



TIMBER NSW

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30 April 2021.

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Supplementary Submission to Senate Standing Committee on Environment and Communications

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

Timber NSW response to questions raised in Senate Hearing 19 April 2021.

Questions were raised in the Senate Hearing held on 19 April 2021 of Stuart Coppock representing Timber NSW concerning the Samuel Recommendation concerning the review of the EPBC Act and the Recommended National Environment Standards published in October 2020, Appendix B3- Recommended National Environment Standard for Compliance and Enforcement.

The content of the Recommended National Environment Standard for Compliance and Enforcement. To assist the reader Schedule 1 of this Supplementary Submission sets out the Recommendations.¹

The Recommended National Environment Standard for Compliance and Enforcement (RNESCE) has a different content than that suggested regarding subsection 38(1) of the EPBC Act. The RNSECE looks to compliance with provisions of the EPBC Act through a new agency which looks to outcomes whilst the suggestion of Timber NSW has to do with the process of a forestry operation. It could be argued that 'acting in accordance with' as a compliance requirement goes to an outcome. Certainly, the failure of a forestry operation to 'act in accordance with' a Regional Forest Agreement (RFA) can be seen as an outcome. However, what Timber NSW is putting forward is that the 'give and take' principle regarding compliance is a behavioral and professional standard that needs to be applied in the process of compliance. Timber NSW is not seeking to exempt any forestry operation from the EPBC Act

¹ Material copied off this website on 28 April 2021: <https://epbcactreview.environment.gov.au/resources/final-report/appendix-b3-compliance-and-enforcement>

or any possible RNSECE. Rather, what is being mooted is the introduction of a statutory standard in how the 'in accordance with' test is to operate to account for the variability of field operations.

The professional standard to introduce as a statutory test could be one that is like the 'business judgement rule contained in Corporations Act 2001, section 180(2). Introduced in 2000, the Business Judgement Rule intended to clarify the perceived subjective interpretation of the obligations of directors to exercise skill and care in their duties. The point about this legislation is it does not remove a director's duty of care. The provision in part provides a defense that a decision was made in good faith for a proper purpose and the judgment made was in the best interests of the exercise of that duty of care.

Under a possible similar measure, a forestry operation conducted in the field must be compliant with the provisions of an RFA, so in NSW this means abiding by the Coastal Integrated Forestry Operations Agreement (IFOA) on public land and the relevant Private Native Forestry Code of Practice on private land. These instruments are respectively governed by State based legislation, namely, the Protection of the Environment Operations Act, the Biodiversity Conservation Act, the Environmental Planning and Assessment Act, the Forestry Act the Local Land Services Act and the Commonwealth's EPBC Act, along with judgements of the NSW Land and Environment Court.

However, a defence in any litigation would exist if the conduct were carried out in the exercise of skill and care that is the best practice in the field of forestry and that the judgement exercised in the alleged subject of any litigation met that standard. Importantly, such a statutory rule would not remove compliance or any enforcement proceedings. Rather, it would ensure a defense that the highest possible standard of duty of care and judgment was exercised in the circumstance.

Such a measure goes to the conduct of the compliance and not the outcome of the failure of any compliance standard.

We hope this and the following table clarifies the questions asked of Timber NSW.

Employment Numbers - NSW

A request was made for employment data in the forestry industry.

General commentary tends to lump all figures into one statistic. This is misleading. Recognition needs to be made of the softwood forestry industry (plantations) and the native forestry industry (hardwoods).

The next issue is the manner in which employment figures are collected and collated. ABARE categories of employment figures are very narrow and can be misleading as to how many people are actually employed. For an example three of the larger companies in the hardwood sector within NSW employ over 1,000 people located across the State. The ABARE employment figures would not pick up this data. The same applies to the large softwood companies.

The only means to collect relevant data is to undertake studies of each entity operating in the timber sector to see what they do, where they operate and then add up the number of employees.

A study that is recent and attempts an exercise like this but only for the North Coast is the Ernst and Young Report for the Forest Industries undertaken in 2019.

Kind regards

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General Manager
Timber NSW/ T/A NSW Forest Products Association

Schedule 1

Extract

Final Report

Appendix B3 - Recommended National Environmental Standard for Compliance and Enforcement

October 2020

| Element | Description |
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| Environmental Outcome | <p>The EPBC Act requirements, and those under accredited arrangements, are complied with and enforced so that matters covered by the EPBC Act are protected.</p> <p>Decisions demonstrate integrity, consistency and transparency to foster public trust in compliance and enforcement activities.</p> |
| National Standard | <ol style="list-style-type: none"> 1. Compliance and enforcement functions must have robust governance arrangements that ensure: <ol style="list-style-type: none"> a. independence from actual, perceived or implied political influence, b. risk focused prioritisation of activities towards achievement of the objects of the Act and the National Environmental Standards, c. management of conflict(s) of interest, including avenues for the public to raise concerns and for those concerns to be transparently responded to, d. compliance and enforcement is proportionate to the seriousness of identified non-compliance, e. the level of compliance effort provides adequate certainty of breaches being detected and acted upon to achieve an effective deterrent against non-compliance, f. adequate resourcing for efficient and effective operation of the elements of this National Environmental Standard, and g. adequate training of staff on the requirements of the EPBC Act and accredited arrangements associated with compliance and enforcement. 2. Compliance and enforcement functions must be supported by legislation, legal capability and capacity that ensures: <ol style="list-style-type: none"> a. a comprehensive suite of legal powers and penalties that at a minimum align with the |

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| | <p>EPBC Act, and provide assurance that this National Environmental Standard is being met,</p> <ol style="list-style-type: none"> b. an ability to intervene before potential environmental harm occurs and respond to potential or actual harm in a timely manner, c. information sharing of the compliance and enforcement activities with any Commonwealth oversight functions, and d. there is adequate resourcing for litigation to ensure legal enforcement actions are not constrained. <p>3. Compliance and enforcement functions must have the following monitoring, intelligence and analytical capabilities:</p> <ol style="list-style-type: none"> a. surveillance and investigation systems that can detect and respond to potential non-compliance across the jurisdiction, b. on-the-ground, remote sensing and electronic communications surveillance options to detect non-compliance where necessary, c. a risk-based focus toward both current and future risks to non-compliance, d. clear avenues for public reporting of potential non-compliance and processes to ensure public reports are responded to in a timely manner, and e. collaborative arrangements with other agencies to gather intelligence, where appropriate, and with adequate consideration of relevant laws, implied duties of confidence and avoiding prejudice to persons being investigated for offences. <p>4. Compliance and enforcement functions must have the following investigations and decision-making capabilities:</p> <ol style="list-style-type: none"> a. risk-based procedures for escalation and actions, focused on activities with the highest risk of non-compliance or environmental harm, b. mechanism(s) to ensure that similar cases, or those that result in cumulative harm, be managed in a consistent manner commensurate with the environmental risk to matters protected under the EPBC Act and potential benefit gained from non-compliance, c. for minor non-compliance, have regard to an individual's or organisation's willingness to return to compliance and their specific circumstances, d. internal tracking and record keeping of investigations and decision-making, and e. meet published timeframes for resolution of investigations and decision-making. <p>5. Compliance and enforcement functions must have escalation procedures for serious non-compliance that include clear and viable paths to enforcement, including:</p> |
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| | <ul style="list-style-type: none"> a. the use of administrative actions, civil procedures and criminal prosecutions, and b. ensuring remediation orders that repair environmental damage are used when monetary penalties are unlikely to provide adequate disincentive. <p>6. Compliance and enforcement functions must have complaint resolution capability and capacity that:</p> <ul style="list-style-type: none"> a. enables timely escalation and resolution of private and third party complaints about compliance and enforcement activities. This includes avenues to escalate to the relevant Commonwealth oversight functions, and b. provides clear avenues for legal review equivalent to those for applicable compliance and enforcement decisions under the EPBC Act. <p>7. Compliance and enforcement functions must have transparency, communication and accountability systems that ensure:</p> <ul style="list-style-type: none"> a. published materials clearly explain compliance obligations to support voluntary compliance, b. transparency and accountability are consistent with the Commonwealth's confidentiality and information handling requirements under relevant legislation, such as the <i>Privacy Act 1988</i> (Cth), c. up-to-date public registers of resolved potential compliance and enforcement actions, and d. an ability for the public to request information through clear policies and published processes. <p>8. Compliance and enforcement functions must support collaboration including:</p> <ul style="list-style-type: none"> a. data-sharing relationships with relevant organisations where appropriate within the restrictions of relevant laws, and b. processes for escalation to relevant Commonwealth oversight functions in cases where a systemic risk to matters protected under the EPBC Act is identified that is unable to be resolved by the Commonwealth or accredited party in a timely manner. |
| <p>Monitoring and Reporting</p> | <ul style="list-style-type: none"> 1. Accurate and complete monitoring and compliance records must be maintained, provided annually to the Commonwealth except where otherwise agreed, and provided upon request to any relevant Commonwealth oversight functions. 2. Publish release an annual report outlining performance against all the elements of this National Environmental Standard and priorities for the following year. 3. Maintain an up-to-date public compliance register showing activities and outcomes of decisions taken. |

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| Review | This National Environmental Standard should be reviewed and updated regularly, including when there are substantive changes to the EPBC Act or relevant administrative arrangements, or major events that may impact the status of protected matters. |
| Further information | <p><i>Privacy Act 1988</i></p> <p><i>Regulatory Powers (Standard Provisions) Act 2014</i></p> <p>OECD Best Practice Principles for Regulatory Policy 2014</p> <p>OECD Regulatory Enforcement and Inspections Toolkit 2018</p> |

This Standard should be applied in conjunction with all other relevant National Environmental Standards.

Definitions

Commonwealth oversight functions: Includes but is not limited to the Environment Assurance Commissioner and legislated Commonwealth oversight bodies such as the Australian National Audit Office.

Legal powers and penalties: Legal powers and penalties are defined in the EPBC Act, and include injunctions (Division 14), directed environmental audits (Division 12), civil and criminal penalties including liabilities for executive officers of a body corporate (detailed throughout Part 3 for each protected matter), remediation of environmental damage (Divisions 14A and 14B), enforceable undertakings (Sections 486DA and 486DB), and the ability to publicise contraventions.

Objects of the EPBC Act: see Section 3 of the EPBC Act.