Midway Limited
ABN: 44005616044

T: +61 3 5277 9255
F: +61 3 5277 0667
enquiries.admin@midwaylimited.com.au

18 March 2021

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

ec.sen@aph.gov.au

Midway submission Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020

Summary

Midway strongly supports the Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020, and urges the Parliament to pass the Bill without delay.

The Bill makes a minor but necessary amendment to the EPBC Act to clarify the intended operation of s38 (3) of the Act regarding the exemption of forestry operations covered by a Regional Forest Agreement. The Bill also amends s6(4) of the RFA Act accordingly to ensure consistency across the two Acts.

The need for clarification has arisen following a Federal Court ruling last year that introduced an ambiguity to the operation of this provision, which has created considerable uncertainty for forestry operations around Australia covered by RFAs.

Our sustainable forestry operations need stability and policy certainty above all else, and we urge all sides of Parliament to work constructively with Senator McKenzie's Bill to ensure we get a good outcome for the tens of thousands of forest industry workers around Australia.

About Midway

Midway is an Australian forestry company based in Geelong, Victoria, with majority shareholdings in South West Fibre Pty Ltd (SWF) based in the Green Triangle (South West Victoria), Queensland Commodity Exports Pty Ltd (QCE) based in Brisbane, Plantation Management Partners (PMP) based in the Tiwi Islands, Midway Tasmania based in Tasmania, and Midway Logistics based in Western Australia.

Midway Limited
ABN: 44005616044

T: +61 3 5277 9255
F: +61 3 5277 0667
enquiries.admin@midwaylimited.com.au

What are Regional Forest Agreements?

Regional Forest Agreements (RFAs) are 20-year plans agreed between the Australian Government and a state government for the productive use and conservation of Australia's native forests.

RFAs were developed to provide a long-term solution to decades of debate about access to and use of Australia's forests. RFAs seek to balance competing economic, social and environmental demands on forests by setting obligations and commitments for forest management that deliver:

- Certainty of resource access and supply to industry
- Ecologically sustainable forest management
- An expanded and permanent forest conservation estate—to provide for the protection of Australia's unique forest biodiversity

Ten RFAs were progressively signed between 1997 and 2001 that cover commercial native forestry regions—five in Victoria, three in New South Wales and one each in Western Australia and Tasmania.

Under each RFA, the Australian Government has accredited the states' forest management systems to deliver ecologically sustainable forest management. Furthermore, the Australian and state governments measure, monitor and report on forests in RFA regions using internationally accepted criteria and indicators to assess the sustainability of forest management.

RFAs are required by law to be independently reviewed every five years, and all reviews conducted have found that they are meeting or exceeding all environmental objectives while providing a level of certainty to industry.

It is important to note that as part of the RFA process, between 1997 and 2001 around 3.3 million hectares of native forest previously available for timber production was transferred into conservation, predominantly through the establishment of the Comprehensensive Adequate Reserve (CAR) system.

The 10 RFA regions cover 39.2 million hectares of land, including 22.3 million hectares (18 per cent) of Australia's forests. The forests in RFA regions comprise 21.0 million hectares of native forest and 1.3 million hectares of plantation forest.

Of the 22.3 million hectares of forests in RFA regions, 30 per cent are multiple-use public forests (i.e. available for timber production), and only a very small area – 70,000 hectares annually – is harvested each year and must then be regenerated.

Midway Limited
ABN: 44005616044

T: +61 3 5277 9255
F: +61 3 5277 0667
enquiries.admin@midwaylimited.com.au

Under each RFA, the CAR reserve system is the primary mechanism to provide for the protection of biodiversity, old-growth forests and wilderness values, and is complemented by the ecologically sustainable management of multiple-use public forests in each RFA region.

As DAWE's own advice[1] about RFAs explains, "Changes to the management of threatened species under the Environment Protection and Biodiversity Conservation Act 1999 or state-based legislation can be incorporated into public forest management frameworks without requiring a change to the RFAs."

Australia's native hardwood timber industry has been warning for months that their future is uncertain because of a Federal Court decision in May 2020 which took a new interpretation of how Regional Forest Agreements operate, and how they interact with the EPBC Act.

s38 (1) of the EPBC Act

Forestry operations covered by an RFA have – since the introduction of the EPBC Act – been exempt from Part 3 of the Act through a clause in s38 of the EPBC Act which states:

https://www.legislation.gov.au/Details/C2014C00506

38 Part 3 not to apply to certain RFA forestry operations

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

The intent of the Commonwealth and states for the s38 provision has always been for it to be interpreted to mean "any forestry operation that happens in an RFA area".

A central objective of the RFA framework and s38 provision is to reduce uncertainty, duplication and fragmentation in government decision-making by producing a durable agreement on the management and use of forests.

This not only facilitates timely land use planning and development approval decisions; it also protects environmental, heritage and cultural values and provide industry with secure access to forest resources.

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

Midway Limited
ABN: 44005616044

T: +61 3 5277 9255
F: +61 3 5277 0667
enquiries.admin@midwaylimited.com.au

The rationale for the s38 EPBC Act provision was recognition 'that in each RFA region a comprehensive assessment … has been undertaken to address the environmental, economic and social impacts of forestry operations.' (Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1999, para [113].)

Are forestry operations 'exempt' from national environmental laws?

It is important to note that native forestry operations are not exempt from environmental laws or Commonwealth oversight. Rather, the Commonwealth delegates this function to the states and in turn the states have developed robust regulatory frameworks which are often more onerous than the EPBC Act but designed to be responsive to how forestry operations work.

This operates in much the same way as the National Environmental Standards recommended by the Samuel Review of the EPBC Act. In fact, in the discussion paper that preceded the review, RFAs were used as an example of the successful implementation of such bilateral agreements.

The RFA framework is such that the Commonwealth accredits the State Government's regulatory framework to ensure there is independent oversight of forestry operations and robust powers to conduct audits and impose sanctions if forestry operations breach regulations. All the RFAs include accreditation of systems for achieving ecologically sustainable forest management.

Furthermore, as previously noted, RFAs are required by law to be independently reviewed every five years, and all reviews conducted have found that they are meeting or exceeding all environmental objectives while providing a level of certainty to industry.

Friends of Leadbeater's Possum vs VicForests

As mentioned earlier, this Bill is urgently needed to address an ambiguity created by a Federal Court ruling last year, *Friends of Leadbeater's Possum vs VicForests*[2]. VicForests is a State-owned business responsible for the harvest, commercial sale and re growing of timber from Victoria's State forests on behalf of the Government.

0n 27 May 2020 the Federal Court's Justice Debra Mortimer handed down her judgment in a case brought by the Friends of Leadbeater's Possum environment group against VicForests, regarding harvesting operations in the Central Highlands.

[2] https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0704

Midway Limited
ABN: 44005616044

T: +61 3 5277 9255
F: +61 3 5277 0667
enquiries.admin@midwaylimited.com.au

The judge found that VicForests' harvesting operations in 22 coupes between 2016-18, which included Greater Glider and Leadbeater's Possum habitat, breached Victoria's Code of Practice for Timber Production 2014 (the Code).

In doing so, Justice Mortimer found the operations were no longer "in accordance with a Regional Forest Agreement" (ie the Central Highlands RFA, one of five RFAs in Victoria) as required by the EPBC Act. Consequently, the judge found that the operations in question were no longer exempt from the EPBC Act. VicForests has appealed the decision, however, the appeal could take considerable time to conclude.

On 27 July the Victorian Government announced it would be reviewing the Code, in part to "minimise the risk to short-term supply obligations arising from third-party litigation". This will address the first difficulty created by the judgment, but the ambiguity around the operation of s38 (1), and what it means to be "in accordance with an RFA", but also be addressed concurrently.

National implications of the Federal Court decision and the need to clarify s38 (1)

The Federal Court decision has set a precent for future harvesting operations in Victoria and potentially for RFAs in other states. The judge's finding that by breaching the code the harvesting operations were no longer exempt from the EPBC Act has created the potential for legal challenges from anti-forestry activist groups in other RFA jurisdictions.

Already, the Bob Brown Foundation recently (unsuccessfully) challenged the Tasmanian RFA in the Federal Court, and has flagged an appeal to the High Court. Midway anticipates that there will be further legal challenges to the RFAs unless the Commonwealth and states act to address the legal ambiguity that the Victorian decision has raised.

However, in her judgment Justice Mortimer interpreted this provision to mean that VicForests' forestry operations in question were not conducted "in accordance with" the Central Highlands RFA because they had or would breach the state Code that regulates timber harvesting, and therefore lose the s38 exemption. From the judgment:

> *… where a regulatory mechanism such as the Code [*Code of Practice for Timber Production 2014] *has a direct bearing on the conduct of forestry operations, then the intention of s 38 and the RFA Act, read with (relevantly here) the CH [Central*

Midway Limited
ABN: 44005616044

T: +61 3 5277 9255
F: +61 3 5277 0667
enquiries.admin@midwaylimited.com.au

Highlands] RFA, is that forestry operations must be undertaken "in accordance" with such a regulatory mechanism to maintain the benefit of the exemption in s 38.

I found (at [202]) that the phrase "in accordance with" meant "consistently with" or "in conformity with". In this way, the EPBC Act, the RFA Act and the RFAs create a substitute regime of regulation not intended to be any less effective in protecting matters of national environmental significance than the scheme in the EPBC Act itself.

Midway does not agree with this interpretation of s38 (1), and it is one of the grounds of VicForests' appeals. Contrary to the judge's finding, it has never been the intention of the parties (Commonwealth and State) to an RFA that harvesting operations would no longer be "in accordance with an RFA" for the purposes of the Act in the event a forestry operation breaches state regulations. While such a determination could eventually be made, the RFAs themselves set out a clear process for these matters to be resolved between the parties, including Dispute Resolution provisions.

For example, The Central Highlands RFA's dispute resolution clause state:

Dispute Resolution

9. The Parties agree that if a dispute arises between the Parties regarding this Agreement it must be resolved expeditiously in accordance with the provisions of clauses 10 to 14.

10. When a dispute arises, a Party may serve a notice on the other specifying:

(a) the nature and substance of the matter or issue in dispute; and

(b) that it is a dispute to be resolved in accordance with clauses 10 to 14.

11. Within 14 days of the notice under clause 10 being served the Parties must attempt to settle the dispute and, in default of settlement, appoint a mediator to conduct a mediation concerning the matter or issue in dispute.

12. If the dispute is not settled under clause 11 and the Parties fail to appoint a mediator, either of them may request the President of the Law Council of Australia, or the equivalent officer of such body as in future may have the functions of the Law Council of Australia, to nominate a mediator to conduct the mediation.

13. The costs of a mediator appointed under clauses 11 or 12 are to be shared equally between the Parties.

Midway Limited
ABN: 44005616044

T: +61 3 5277 9255
F: +61 3 5277 0667
enquiries.admin@midwaylimited.com.au

14. Each of the Parties agrees to use its best endeavours to resolve the dispute through mediation.

Certainly, it was never understood that the s38 (1) exemption would be automatically lost as a result of a court ruling. Such a reading of the Act introduces enormous uncertainty for forestry operations covered by an RFA, and the EPBC Act is not designed to deal with the volume of coupe-by-coupe forestry operations that would result if they were required to seek approval under the Act.

Requiring forestry operations to seek Environment Protection and Biodiversity Conservation Act 1999 approval would create operationally unviable delays in planned harvesting operations that have already been subjected to significant environmental planning and approvals and create congestion in the EPBC Act approvals pipeline.

Furthermore, such an interpretation shows a fundamental misunderstanding of how forestry operations are conducted and how they are regulated. While rare, minor breaches of timber harvesting regulations occur occasionally. It would be impractical to have those forestry operations declared invalid and be required to seek approval under the EPBC Act – where approvals can take years – simply because of minor breaches. The RFA framework never intended this to be the case.

Crucially, Justice Mortimer in her judgment does not articulate clearly under what circumstances a breach would result in the loss of the s38 (1) exemption. It is this ambiguity which Senator McKenzie's amendment addresses.

How the Bill addresses the uncertainty

The purpose of this Bill is to clarify the intended operation of s38 of the EPBC Act, to make it clear that the provision exempts forestry operations covered by Regional Forest Agreements (RFAs) from the EPBC Act.

The Bill makes necessary amendments to the EPBC Act and RFA Act to clarify the meaning of forestry operations covered by RFAs and by s38 of the EPBC Act. The Bill's amendments will put beyond any doubt that the EPBC Act is intended to exempt forestry operations covered by an RFA.

In doing so, the Bill will provide much-needed certainty for Australia's native forestry operations, which are almost entirely covered by RFAs.

Forestry operations covered by an RFA have – since the introduction of the EPBC Act – been exempt from the Act through a clause in s38 of the EPBC Act which states:

Midway Limited
ABN: 44005616044

T: +61 3 5277 9255
F: +61 3 5277 0667
enquiries.admin@midwaylimited.com.au

38 Part 3 not to apply to certain RFA forestry operations

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

The intent of the Commonwealth and RFA signatory states for the s38 provision has always been for it to be interpreted to mean “any forestry operation that happens in an RFA area".

This Bill will affirm and clarify the Commonwealth’s intent regarding RFAs, to make it explicitly clear that forestry operations in an RFA region are exempt from the Act, and that compliance matters are to be dealt with through the state regulatory framework and do not invalidate the RFA provisions.

This is achieved by removing the ambiguity of what it means to be “undertaken in accordance with an RFA”, which the Federal Court decision has shown is not explicit with respect to the Commonwealth’s intended meaning.

This Bill amends the s 38 provision of the EPBC Act thus:

s 38(1) Part 3 does not apply to an RFA forestry operation ~~that is undertaken in accordance with an RFA~~.

The Bill also amends s6(4) of the RFA Act accordingly to ensure consistency across the two Acts.

*Noting that the term ‘RFA forestry operation’ is already defined in the EPBC Act and RFA Act as:

RFA forestry operations means:

(a) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and New South Wales) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or

(b) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Victoria) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or

(c) harvesting and regeneration operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Western Australia) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or

Midway Limited
ABN: 44005616044

T: +61 3 5277 9255
F: +61 3 5277 0667
enquiries.admin@midwaylimited.com.au

(d) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA).

Forest industry workers need certainty

Senator McKenzie's Bill seeks to provide much-needed certainty for Australian forest industry workers. Midway employs over one thousand harvest, haulage, and timber mill workers across the supply chains in regional towns across most Australian states who are anxious about the long-term future of their industry.

Since the court ruling in May 2020, we have already seen a similar legal challenge to the Tasmanian RFA by the Bob Brown Foundation, and the threat of many more legal challenges by anti-forestry groups around Australia.

Anti-forestry groups are using the Victorian and Tasmanian cases as a call to arms to shut down the industry, and vow to launch more legal challenges against RFAs[3].

The Commonwealth must act urgently to resolve this uncertainty to ensure that the tens of thousands of jobs that depend on Australia's native forestry operations are not exposed to the sort of crisis now facing Victoria's native hardwood sector. This amendment will achieve this outcome. We would hope the Government and Opposition – who all support the RFA framework – support this Bill.

[3] https://www.abc.net.au/news/2020-05-27/leadbeaters-possum-federal-court-rules-vicforests-logging-breach/12292046

Midway Limited
ABN: 44005616044

T: +61 3 5277 9255
F: +61 3 5277 0667
enquiries.admin@midwaylimited.com.au

While this amendment could be dealt with as part of the Government's broader EPBC Act reforms currently before Parliament, to date the Government has not agreed with industry's position that the Act needs to be amended to address the uncertainty. Midway remains open to work with the Government on any alternative approach that achieves the same objective. In the absence of an alternative proposal, Midway urges the Parliament to support Senator McKenzie's Bill.

Yours sincerely

Mr Tony Price
Managing Director
Midway Limited