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Submission on the *Environment Protection and Biodiversity Conservation Amendment (Regional Forests Agreements) Bill 2020*

The World Wide Fund for Nature-Australia (WWF-Australia) welcomes the opportunity to contribute to the inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Regional Forests Agreement) Bill 2020* (the Bill).

WWF-Australia was deeply engaged in the development of the *Environment Protection and Biodiversity Conservation Act 1999* (the Act), and we contributed constructively to both 10-year independent statutory reviews of the Act (Hawke and Samuel Reviews). We have actively engaged with a range of business and industry stakeholders to explore opportunities for comprehensive and durable reform to the Act. We do so in the interests of advancing the restoration and protection of Australia's unique environment and biodiversity.

The Bill

Under the Regional Forests Agreements (RFAs) exemption clauses incorporated into the EPBC Act and the Regional Forest Agreement Act 2002 (RFA Act), the Commonwealth formally removes itself from any ongoing involvement in the assessment and approval of forest logging operations, and their impact on Matters of National Environmental Significance (MNES).

Regional Forest Agreements were intended to provide the framework for native forest management in Australia and for the needs of conservation and industry by establishing a Comprehensive, Adequate and Representative (CAR) Reserve System, sustainably managing areas available for logging outside of reserves and providing secure access to the forest resource for the native forest logging and log processing industry.

The purpose of the 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 Regional Forest Agreements from the requirements of Part 3 of the EPBC Act. Part 3 requires approval to be obtained before certain 'actions' are carried out.

As Senator McKenzie notes in her Second Reading speech, the Bill has been introduced to overcome the 2020 Federal Court decision, *Friends of Leadbeater's Possum Inc v VicForests* (No 4) [2020] FCA 704). 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 were undertaken in compliance with the Victorian system of forest management and regulation¹. This reasoning can be extended to apply to other RFAs in other jurisdictions. In the final decision in the

¹ *Friends of Leadbeater's Possum v VicForests* (2018) 260 FCR 1

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, 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.

Key Points

WWF-Australia does not support the Bill as it:

1. Ignores the findings of the Independent Review of the Act that “our natural environment is in an overall state of decline and the current environmental trajectory is unsustainable. And that the Act is ineffective and has failed to protect matters of national environmental significance”.
2. Seeks to continue the exemption of forestry operations from the jurisdiction of the EPBC Act, even when State regulatory regimes fail to protect Matters of National Environmental Significance.
3. Would have the effect of legitimising weak and permissive state-based forestry operations, as demonstrated in *Friends of Leadbeater’s Possum Inc v VicForests (No 4) [2020] FCA 704* by the widespread breaches by VicForests of the *Code of Practice for Timber Production 2014 (Vic)*.
4. Is inconsistent with Professor Samuel’s finding in the Final Report that “there are fundamental shortcomings in the interactions between RFAs and the EPBC Act” and the Commonwealth should “increase the level of environmental protection afforded in RFAs”.
5. Would continue the ranking of Eastern Australia as a global hotspot for deforestation and forest degradation.
6. Erodes the capacity of the Commonwealth to exercise its powers to reduce forest carbon emissions caused by forestry operations at a time when Australia needs to significantly cut carbon emissions under the Paris Agreement.
7. Limits the capacity of the Commonwealth to protect unburnt forests from forestry operations following the catastrophic bushfires of 2019-20.
8. Should not pre-empt both the Government Response to and stakeholder consultation on the Final Report of the Independent Review.

In his Final Report, Professor Samuel found that “the environmental considerations under the RFA Act are weaker than those imposed elsewhere for MNES”, and noted that:

- “there is insufficient Commonwealth oversight of RFAs and the assurance and reporting mechanisms are weak”;
- Environmental considerations under the RFAs “do not align with the assessment of significant impacts on MNES required by the EPBC Act”; and
- the Commonwealth relies solely on the States to undertake surveillance, compliance and enforcement, while not requiring reporting on the environmental outcomes of activities conducted under RFAs.

Professor Samuel recommended that the Commonwealth should “increase the level of protection afforded in Regional Forest Agreements”:

- 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.

- 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.²

WWF-Australia strongly supports Professor Samuel's finding that existing "Commonwealth oversight of environmental protections under RFAs is insufficient and immediate reform is needed. The National Environmental Standard for MNES should be immediately applied and RFAs should be subject to robust Commonwealth oversight."³ The Bill is inconsistent with Professor Samuel's findings and Recommendation 15.

WWF-Australia does not support forestry operations covered by a Regional Forest Agreement being exempted from Part 3 of the Act. Deforestation and forest degradation are a driver of biodiversity decline and forest carbon emissions in Australia. WWF-International identified Eastern Australia as a global hotspot for deforestation and forest degradation.⁴ Australia is the only developed nation identified as a deforestation front. The hotspot includes forests in which forestry operations occur in areas subject to a Regional Forest Agreement.

The Bill would exempt native timber harvesting from the jurisdiction of the Act in areas subject to a Regional Forest Agreement even when States fail to enforce environmental assessment and compliance regimes.

Whilst we strongly support Professor Samuel's findings, our view is that the proper response to *Friends of Leadbeater's Possum Inc v VicForests (No 4) [2020] FCA 704* should rather be for removal of the exemption of RFAs under subsection 38(1) of the Act.

The case highlights the significant impact forestry operations can have on threatened species protected under the Act due to the failure of State Government forestry agencies to comply with State statutory regimes designed to protect ecosystems and threatened species habitat. The Bill would enable weak and permissive State forestry compliance regimes to continue to degrade forest ecosystems and harm threatened wildlife.

The case also highlights multiple failures of a State forestry agency to comply with its own code of practice, and thereby to be in breach of s38(1) of the Act.

In respect of the statement in the Explanatory Memorandum to the Bill that:

Contrary to Justice Mortimer's finding, it has never been the intention of the parties to Regional Forest Agreements (Commonwealth and state governments) that harvesting operations would no longer be "in accordance with an RFA" for the purposes of subsection 38(1) of the EPBC Act in the event a forestry operation breaches state regulations, and that the EPBC Act would apply.(p2)

WWF-Australia considers that in instances where "a forestry operation breaches state regulations", Commonwealth regulatory oversight is essential to ensure it retains the power to

² Recommendation 15, Final Report of the Independent Review of the EPBC Act

³ Final Report of the Independent Review of the EPBC Act, p. 107.

⁴ Pacheco, P., Mo, K., Dudley, N., Shapiro, A., Aguilar-Amuchastegui, N., Ling, P.Y., Anderson, C. and Marx, A. 2021. *Deforestation fronts: Drivers and responses in a changing world*. WWF, Gland, Switzerland.

protect Matters of National Environmental Significance in accordance with its international responsibilities.

Further, the Bill's Explanatory Memorandum states that:

While rare, minor breaches of timber harvesting regulations occur occasionally, it would be impractical to have those forestry operations cease to be covered by the exemption from Part 3 of the EPBC Act and be required to seek approval under the EPBC Act – where approvals can take years – simply because of minor breaches.

This is despite Justice Mortimer holding that VicForests breached the Code of Practice for Timber Production 2014 (Vic) in 66 forestry coupes in Victoria's Central Highlands. This level of infraction of the Code does not satisfy the definition of being "rare, minor breaches".

The Bill would also remove legitimate third-party enforcement rights for community organisations seeking to enforce the Act when State Government forestry agencies fail to abide by environmental protection provisions in forestry operation codes.

Given the above, it is our view that this Bill represents an attempt to cherry-pick one part of the EPBC Act without consideration for more integrated reform that would address the rapidly declining state of Australia's environment and the views of all stakeholders. The Bill therefore provides the Committee with an opportunity to look more deeply at issues surrounding the Act, its effectiveness and operation, and to seek a full Government Response to Professor Samuel's Final Report and enable a transparent process of consultation with all stakeholders on his findings and comprehensive reform of the Act.

Recommendations

WWF-Australia submits:

1. That the Committee recommend that the Bill not proceed.
2. The Committee should recommend that the Government provide its Response to the Independent Review's Final Report and that a public consultation process for considering both the Final Report and Government Response should be established.