s legal advisers do not provide legal advice to the Parliament: see para 4.8.3 in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (February 2015).

To the extent that Questions 7(a) and (b) relates to administrative or policy matters, those are matters for the responsible Department.

- c. The Australian Government retain its ability to terminate or suspend a RFA?

**AGS response:** Question 7(c) appears to ask AGS to provide legal advice to the Committee. We refer to the general position that the Government’s legal advisers do not provide legal advice to the Parliament: see para 4.8.3 in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (February 2015).

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- d. The Australian Government's environmental standards that must be satisfied for a RFA to be agreed to by a state/territory and the federal government?

**AGS response: The meaning of Question 7(d) is not clear to us.**

8. Does DAWE's submission to the *Environment Protection and Conservation Amendment (Regional Forest Agreements) Bill 2020* inquiry contradict the position of the AGS made in their submission to the Federal Court case?

**AGS response: We understand the reference in Question 8 to 'the position of the AGS made in their submission to the Federal Court case' to mean the submissions of the Commonwealth (as represented by the then Department of Agriculture and Water Resources) as intervener in the proceedings on the separate question in *Friends of Leadbeater's Possum Inc v VicForests* (VID 1228 of 2017).**

**To the extent that Question 8 asks AGS to provide legal advice to the Committee, we refer to the general position that the Government's legal advisers do not provide legal advice to the Parliament: see para 4.8.3 in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (February 2015).**

**To the extent that Question 8 relates to administrative or policy matters, those are matters for the responsible Department.**

9. Given the Commonwealth's position in the original case, will the Commonwealth intervene in the appeal?

**AGS response: We understand the reference in Question 9 to 'the appeal' to mean the proceedings in *VicForests v Friends of Leadbeater's Possum Inc* (VID 615 of 2020). The Full Court hearing in those proceedings was held on 12-14 April 2021, and judgment is now reserved. The Commonwealth did not intervene.**