Regional Forest Agreements

1.1 On 18 June 2008, the Senate referred to the committee an inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (the full terms of reference are in Appendix 1). The Senate agreed that the committee could table a first report by 18 March 2009 and a final report on 24 April 2009. This is the final report of the committee.

1.2 The committee's first report addressed the bulk of the terms of reference, however the effectiveness of Regional Forest Agreements in protecting conservation values is a particularly complex and contentious policy issue. The committee needed additional time to consider the evidence on this subject, and to seek further advice from the Department of Agriculture, Fisheries and Forests (DAFF). The committee is grateful to officials from DAFF for their responses to the committee's questions.

The origin of Regional Forest Agreements

1.3 In 1992, the Commonwealth and state and territory governments jointly released the National Forest Policy Statement (NFPS). The statement outlines agreed objectives and policies for the future of both public and private forests in Australia:

- To maintain an extensive and permanent forest estate
- To manage that estate in an ecologically sustainable manner, and
- To develop internationally competitive and ecologically sustainable forest-based industries that maximise value-adding opportunities and efficient use of resources.[1]

1.4 The NFPS arose as a result of ongoing disagreement between federal and state governments over forest resource management; conflict between environmentalists and the forest industry; and a desire by the federal government to implement its international obligations with regard to nature conservation in Australia.[2]

1.5 The introduction of Regional Forest Agreements (RFAs) represented a key element in the implementation of the NFPS.[3] The NFPS included agreement to

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1 Department of Environment, Water, Heritage and the Arts, *Submission 85*, pp 61-62.

2 Bill Slee, 'Resolving production-environment conflicts: the case of the Regional Forest Agreement Process in Australia', *Forest Policy and Economics*, vol. 3, 2001, pp 17-30; Marcus Lane, 'Regional Forest Agreements: Resolving resource conflicts or managing resource politics?', *Australian Geographical Studies*, vol. 37, no. 2, pp 142-153; Marcus Lane, 'Decentralisation or privatisation of environmental governance? Forest conflict and bioregional assessment in Australia', *Journal of Rural Studies*, vol. 19, 2003, pp 283-294.

3 DAFF, About RFAs, http://www.daff.gov.au/rfa/about/why (accessed 16 January 2009); Bill Slee, 'Resolving production-environment conflicts: the case of the Regional Forest Agreement Process in Australia', *Forest Policy and Economics*, vol. 3, 2001, pp 17-30.

undertake 'comprehensive regional assessments', the results of which would enable the Commonwealth and the states to 'reach a single agreement relating to their obligations for forests in a region'.[4] These agreements would:

> accredit the comprehensive regional assessment for the purpose of evaluating forest resource use impacts of proposed development projects, provided those developments do not require substantial alteration to the agreed forest management guidelines for the region.[5]

1.6 The introduction of RFAs was one of several strategies intended to address forest resource conflicts, following earlier attempts such as 'Environmental impact assessment, public inquiries (instituted under both state and federal legislation), and inquiries by new agencies (such as the Commonwealth's Resource Assessment Commission)'.[6] Collectively, the RFAs around Australia provide a blueprint for the management of forest resources, as well as 'the basis for an internationally competitive and ecologically sustainable forest products industry'.[7]

1.7 To establish a RFA, a state or territory must invite the Commonwealth to enter into the agreement and that invitation must be accepted. The process for developing RFAs involved five key steps:

- An agreement to defer forestry activities in six million hectares of Australian forests, allowing them to be assessed for conservation value.[8] This assessment was made using what were called the JANIS criteria: which are 'national criteria for the conservation of biodiversity, old growth forest and wilderness'.[9] This interim protection was over-ridden once areas of high conservation value were reserved.
- A scoping agreement between the Commonwealth and relevant state government to establish the parameters including 'government obligations, regional objectives and interests, and broad forest uses, as well as the nature and scope of the forest assessment'.[10] The scoping agreement for each region also examined the estimated cost of the agreement process; arrangements for

4 National Forest Policy Statement, 1995, p. 21.

5 National Forest Policy Statement, 1995, p. 22.

6 Marcus Lane, 'Regional Forest Agreements: Resolving resource conflicts or managing resource politics?' *Australian Geographical Studies*, vol. 37, no. 2, pp 142-153.

7 Angus Martyn, Regional Forest Agreements Bill 2002, Bills Digest No. 91, Parliamentary Library, Canberra, 2001-02.

8 Gary Musselwhite and Gamini Herath, 'Australia's regional forest agreement process: analysis of the potential and problems', *Forest Policy and Economics*, Vol. 2, 2005, p. 582.

9 NSW National Parks and Wildlife Service and Environment Australia, *JANIS and natural national estate conservation requirements*, 4 May 1998, http://www.daff.gov.au/__data/assets/pdf_file/0004/49189/nsw_ed_ne35eh.pdf (accessed 31 March 2009), p. 3.

10 DAFF, RFAs- How?, http://www.daff.gov.au/rfa/about/how (accessed 31 March 2009).

consultation with industry and the public; and an administrative framework for managing assessments and negotiating the agreement.[11]

- The conduct of a comprehensive regional assessment (CRA) of forest values using the nationally agreed JANIS criteria.[12] Each CRA was conducted on a regional basis and sought to detail the environmental, economic and social values of, as well as community and industry aspirations for a forest region.[13]
- The integration of information from the ecological, economic and social assessments arising from the CRA process. In most cases, a steering or management committee comprising state and Commonwealth representatives and in some instances stakeholders, conducted integrative analysis.[14]
- Negotiation between the Commonwealth and relevant state government to finalise the details of the RFA. Draft agreements were released for public comment. The final RFA for each region was then signed by the Commonwealth and the state.[15] The process included the identification and reservation of areas that became parts of the CAR reserve system.[16]

1.8 In practical terms, one of the intentions of RFAs is to enable forestry activities to be undertaken in a region without the requirement for environmental impact assessment for every individual action. Thus the EPBC Act allows for forestry operations subject to a RFA to be exempt from seeking environmental approval under Part 3 of the Act.

1.9 The *Regional Forest Agreements Act 2002* gives legislative effect to certain provisions of the Commonwealth-State RFAs which had previously not been legally binding.[17] The Act arose partly in response to legal advice obtained in 1998 by Senator Bob Brown that concluded that the Tasmanian RFA was a statement of intent only and had no legal effect.[18] One of the consequences of this legal opinion, if

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11 Marcus Lane, 'Decentralisation or privatisation of environmental governance? Forest conflict and bioregional assessment in Australia', *Journal of Rural Studies*, vol. 19, 2003, pp 283-294.

12 DAFF, RFAs- How? http://www.daff.gov.au/rfa/about/how (accessed 31 March 2009).

13 Marcus Lane, 'Decentralisation or privatisation of environmental governance? Forest conflict and bioregional assessment in Australia', *Journal of Rural Studies*, vol. 19, 2003, pp 283-294.

14 Marcus Lane, 'Decentralisation or privatisation of environmental governance? Forest conflict and bioregional assessment in Australia', *Journal of Rural Studies*, vol. 19, 2003, pp 283-294.

15 Marcus Lane, 'Decentralisation or privatisation of environmental governance? Forest conflict and bioregional assessment in Australia', *Journal of Rural Studies*, vol. 19, 2003, pp 283-294.

16 Jan McDonald, 'Regional Forest (Dis)Agreements: The RFA process and sustainable forest management', *Bond Law Review*, Vol. 11, No. 2, 1999, p. 313.

17 Angus Martyn, Regional Forest Agreements Bill 2002, Bills Digest No. 91, Parliamentary Library, Canberra, 2001-02.

18 Angus Martyn, Regional Forest Agreements Bill 2002, Bills Digest No. 91, Parliamentary Library, Canberra, 2001-02.

correct, was that the compensation provisions of RFAs would not be legally enforceable.[19] Senator Robert Hill explained the government's rationale for the Bill:

> Only part three of the Tasmanian and Central Highland RFAs is expressed to be legally binding. The primary reason for the legislation is to give effect to some key provisions which are not expressed to be legally binding…thereby providing greater certainty about the operations of RFAs.[20]

1.10 Further government statements at the time indicated that concerns about the legal enforceability of the compensation provisions were a key motivating factor:

> …the Commonwealth has introduced its Regional Forest Agreement Bill, to ensure that the compensation provisions of RFAs are legally enforceable against the Commonwealth.[21]

1.11 The first RFA, for East Gippsland, was signed between the Commonwealth and Victorian governments on 3 February 1997.[22] There are now ten Regional Forest Agreements:

- East Gippsland Victoria, 1997
- Tasmania, 1997
- Central Highlands Victoria, 1998
- Western Australia, 1999
- North East Victoria, 1999
- Eden New South Wales, 1999
- West Victoria, 2000
- Gippsland Victoria, 2000
- North East New South Wales, 2000 and
- Southern New South Wales, 2001.[23]

1.12 Variations to a signed RFA can be made and are achieved by mutual agreement by the Commonwealth and the state. The committee understands that there

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19 Angus Martyn, Regional Forest Agreements Bill 2002, Bills Digest No. 91, Parliamentary Library, Canberra, 2001-02.

20 Senator the Hon Robert Hill, *Senate Hansard*, 28 May 1998, p. 3438.

21 The Hon Wilson Tuckey, 'WA Conservation Council legal opinion misses the point', Press Release, 28 June 1999.

22 DAFF, RFAs, http://www.daff.gov.au/rfa/regions/vic-eastgippsland/rfa. Accessed 28 February 2009 (accessed 16 January 2009).

23 DAFF, Map of RFA regions, http://www.daff.gov.au/rfa/regions/map (accessed 25 March 2009).

have been only two variations, both to the Tasmanian RFA, one in 2001 and another in 2007.[24]

1.13 The RFA Act requires that annual reports and reports on five yearly reviews of the implementation of RFAs be tabled in parliament by the Commonwealth minister.[25] Each of the current RFAs contain clauses requiring a performance review for each five year period of the agreement.[26] Despite these provisions, the committee understands that only in the Tasmanian case have these reviews been undertaken.

1.14 The Tasmanian RFA has undergone two five-yearly reviews, in 2002 and 2008.[27] The first review of the Tasmanian RFA was undertaken by the Tasmanian Resource Planning and Development Commission (RPDC) whilst the second was independently conducted by Mr John Ramsay, who was jointly appointed by the Commonwealth and Tasmanian Governments.[28] The RPDC review report made 30 recommendations 'to ensure continued progress and improvement, where needed, in implementation of the RFA'.[29] The second review reported on 'progress against the agreed milestones and commitments contained in the 1997 Tasmanian Regional Forest Agreement, the 2005 Tasmanian Community Forest Agreement and the recommendations arising from the first Review conducted by the Tasmanian Resource Planning and Development Commission in 2002'.[30]

1.15 The committee notes that a scoping agreement between the Commonwealth and New South Wales governments for the first five year review of the three RFAs in that state was entered into in 2008.[31]

RFAs and the protection of biodiversity and threatened species

1.16 According to the Department of Agriculture, Fisheries and Forestry (DAFF):

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24 DAFF, Tasmanian RFA, http://www.daff.gov.au/rfa/regions/tasmania/rfa (accessed 26 March 2009).

25 *RFA Act 2002*, s 10(4) – (7).

26 For example, see clauses 38-41 of the NSW Eden Region RFA and clauses 45-47 of the Tasmanian RFA.

27 DAFF, Tasmanian RFA reviews and annual reports, http://www.daff.gov.au/rfa/publications/annual-reports/tasmania (accessed 26 March 2009).

28 Tasmanian Department of Infrastructure, Energy and Resources, Regional Forest Agreement, http://www.dier.tas.gov.au/forests/tasmanian_regional_forest_agreement_rfa/regional_forest_agreement (accessed 26 March 2009).

29 DAFF, Tasmanian RFA – first five yearly review, http://www.daff.gov.au/rfa/publications/annual-reports/tasmania/first-review (accessed 26 March 2009).

30 John Ramsay, *Report to the Australian and Tasmanian Governments on the Second Five Yearly Review of Progress with Implementation of the Tasmanian Regional Forest Agreement*, February 2008, p. 1.

31 DAFF, NSW RFA first five yearly review scoping agreement, http://www.daff.gov.au/__data/assets/pdf_file/0012/967089/nsw-rfa-5-year-review-2008.pdf (accessed 27 March 2009).

> Regional Forest Agreements (RFAs) safeguard biodiversity, old-growth forests, wilderness and other natural and cultural values. They achieve this outcome by setting aside representative areas of forest in conservation reserves, through the targets outlined in the nationally agreed criteria (JANIS) for a Comprehensive Adequate and Representative (CAR) reserve system and through sustainable forest management outside of reserves.[32]

1.17 The National Association of Forest Industries described the development of CAR reserves as '[o]ne of the key outcomes of the RFA process'.[33] NAFI stated that:

> This system was developed to ensure that:
>
> - there is comprehensive inclusion of flora and fauna species and ecological communities;
> - there is adequate spatial coverage to ensure the maintenance of ecological communities including species diversity, viability, interaction and evolution; and
> - the reserve system is representative of Australia's ecology to ensure sustainable diversity and species viability.[34]

1.18 With specific regard to the Tasmanian RFA (TRFA), the Tasmanian Government asserted that the two statutory five yearly reviews had confirmed that:

> …the intent of the TRFA in implementing effective conservation, forest management and forest industry practices continues to be met. The findings of the Reviews in respect of effective conservation practices demonstrates that the TRFA protects forest species and forest habitats within its jurisdiction, where the EPBC does not directly apply. The successful appeal by Forestry Tasmania to the full Bench of the Federal Court against the judgement of a lower court has also clarified the validity of the TRFA in meeting the requirements of the EPBC Act where that Act does not directly apply.[35]

1.19 Numerous concerns have been raised about the original RFA process and about the effectiveness of RFAs in ensuring adequate environmental protection. RFA consultation processes were sometimes unable to accommodate conservation groups, and conservation-oriented forest management options were excluded from consideration in some RFA processes.[36] Concern was expressed that the RFAs effectively left matters of Commonwealth environmental concern in the hands of the

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32 DAFF, About RFAs – Protecting our forest environment, http://www.daff.gov.au/rfa/about/protecting-environment (accessed 26 March 2009).

33 National Association of Forest Industries, *Submission 56*, p. 3.

34 National Association of Forest Industries, *Submission 56*, pp 3-4.

35 Government of Tasmania, *Submission 99*, p. 2.

36 Tony Foley, 'Negotiating resource agreements: lessons from ILUAs', *Environmental and Planning Law Journal*, Vol. 19, No. 4, 2002, pp 267–275.

states,[37] a criticism that has been reiterated more recently,[38] including in submissions to this inquiry.[39] An analysis of the use of scientific information in developing a reserve system under RFAs concluded that "no RFA to date has applied the criteria of adequacy and representativeness in a substantial manner".[40] Criticism of RFAs by scientists and planners was common.[41] Economist Alan Slee criticised the limited attempts to address non-market values in the process, however he thought that:

> In the process and implementation of RFAs, the Australian federal and state governments have designed a policy instrument that has the capacity to enhance both conservation and timber production values in native forests… [and that] From an economic and social perspective, it is possible to identify scope for some gains as a result of the implementation of the RFA.[42]

1.20 In the current inquiry a number of submitters raised concerns about the effectiveness of RFAs in conserving biodiversity and protecting threatened species. A number of state-based conservation groups raised concerns regarding the effectiveness of RFAs in Western Australia, Victoria and New South Wales.

1.21 Forests in Western Australia are managed under the WA Forest Management Plan 2004-2013, signed into effect by the then WA Minister for the Environment, Judy Edwards, on 10 December 2003.[43] The plan establishes Key Performance Indicators (KPIs) for monitoring the effects of forest management. The implementation of these KPIs is set out in the 'Protocol for Measuring and Reporting on the Key Performance Indicators of the Forest Management Plan 2004-2013'. The

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37 Jan McDonald, 'Regional Forest (Dis)Agreements: The RFA process and sustainable forest management', *Bond Law Review*, Vol. 11, No. 2, 1999, p. 315; Lee Godden and Jacqueline Peel, 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): Dark sides of virtue', *Melbourne University Law Review*, Vol. 31, 2007, pp 106–145.

38 Andrew McIntosh, 'Why the *Environment Protection and Biodiversity Conservation Act*'s referral, assessment and approval process is failing to achieve its environmental objectives', *Environmental and Planning Law Journal*, Vol. 21, 2004.

39 Mr Michael Stokes, *Submission 54*; Mr Tom Baxter, *Submission 65*.

40 Gary Musselwhite and Gamini Herath, 'Australia's regional forest agreement process: analysis of the potential and problems', *Forest Policy and Economics*, Vol. 2, 2005, p. 586.

41 Jamie Kirkpatrick, 'Nature conservation and the Regional Forest Agreement process', *Australian Journal of Environmental Management*, Vol. 5, 1998, pp 31–37; Pierre Horwitz and Michael Calver, 'Credible science? Evaluating the Regional Forest Agreement process in Western Australia', *Australian Journal of Environmental Management*, Vol. 5, 1998, pp 213-225; John Dargavel, 'Politics, policy and process in the forests', *Australian Journal of Environmental Management*, Vol. 5, pp. 25–30; Marcus Lane, 'Decentralization or privatization of environmental governance? Forest conflict and bioregional assessment in Australia', *Journal of Rural Studies*, Vol. 19, 2003, pp 283–294.

42 Bill Slee, 'Resolving production-environment conflicts: the case of the Regional Forest Agreement process in Australia', *Forest Policy and Economics*, Vol. 3, 2001, p. 28.

43 Conservation Commission of Western Australia, *Forest management Plan 2004–2013*, http://www.dec.wa.gov.au/fmp (accessed 30 March 2009).

performance target for KPI number 2 is that 'no species or ecological community will move to a higher category of threat as a result of management activities'.[44]

1.22 Despite this target, the Conservation Council of Western Australia stated that two forest fauna species, the brush-tailed phascogale (*Phascogale tapoatafa*) and brush-tailed bettong, or woylie, (*Bettongia penicillata*), have moved to a more threatened category during the operation of the RFA and FMP. On that basis, the Conservation Council argued 'that the FMP cannot protect threatened species of fauna and that reliance of the RFA on the FMP for this purpose is misplaced'.[45]

1.23 Cases such as this highlight the complexity of assessing the conservation status of species, and determining their links to forest management (and thus to the performance of RFAs).

1.24 The lists that form the basis for assessing performance against this KPI are the Declared Flora, Specially Protected Fauna and Threatened Ecological Communities lists endorsed by the Minister under the WA *Wildlife Conservation Act 1950*.[46] The KPI relevant to the status of threatened species requires that the movement of species between protection categories be reported '[a]nnually with the review of the lists'.[47] The committee notes that the lists have been updated regularly over the life of the plan to date.

1.25 Both the species mentioned by the Conservation Council of Western Australia – the brush-tailed phascogale and woylie – are currently listed in the WA Specially Protected Fauna list.[48] The brush-tailed phascogale was listed in WA on 1 December 2006,[49] whilst the woylie had been listed prior to 1996[50] and was re-listed on the state

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44 Western Australian Department of Environment and Conservation, *Protocols for Measuring and Reporting on the Key Performance Indicators of the Forest Management Plan 2004-2013*, March 2007, p. 18, available: http://www.dec.wa.gov.au/component/option,com_docman/gid,1017/task,doc_download/ (accessed 28 January 2009).

45 Conservation Council of Western Australia, *Submission 96*, p. 6.

46 Western Australian Department of Environment and Conservation, *Protocols for Measuring and Reporting on the Key Performance Indicators of the Forest Management Plan 2004-2013*, March 2007, p. 20, available: http://www.dec.wa.gov.au/component/option,com_docman/gid,1017/task,doc_download/ (accessed 3 April 2009).

47 Conservation Commission of Western Australia, *Forest Management Plan 2004-2013*, December 2003, p. 30, available: http://www.dec.wa.gov.au/fmp (accessed 3 April 2009).

48 Western Australian Government Gazette No. 134, Wildlife Conservation (Specially Protected Fauna) Notice 2008(2), 5 August 2008, available: http://www.slp.wa.gov.au/gazette/gg.nsf/gaz?OpenView&Start=2.47&Count=100&Expand=2.98#2.98 (accessed 3 April 2009).

49 Western Australian Government Gazette No. 200, Wildlife Conservation (Specially Protected Fauna) Notice 2006(2), 1 December 2006, available: http://www.slp.wa.gov.au/gazette/gg.nsf/gaz/6EE672CD10F1F63C48257236001212DB?openDocument (accessed 3 April 2009).

list as of 5 August 2008. Thus both species have been elevated to a higher category of threat since the commencement of the FMP.

1.26 However, the KPI is not just about species decline: it also states that the change in status should not be caused by forest management activities. The Conservation Commission of Western Australia recently released a mid-term audit of performance under the Forest Management Plan.[51] That audit collated information from all KPI assessments, including in relation to the KPI outlined above. That report indicates that, in the case of the woylie, recent species decline 'is unlikely to be driven by habitat loss or fragmentation' and therefore is 'not related to management activities'.[52] In relation to the brush-tailed phascogale, the audit indicates that the causes of decline are currently unknown, and that a meeting of the Conservation Commission in November 2008 resolved that there be further investigation 'with the aim of identifying options for immediate action'.[53]

1.27 The committee notes that, in addition to the Conservation Commission examining options for acting to protect the woylie, the audit itself is also subject to scrutiny by the Environmental Protection Authority, a statutory authority.[54] This process will include public consultation on the audit. This process is currently underway. In these circumstances, it would seem that the Conservation Council of WA's suggestion 'that the FMP cannot protect threatened species of fauna and that reliance of the RFA on the FMP for this purpose is misplaced' is premature. The case does however highlight the importance of understanding the role of habitat loss in species decline, and it is important that forest managers are willing to act in the event that species decline is linked to habitat loss due to forestry.

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50 Western Australian Department of Environment and Conservation, Woylie Conservation Research Project, available: http://www.dec.wa.gov.au/index2.php?option=com_content&task=view&id=3230&pop=1&page=2&Itemid=97 (accessed 3 April 2009).

51 Conservation Commission of Western Australia, *Forest Management Plan 2004-2013: Mid-term audit of performance report*, 24 December 2008, http://www.conservation.wa.gov.au/media/7582/fmp%20mid%20term%20audit%20report_200308.pdf (accessed 3 April 2009).

52 Conservation Commission of Western Australia, *Forest Management Plan 2004-2013: Mid-term audit of performance report*, 24 December 2008, p. 141, http://www.conservation.wa.gov.au/media/7582/fmp%20mid%20term%20audit%20report_200308.pdf (accessed 3 April 2009).

53 Conservation Commission of Western Australia, *Forest Management Plan 2004-2013: Mid-term audit of performance report*, 24 December 2008, p. 141, http://www.conservation.wa.gov.au/media/7582/fmp%20mid%20term%20audit%20report_200308.pdf (accessed 3 April 2009).

54 Conservation Commission of Western Australia, *Forest Management Plan 2004-2013: Mid-term audit of performance report*, 24 December 2008, p. 3, http://www.conservation.wa.gov.au/media/7582/fmp%20mid%20term%20audit%20report_200308.pdf (accessed 3 April 2009).

1.28 Forestry operations in Victoria, and specifically in East Gippsland, the Central Highlands and Yarra Ranges, were variously criticised by some submitters.[55] Threatened species such as the Baw Baw frog (*Philoria frosti*) and Leadbeater's possum (*Gymnobelideus leadbeateri*) were cited as examples of those at risk from forestry operations conducted under RFAs in Victoria.

1.29 The North East Forest Alliance and Northern Inland Environment Council claimed that forestry operations in New South Wales had failed to protect threatened species of flora and fauna in that state:

> The RFA in north-eastern NSW did not meet the requirements of a Comprehensive, Adequate and Representative reserve system. A large number of forest ecosystem and oldgrowth forest targets were not met…Furthermore, the results of the RFA were inadequate to protect nationally-listed species.
>
> Using the NSW Government's own conservation analysis, targets and data produced during the Comprehensive Regional Assessment, it is evident that only one of the 20 nationally-listed forest fauna species met their conservation targets after the RFA and many nationally-listed flora species fell dramatically short of their targets. Substantial additional reservation and conservation action is still required to meet the minimum requirements identified for these species through the CRA process.[56]

1.30 As noted in the first report, the committee received numerous submissions referring to individual threatened species in Tasmanian and other forests. Some of these submissions queried whether the management of these species under RFAs was producing conservation outcomes consistent with the National Forest Policy Statement objective of maintaining nature conservation value in forests. One example discussed during the Wielangta court cases, outlined below, was the Swift Parrot. The committee notes that the government has recognised this issue. Responding to written questions from the committee, DAFF wrote:

> The Australian Government has…written to the Tasmanian Government seeking advice on the management of one species, the Swift Parrot, under the RFA. The Department is currently assessing the advice received.[57]

RFAs and the evolution of conservation information

1.31 RFAs were intended to give certainty to biodiversity conservation, through the CAR reserve system, and certainty of access to forests for production activities such as logging and woodchip production. However, they were also intended to take account of changes in the conservation status of species and ecological communities over time. The National Forest Policy Statement, to which the Commonwealth and all state and territory governments are signatories, states:

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55 Lawyers for Forests, *Submission 68*, pp 5–8; Mr Keith Sarah, *Submission 13*; Professor Lee Godden, *Submission 92*, p.8.

56 North East Forest Alliance and Northern Inland Environment Council, *Submission 97*, p. 5.

57 DAFF, Correspondence to the Committee, 16 April 2009, p. 2.

> The objective here is the management of public native forests so as to retain the full suite of forest values over time.[58]

And:

> Forest management agencies will continue to assess forest areas for the purpose of developing strategic management plans and, where necessary, operational harvesting plans. As a consequence of these forest assessments, areas that have important biological, cultural, archaeological, geological, recreational and landscape values will continue to be set aside and protected from harvesting operations or managed during operations so as to safeguard those values.[59]

1.32 These government statements indicate that it was originally intended that the management of forest areas would adapt over time and respond to new and / or additional information. The parties did not intend for activities in forest areas to have an adverse effect on threatened native flora and fauna, and if activities were found to have an adverse effect, then changes to those activities would be considered.

1.33 Whilst the RFA Act itself does not outline circumstances a result of which an RFA can be amended or dissolved, 'The Commonwealth Position on Regional Forest Agreements' discusses 'exceptional and unforeseen circumstances':

> The way exceptional and unforeseen circumstances are handled will be agreed to by the Commonwealth and the State concerned and may vary according to the circumstances. Among the possibilities are revising management practices, plans or conditions, renegotiating a specific part of the regional forest agreement, and undertaking an impact-specific assessment…The following are examples of exceptional and unforeseen circumstances that could be handled through amendments to the management plans and practices, or through initiatives outside the regional forest agreement process, rather than a revision of an entire regional forest agreement:
>
> - If it is found that forest use activities or a wood processing project would cause
>   - A species of flora or fauna to become threatened (that is, rare, endangered or vulnerable)
>   - A species of flora or fauna that is already threatened to become more threatened
>   - A major decline in species population levels or a major disruption to important ecological processes…[60]

1.34 The committee wrote to DAFF seeking further information on how new information about threatened species or ecological communities in areas subject to

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58 National Forest Policy Statement, 1995, p. 7.

59 National Forest Policy Statement, 1995, p. 10.

60 DAFF, *The Commonwealth Position on Regional Forest Agreements*, http://www.daff.gov.au/rfa/about/process/introduction (accessed 27 March 2009), Box 3.

RFAs is taken into account after an RFA is signed. The Department gave examples from Western Australia where practices or variations were introduced for 'improved protection of threatened species and communities', including:

- Refinement and application of Fauna Distribution Information System in coupe planning and prescribed fire planning. The tactics that follow through this systematic approach have on occasions led to variations in coupe shape, timing of access or felling operations (e.g. to minimize disturbance to adjacent quokka populations in the unharvested informal reserves).
- The introduction of fauna habitat zones in State forest (a WA Forest Management Plan initiative). One of the criteria used in the finalization of boundaries is to incorporate known occurrences of threatened or vulnerable fauna within these zones. To date the location of 42 zones have been finalized.
- Specific Fire Management Guidelines have been developed to guide the application of fire for specific ecosystems (granite outcrops, tingle forest) and species (Noisy scrub bird, quokka, tammar, western ringtail possum, honey possum, mallee fowl, geocrinia frogs, sunset frog).[61]

1.35 Climate change is one area in which conservation information is continuing to evolve. Many submissions gave evidence about the role native forests play in carbon storage and climate change mitigation. The Ad Hoc Technical Expert Group on Biodiversity and Climate Change, established under the Biodiversity Convention concluded that

> Maintaining natural ecosystems (including their genetic and species diversity) is essential to meet the ultimate objective of the UNFCCC because of their role in the global carbon cycle and because of the wide range of ecosystem services they provide that are essential for human well-being.[62]

1.36 Regional Forest Agreements did not anticipate climate change, either from the perspective of carbon storage and emissions mitigation or the impacts of changing climate on biodiversity and water conservation needs.

1.37 The committee did not examine this issue in detail. In its first report, the committee was supportive of addressing climate change in the Act, but noted that this will require careful consideration, particularly in the context of international agreements and other policy initiatives such as the Carbon Pollution Reduction Scheme.

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61 DAFF, Correspondence to the Committee, 16 April 2009, p. 1.

62 Secretariat of the Convention on Biological Diversity, *Draft findings of the Ad Hoc Technical Expert Group on Biodiversity and Climate Change*, London 17–21 November 2008, p. 3.

Species conservation under RFAs: the Wielangta cases

1.38 Central to much of the debate amongst stakeholders regarding RFAs was a series of three court cases commenced in 2005, and concluded in 2008, initiated by Senator Bob Brown and relating to Tasmanian forests covered by the Tasmanian RFA. While there have been a number of court cases relating to the EPBC Act, these particular cases have been critical to consideration of how matters of national environmental significance are protected under RFAs. The committee believed it was important to examine these court cases in detail, as they provide a practical example of the issues and complexities involved in RFAs.

1.39 In 2005, Senator Bob Brown 'applied to the Federal Court of Australia for an injunction to stop Forestry Tasmania from logging Wielangta Forest on Tasmania's east coast'.[63] Numerous submissions to the committee debated the implications of this series of court cases. Some submitters suggested amendments to the EPBC Act in light of the courts' decisions.

The first case: Federal Court

1.40 On 19 December 2006, Marshall J handed down his judgement in the case of Senator Bob Brown vs. Forestry Tasmania.[64] The case involved an application by Senator Brown made under s 475 of the EPBC Act concerning alleged contraventions of s 18(3) of the Act by Forestry Tasmania:

> Senator Brown has alleged that Forestry Tasmania's forestry operations and proposed forestry operations in the Wielangta State forest are prohibited in the absence of approval by the relevant Commonwealth Minister. It is said that this is because the forestry operations have had or will have a significant impact on three threatened species. Those species are the Tasmanian wedge-tailed eagle, the broad-toothed stag beetle and the swift parrot.[65]

1.41 Senator Brown also sought an injunction to prevent Forestry Tasmania from undertaking any forestry operations, or any activities in connection with forestry operations, in the Wielangta State forest.

Issues to be considered in the proceeding

1.42 The parties asked that the Court examine an agreed list of issues. The list that was considered by the Court included the following:

- Whether forestry operations in [logging coupes] WT017E and WT019D and proposed forestry operations in coupes other than WT017E and WT019D were actions for the purposes of the EPBC Act;
- Whether the RFA was an RFA within the terms of the RFA Act;

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63 Bob Brown, *Wielangta forest landmark trial* (leaflet), 2008.

64 Brown v Forestry Tasmania (No 4) [2006] FCA 1729.

65 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, p. 2.

- Whether the respondent had an exemption from Part 9 of the EPBC Act by virtue of section 38 of the EPBC Act and section 6(4) of the RFA Act; and
- Whether forestry operations in the Wielangta forest area would be or had been carried out in accordance with the RFA by reference to clause 68;
- The likely extent of forestry operations in the Wielangta area beyond August 2008;
- The extent to which the broad-toothed stag beetle, Tasmanian wedge-tailed eagle and swift parrot were present or likely to be present in the Wielangta forest area;
- What part of the Wielangta forest would be, or was likely to be, subject to forestry operations by the respondent in the next approximately 15 years;
- Whether forestry operations and proposed forestry operations in the Wielangta forest were likely, having regard to the endangered status of the three species and all other threats to the three species, have a significant impact on the three species. [66]

1.43 In summary, Marshall J found that:

- Forestry operations, and proposed forestry operations, of Forestry Tasmania in the Wielangta area would be likely to have a significant impact on the three species identified.
- The Regional Forest Agreement (RFA) between the Commonwealth and the State of Tasmania was an RFA within the terms of the *Regional Forest Agreements Act 2002*; and
- That Forestry Tasmania did not have an exemption from relevant provisions of the EPBC Act by virtue of the exemption provisions in s 38 of the EPBC Act and s 6(4) of the RFA Act. This was because Marshall J formed the view that the forestry operations in the Wielangta forest would be, and had been, conducted otherwise than in accordance with the RFA.[67]

Judgement against each of the agreed issues

Whether forestry operations in the Wielangta area are actions for the purposes of the EPBC Act

1.44 Senator Brown contended that Forestry Tasmania's operations in coupes WT017E and WT019D constituted the taking of an action under s 18(3) of the EPBC Act.[68]

1.45 WT017E and WT019D were those coupes where forestry operations had been or were being undertaken at the time of the court case. Gunns Ltd had been granted

66 Brown v Forestry Tasmania (No 4) [2006] FCA 1729, p. 3.

67 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, p. 3

68 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, p. 9.

government authorisation to harvest timber in these coupes. Harvesting of coupe 17E was completed in August 2005, whilst harvesting of 19D was scheduled for completion on 30 June 2006. Harvesting of 19D was, however, interrupted by the court proceedings.[69]

1.46 Marshall J ruled, despite Forestry Tasmania's arguments to the contrary, that the forestry operations in coupes 17E and 19D of the Wielangta forest and proposed forestry operations in coupes other than these constituted an action for the purposes of the EPBC Act. However, Marshall J added '[i]f that view is wrong, at least there is no dispute that the forestry operations in coupes 17E and 19D are an "action" for the purposes of the EPBC Act'.[70]

Whether the Tasmanian RFA is an RFA within the terms of the RFA Act

1.47 The applicant claimed that the Tasmanian RFA was not an RFA within the meaning of the RFA Act because it did not provide for a comprehensive, adequate and representative reserve system nor ecologically sustainable management and use of forested areas in the region.[71]

1.48 Much of the deliberation on this issue focussed on the meaning of 'provides for' and whether an RFA must 'provide for' or 'provide' a comprehensive, adequate and representative (CAR) reserve system. Marshall J accepted that 'provides for' means to plan or make arrangements for, and thus the RFA must plan for or make arrangements for a CAR reserve system as opposed to actually establishing a CAR reserve system.[72]

1.49 On the matter of whether the Tasmanian RFA planned for or made arrangements for a CAR reserve system and was therefore an RFA within the terms of the RFA Act, Marshall J found:

> The provision of a CAR reserve system does not mean that legally enforceable rights to the creation of such a system must be available. That may be the case if there was an obligation to 'provide' a CAR Reserve System, but that is not the obligation contained in the RFA Act.[73]

Thus, the judge concluded that the RFA 'is an RFA within the terms of the RFA Act'.[74]

Whether Forestry Tasmania has an exemption from Part 9 of the EPBC Act

1.50 The Court ruled that, so long as its forestry operations were conducted in accordance with the Tasmanian RFA, Forestry Tasmania did have an exemption from Part 3 and / or Part 9 of the EPBC Act by virtue of section 38 of the EPBC Act and section 6(4) of the RFA Act.

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69 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, pp 11-12.

70 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, p. 14.

71 *Regional Forest Agreements Act 2002*, s 4.

72 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, pp 40-41.

73 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, pp 41-42.

74 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, pp 41-42.

Whether the forestry operations in Wielangta have been conducted in accordance with the RFA

1.51 Because the Court found that the EPBC Act exemption existed only so long as forestry operations were undertaken in accordance with the RFA, much then hinged on the question of whether the operations under discussion in this case were indeed compliant with the RFA. Central to this debate was clause 68 of the Tasmanian RFA. Clause 68 provides that 'The State agrees to protect the Priority Species…through the CAR Reserve System or by applying relevant management prescriptions'.[75]

1.52 Senator Brown submitted that "in accordance with an RFA" should be construed strictly. He argued that "agrees to protect" means that the respondent must "deliver protection of" and not merely "agrees to try and protect".[76] He argued that 'the RFA must provide real, practical protection to threatened species' in order to comply with clauses 68, 70 and 96 of the Tasmanian RFA.[77]

1.53 Having heard detailed evidence regarding the three threatened species (see also below), the Court found that the State of Tasmania had failed to protect any of the three species through the CAR reserve system or by applying relevant management prescriptions, and was unlikely to do so in future.[78] As a result, Justice Marshall concluded that:

> Forestry operations in the Wielangta forest area have not been carried out in accordance with the RFA be reference to cl 68. I am not confident that they will be carried out in accordance with the RFA by reference to cl 68 in the future. Consequently, s 38 of the EPBC Act does not exempt Forestry Tasmania's forestry operations in Wielangta from the provisions of Pt 3 of that Act. The same applies with respect to s 6(4) of the RFA Act.[79]

1.54 It followed that the Court ultimately found that Forestry Tasmania was not exempt from Part 3 and / or Part 9 of the EPBC Act.

The likely extent of forestry operations in the Wielangta area beyond August 2008

1.55 The Court determined that activities which fall within the term 'forestry operations' for consideration in the proceeding were:

- Management of trees prior to harvesting;
- Harvesting of forest products;

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75 Tasmanian Regional Forest Agreement, November 1997, http://www.daff.gov.au/__data/assets/pdf_file/0003/49278/tas_rfa.pdf (accessed 11 March 2009).

76 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, p. 44.

77 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, p. 45.

78 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, pp 53-58.

79 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, p. 60; clause 68 of the Tasmanian RFA states 'The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System or by applying relevant management prescriptions'.

- Related land clearing;
- Regeneration (including burning);
- Transport operations; and
- Access construction.

1.56 As to the likely extent of forestry operations in the Wielangta forest beyond August 2008, Marshall J determined, based on the past conduct and future planning of Forestry Tasmania, that forestry operations were likely to continue to 2013 and possibly beyond.[80]

Extent to which the stag beetle, wedge-tailed eagle and swift parrot are present or likely to be present in the Wielangta forest

1.57 During examination of this issue, the Court heard extensively from experts on behalf of both the applicant and respondent. It concluded that all of the three species were present or likely to be present in the Wielangta forest.[81]

Parts of Wielangta forest subject to forestry operations in the next 15 years

1.58 The Court found it was difficult to ascertain what parts of Wielangta forest would be definitely subject to forestry operations in the next 15 years. Nevertheless, the judgement identified 15 coupes in the Wielangta area that were likely to be subject to forestry operations up to 2013.[82]

Significant impact of forestry operations on the three species identified

1.59 This issue was the most extensively debated matter in the case. Both the applicant and respondent produced numerous experts to support their respective positions. Having weighed the evidence, the court determined that each of the three species were likely to be significantly impacted by forestry operations in the Wielangta forest, having regard for both the threatened species' status and other threats facing each of the species.[83]

Effect of the decision

1.60 The court made two declarations:

- The appellant's forestry operations in coupes WT017E and WT019D in the Wielangta state forest, and its likely future forestry operations in other coupes in Wielangta, are likely to have a significant impact on the broad-toothed stag beetle, the Tasmanian wedge-tailed eagle and the swift parrot; and
- The forestry operations undertaken by the appellant have not been undertaken in accordance with the Tasmanian RFA.[84]

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80 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, p. 9.

81 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, pp. 14-17.

82 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, p. 17.

83 Brown v Forestry Tasmania (No 4) [2006] FCA 1729 Summary, pp 21, 28 and 34.

84 Forestry Tasmania v Brown [2007] FCAFC 186.

1.61 The court then ordered an injunction that, '[p]ending the grant of any approval under Part 3 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the Act) or further order, the appellant [Forestry Tasmania] was restrained from undertaking in Wielangta any "forestry operations" as defined in s 40(2) of the Act'.[85]

1.62 Marshall J's ruling had the effect of requiring forestry operations in an area covered by an RFA to be conducted in accordance with the relevant RFA otherwise those activities were unlawful.[86] Conducting forestry operations in accordance with an RFA included the protection of threatened species, where this was a condition of the RFA.

1.63 In addition, conservation groups believed an important outcome of the case was the recognition by Marshall J that 'significant impact' did not mean that the action in question must have the primary impact on the species but that 'significant impact' could be cumulative.[87]

1.64 Forestry Tasmania appealed to the full bench of the Federal Court against the Court's declarations.

The second case: Federal Court appeal

1.65 On 30 November 2007, the Full Court of the Federal Court handed down its judgement on appeal of Forestry Tasmania v Brown.[88] It overturned Justice Marshall's decision. Sundberg, Finkelstein and Dowsett JJ ordered that:

> The appeal be allowed.
>
> The orders of the primary judge be set aside, and in lieu thereof it be ordered:
>
> > The application be dismissed
> >
> > The parties bear their own costs of the proceedings at first instance.
>
> The respondent's notice of contention be dismissed.
>
> The respondent pay the appellant's costs of appeal and notice of contention.[89]

Judgement in detail

1.66 The Full Court stated that the central issue on appeal was whether section 38 of the EPBC Act exempted Forestry Tasmania's operations from the provisions of Part 3 of the EPBC Act and section 6(4) of the RFA Act. In order to address this issue, the

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85 Quoted in Forestry Tasmania v Brown [2007] FCAFC 186.

86 Larissa Waters, 'Brown v Forestry Tasmania (No 4) [2006] FCA 1729 (19 December 2006) – Federal Court finds logging unlawful', *National Environmental Law Review*, summer, 2006, pp. 25 – 30.

87 Shashi Sivayoganathan, 'Forestry Tasmania v Brown: Biodiversity Protection – An Empty Promise?' *National Environmental Law Review*, spring, 2007, pp. 21 – 28.

88 Forestry Tasmania v Brown [2007] FCAFC 186.

89 Forestry Tasmania v Brown [2007] FCAFC 186.

Full Court examined and considered the EPBC Act, the Tasmanian RFA, the CAR reserve system and the RFA Act.[90]

1.67 In contrast to the initial Federal Court decision, Sundberg, Finkelstein and Dowsett JJ determined that clause 68 of the Tasmanian RFA did *not* require the State to protect the three threatened species. In their view, clause 68 'does not involve an enquiry into whether CAR effectively protects the species. Rather it is the establishment and maintenance of the CAR reserves that constitute the protection'.[91]

1.68 The Full Court found that Forestry Tasmania's activities in the Wielangta were exempt under the EPBC Act. Furthermore, Sundberg, Finkelstein and Dowsett JJ concluded that the EPBC Act did not apply to forestry operations in RFA regions and that the way in which the objects of the EPBC Act would be met with respect to forestry operations should be ascertained by referring to the relevant RFA.[92]

1.69 Sundberg, Finkelstein and Dowsett JJ believed it was unnecessary to consider all of the agreed issues originally examined by Marshall J. The Full Court was critical of Marshall J for, in their opinion, unnecessarily examining the agreed issues in extensive detail.

1.70 The Full Court stated:

> Our conclusion on s 38 of the Act makes it unnecessary to examine the grounds of appeal disputing the primary judge's findings about the degree of protection provided by CAR to the three species. This aspect of the case at first instance occupied most of the 33 sitting days, together with views. In the events that happened, a great deal of time and much expense has been devoted to investigating matters that have turned out not be determinative of any relevant issues…If there was any issue at all that was appropriate for preliminary determination, it was that turning on s 38. Instead many far-ranging issues were, in our view, wastefully explored.
>
> Courts have frequently stressed the caution that must be taken in deciding whether to determine separate questions and issues lest this course leads to increased cost and delay. No caution was on display in this case.[93]

1.71 The committee notes that in reaching its judgement, the Full Court did not rely on a variation to the Tasmanian RFA which was agreed by the then Prime Minister, the Hon John Howard MP, and the Hon Paul Lennon MP, the then Premier of Tasmania, on 23 February 2007.[94] The variation to the RFA was a new clause 68 whereby the Commonwealth and State of Tasmania agreed that the CAR reserves and

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90 Forestry Tasmania v Brown [2007] FCAFC 186.

91 Forestry Tasmania v Brown [2007] FCAFC 186.

92 Forestry Tasmania v Brown [2007] FCAFC 186, p. 23.

93 Forestry Tasmania v Brown [2007] FCAFC 186.

94 Mr Tom Baxter, *Submission* 65, p. 7; DAFF, Tasmanian Regional Forest Agreement, http://www.daffa.gov.au/rfa/regions/tasmania/rfa (accessed 20 March 2009).

management prescriptions provided for by the Tasmania RFA protected rare and threatened species and forest communities.[95]

1.72 Subsequent to the Full Court's decision, Senator Brown appealed to the High Court of Australia.[96]

The third case: the High Court refuses a special leave application

1.73 On 23 May 2008, the High Court considered an application for special leave to appeal brought by Senator Brown. Senator Brown sought to appeal the decision of the Full Court of the Federal Court, and specifically two issues, 'one concerning the proper construction of a particular regional forestry agreement and the other concerning the powers of the Full court of the Federal Court of Australia in hearing an appeal against the grant of a permanent injunction'.[97]

1.74 The High Court refused to grant special leave to appeal on the basis that:

> In 2007 the 1997 agreement was varied and a new clause 68 agreed. The new clause provided that, "The Parties agree that the CAR Reserve System, established in accordance with this Agreement, and the application of management strategies and management prescriptions developed under Tasmania's Forest Management Systems, protect rare and threatened fauna and flora species and Forest Communities".
>
> It has long been recognised that an appellate court exercising powers of the kind given to the Full Court of the Federal Court as to which…may have regard, in considering whether to allow an appeal against the grant of a permanent injunction, to facts and circumstances occurring after the initial grant…That being so, having regard to the terms of the substituted clause 68 of the relevant regional forestry agreement, an appeal to this Court against the decision of the Full Court to dissolve the injunction that had been granted at first instance would enjoy insufficient prospects of success to warrant a grant of special leave to appeal.

1.75 The amendment made to clause 68 of the Tasmanian RFA was agreed by then Prime Minister the Hon John Howard and the Tasmanian Premier at the time, the Hon Paul Lennon on 23 February 2007.[98] The amendment removed the original clause 68 which stated:

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95 DAFF, Tasmanian Regional Forest Agreement, http://www.daffa.gov.au/rfa/regions/tasmania/rfa (accessed 20 March 2009).

96 High Court of Australia, Brown v Forestry Tasmania [2008] HCATrans 202, http://www.austlii.edu.au/au/other/HCATrans/2008/202.html (accessed 20 March 2009).

97 High Court of Australia, Brown v Forestry Tasmania [2008] HCATrans 202, http://www.austlii.edu.au/au/other/HCATrans/2008/202.html (accessed 1 April 2009).

98 DAFF, Variation to the Tasmanian RFA 23 February 2007, http://www.daff.gov.au/__data/assets/pdf_file/0015/156003/variation-tas-rfa.pdf (accessed (1 April 2009).

> The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System or by applying relevant management prescriptions

and replaced it with an agreement between the state and Commonwealth that the CAR reserve system and management strategies protected rare and threatened species.[99]

1.76 The variation to clause 68 was made shortly after the first case heard by Marshall J and prior to the appeal before the Full Court. Some witnesses asserted that:

> …the (then) Tasmanian Premier Paul Lennon and PM John Howard signed into effect a variation to the Tasmanian RFA in order to circumvent the trial judgment in the Wielangta case.
>
> This Tasmanian RFA variation…overrode the Federal Court trial judgment which had found that such protection was not and would not occur in Wielangta (let alone elsewhere in Tasmania).
>
> This RFA variation, without public consultation nor independent scientific assessment, in the face of the trial judge's finding of fact to the contrary, and overriding court orders before the hearing of an appeal, effectively gutted through the stroke of the Premier and Prime Ministerial pens the requirement to actually 'protect' nationally listed species.[100]

Interpretation of the Wielangta cases

1.77 It is apparent to the committee that the Full Court's judgement has been interpreted differently by those who oppose and those who support the use of RFAs as they currently operate. Critics of RFAs, such as Lawyers for Forests, have argued that the cases demonstrated the weakness of the EPBC Act. The cases were consistently cited as an example where an RFA had failed to protect the environment and conserve biodiversity:

> The cases bring to light the deficiencies both of the EPBC Act and the limits of protections for species and habitat afforded under RFAs. Justice Marshall based his interpretation of section 38 in light of the objects of the EPBC Act, in particular its objectives to "promote the conservation of biodiversity", provide for the protection of "matters of national environmental significance" and to "assist in the co-operative implementation of Australia's international environmental responsibilities"…By providing for RFA exclusions under section 38, the EPBC is failing to implement these key objectives…Consequently, a large portion of Australia's existing biodiversity, including listed threatened species, is not subject to protections and procedures afforded under the EPBC Act.[101]

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99 DAFF, Tasmanian RFA, http://www.daff.gov.au/__data/assets/pdf_file/0003/49278/tas_rfa.pdf (accessed 1 April 2009); DAFF, Variation to the Tasmanian RFA 23 February 2007, http://www.daff.gov.au/__data/assets/pdf_file/0015/156003/variation-tas-rfa.pdf (accessed (1 April 2009).

100 Mr Tom Baxter, *Submission 65*, p. 7.

101 Professor Lee Godden, *Submission 92*, p. 8.

1.78 Because the Full Court's did not revisit Justice Marshall's findings of fact, they remain valid:

> …Justice Marshall [conducted]… a detailed examination of whether in fact the Tasmanian regional forestry agreement and forest management systems in place in Tasmania were adequate to protect three important listed species. The findings of fact made in that case were that the Tasmanian RFA and forest management systems did not adequately protect those three listed species.
>
> Despite that decision being overturned by the full court of the Federal Court, those findings of fact still remain. Those findings of fact were made after a lengthy court case and detailed analysis and submissions by the parties.[102]

1.79 This position was confirmed during the hearing of Senator Brown's seeking special leave to appeal, when Justice Kirby was speaking to a representative of Forestry Tasmania:

> Kirby: You did not succeed in the Full Court or this Court on the lengthy argument on the facts that you contended before Justice Marshall. You lost on that.
>
> O'Bryan: Yes, that is true.[103]

1.80 Representatives of the forestry industry claimed that the Wielangta cases 'affirmed that the Regional Forest Agreements provide adequate protection for forest species and habitats in accordance with the provisions of the EPBC Act'.[104] Timber Communities Australia suggested that:

> The Wielangta case provides a thorough examination of the effectiveness of the EPBC Act in ensuring that endangered species are protected during forestry operations…The Wielangta case also confirms that the strict provisions of the RFAs provide protection of threatened and endangered species.[105]

1.81 These, with respect, do not appear to be fair representations of the legal situation. The committee notes that the Full Court did not determine that the Tasmanian RFA provided adequate protection of threatened species. On the contrary, the court commented, in relation to clause 68 of the RFA:

> The question is whether cl 68 does require the State to [in fact] protect the species... In our view it does not. Clause 68 does not involve an enquiry into whether CAR effectively protects the species. Rather it is the

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102 Mr Andrew Walker, Lawyers for Forests Inc., *Committee Hansard*, 8 December 2008, p. 26.

103 High Court of Australia, Brown v Forestry Tasmania [2008] HCATrans 202, http://www.austlii.edu.au/au/other/HCATrans/2008/202.html (accessed 1 April 2009).

104 Mr Allan Hansard, Chief Executive Officer, National Association of Forest Industries, *Committee Hansard*, 18 February 2009, p. 9.

105 Timber Communities Australia, *Submission* 7, p. 5.

> establishment and maintenance of the CAR reserves that constitute the protection.
>
> The verbiage of cl 68 supports this view. The State does not agree "to protect the priority species listed in Attachment 2 (Part A)". It agrees to protect them "through the CAR Reserve System". [106]

By *providing for* a CAR reserve system, the Tasmanian government had fulfilled its obligations under the RFA to protect threatened species. It was for this reason that an analyst of the judgement summarised the situation as being:

> that, in areas covered by the RFA, it is presumed that the protective mechanisms envisaged by the RFA protect the relevant species, even in circumstances where they do not.[107]

The future of RFAs

1.82 The long-term objections of some environmental organisations to RFAs intensified in the wake of the Wielangta judgements. It was suggested to the committee by a number of submitters that sections of the Act exempting RFA logging activities from assessment be removed so as to 'place the forestry industry on a level playing field with other industries which must obtain EPBC approval before significantly impacting Commonwealth listed threatened species'.[108] Mr Tom Baxter stated:

> In my view, the best way to protect nationally listed threatened species would be to delete EPBC Act ss 38-41. The EPBC Act contains plenty of mechanisms through which the Commonwealth could then assess such impacts of forestry operations in a place such as Tasmania and issue approval(s) as appropriate, subject to suitable conditions, eg to protect nationally listed species.[109]

1.83 Removal of the exemptions for RFAs under the Act would require forestry operations to be assessed and approved via EPBC processes. NAFI argued that this would have serious implications:

> If the EPBC Act were to apply in addition to the RFAs, a situation of conflicting and resource intensive policy and regulatory duplication would arise. The EPBC Act guidelines would lead to the impost of added and unnecessary regulation without any additional environmental benefit.
>
> The added burden would significantly effect the operations of the forestry sector…Increased compliance costs associated with meeting duplicative

106 Forestry Tasmania v Brown [2007] FCAFC 186.

107 Shashi Sivayoganathan, 'Forestry Tasmania v Brown: Biodiversity Protection – An Empty Promise?', *National Environmental Law Review*, Spring 2007, pp 21-42.

108 Mr Tom Baxter, *Submission 65*, p. 7.

109 Mr Tom Baxter, *Submission 65*, p. 7.

> regulations would decrease the competitiveness of the sector and would undermine the integrity and effectiveness of the RFAs.[110]

1.84 Further, NAFI made reference to the conflict which gave rise to RFAs and expressed concern that removal of RFAs would return Australia to those natural resource management conflicts:

> …the RFAs came about in a certain way, and the reason why they have stuck, is that there has been a long history of conflict which led to many instances of blockades around this parliament and conflict in regional committees – and so the NFPS was born.
>
> Importantly, and why it has held together, is that there was an upfront, transparent process prior to signing off on regional forest agreements. Hundreds of millions of dollars of taxpayers' money was invested in those processes in the 1990s. People have forgotten all this.[111]

They suggested that undoing the RFAs would increase conflict, and produce poorer environmental outcomes:

> What is really being proposed here takes us back to the process that existed before the RFAs and before the EPBC Act where, unfortunately, every coupe that was to be logged for woodchip exports had to go through this very arduous process of assessment. It created tremendous angst for all parties concerned. It created a situation where there was very low investment in the forest industries because of the way it was done. It created a situation where you did not have good environmental outcomes because you were looking on a coupe-by-coupe basis, rather than looking – as you should in relation to environmental management – at the full regional picture. One of the reasons why the national policy statement was set up and the regional forest agreements were set up was to overcome this type of process. So I would be very concerned if a proposal were to be put forward to go back to those days.[112]

1.85 The committee acknowledges NAFI's concerns. The kind of uncertainty and conflict seen prior to the introduction of RFAs would not be beneficial to any of the stakeholders interested in forest conservation and management. The committee also notes that there are mechanisms by which possible breaches of RFAs can be identified and addressed.

1.86 DAFF provided to the committee information about complaints investigated since 2007. There have been 14 complaints in Tasmania, NSW and Victoria, comprising seven complaints relating to forestry activities the investigation of which has been completed; six which are currently being investigated; and one which turned out not to be related to forestry operations. Of the seven completed investigations, in all cases forestry management prescriptions were found to be in place consistent with

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110 NAFI, *Submission 56*, p. 6.

111 Mr Shane Gilbert, Strategic Advisor, NAFI, *Committee Hansard*, 18 February 2009, p. 11.

112 Mr Allan Hansard, Chief Executive Officer, NAFI, *Committee Hansard*, 18 February 2009, p. 15.

the RFA, and none required changes to forestry practices, remediation action or prosecution.[113] No complaints were received in respect of Western Australia

1.87 While there is a mechanism for addressing complaints which is being utilised, the committee did not examine its operation in detail, and does not know whether stakeholders are aware of it. For example, a complaints mechanism is not identified on the DAFF webpages about RFAs. However, DAFF also pointed out that '[i]t is important to note that complaints are usually also made to relevant State authorities, who may have taken action prior to Commonwealth raising an issue'.[114] The committee did not seek information from the states to verify this.

1.88 The committee recognises there will be different interpretations of the fact that no complaints have been upheld. Supporters of the RFAs will suggest that this demonstrates good forest management practices are being adhered to. Detractors will point to the Wielangta court cases and argue that consistency of forestry practices with an RFA does not indicate environmental protection, and that the complaints process may thus be of limited use.

1.89 While there are existing mechanisms within the RFAs to improve forest management and deal with possible breaches, the administration of forests under RFAs could still be improved upon.

Other proposals

1.90 The committee believes it is important not to undermine the progress made under RFAs with regard to the streamlining of assessments and approvals. The committee was provided with a number of proposals that attempted to improve the operation of the Act with regard to forestry operations without seeking to remove RFAs. This section outlines those proposals.

1.91 Mr Michael Stokes offered a proposal whereby the Act would be amended to require the Minister to consider whether forestry operations will be conducted in accordance with the relevant RFA before exempting the activity.[115]

1.92 Professor Lee Godden recommended to the committee that a review be undertaken of s 38 of the Act with the intention of removing the exemptions for RFAs for environmental impact assessment. Professor Godden explained that bringing an action, such as forestry activity, under the scope of the EPBC Act would not necessarily bring a halt to those activities but rather would afford 'an opportunity to assess the activity; arguably taking into account cumulative impacts and adaptive management principles'.[116]

1.93 Professor Godden was critical of '[t]he relatively weak obligations to protect species imposed under the RFA structure that favour the development and logging

113 DAFF, Correspondence to the Committee, 16 April 2009, p. 2.

114 DAFF, Correspondence to the Committee, 16 April 2009, p. 2.

115 Mr Michael Stokes, *Submission 54*, pp 4–5.

116 Professor Lee Godden, *Submission 92*, p. 9.

operations', and recommended the 'adoption of mandatory status for RFA "obligations" in conformity with intergenerational equity and biodiversity conservation principles', as well as 'an enhanced, public review and consultancy regime for RFAs'.[117]

1.94 Another alternative proposal was offered by The Wilderness Society (TWS). TWS recommended that, should the exemption from assessment and approval under the EPBC Act remain for forestry operations covered by an RFA, then additions should be made to the 'Limits on application' in s 42 of the Act. TWS suggested the following points be added to the list of exceptions from exemptions granted under an RFA:

- The subject of a Federal Court finding that the RFA and the operation itself does not protect listed threatened species, communities or migratory species; or
- Part of RFA forestry operations where the gross carbon emissions from any company, contractor or commercial entity's operation exceeds 25 000 tonnes per year.[118]

1.95 Whilst Mr Tom Baxter recommended in the first instance that the sections of the Act relevant to RFAs be removed entirely, he also suggested that, at a minimum, s 75(2B) be deleted.[119] Section 75(2B) was inserted into the Act in 2006 and has the effect of preventing the Minister from considering adverse impacts of any RFA forestry operation or a forestry operation in an RFA region.[120] Deletion of s 75(2B) would mean that adverse impacts of forestry operations could once again be considered by the Minister in determining whether an action was a controlled action.

1.96 All of the above proposals seek to increase the scrutiny of forestry operations conducted under RFAs, either by limiting the exemptions available to forestry operations conducted under an RFA or requiring forestry operations to be assessed, to some extent, to determine whether those actions are compliant with the terms of the relevant RFA and / or the requirements of the EPBC Act more broadly.

1.97 Reform of the framework surrounding Regional Forest Agreements should not be undertaken lightly. These are complex, carefully crafted and long-term agreements that have been associated with significant reforms to forest practices, structural adjustment in the timber industry, and increases in the size of the conservation estate. Accordingly, the committee sought further information about how the RFAs were operating, and how some of the issues raised by submitters were handled in the existing system.

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117 Professor Lee Godden, *Submission 92*, p. 9.

118 The Wilderness Society, *Submission 51*, p. 15.

119 Mr Tom Baxter, *Submission 65*, pp 8-12.

120 Environment and Heritage Legislation Amendment Bill (No. 1) 2006, Explanatory Memorandum (EM), p. 30.

1.98 The committee asked DAFF to explain what existing legal obligations face forest managers in the event that newly-listed threatened species are found within RFA areas. DAFF advised that:

> With the exception of the Tasmanian RFA, there are no obligations within the RFAs imposing a legally enforceable obligation upon the states to ensure the protection of species or ecological communities listed in the EPBC Act. However, in all the RFAs, the parties agree that specified State and Commonwealth legislation and other measures, such as the establishment of CAR reserves, will provide for the protection of rare or threatened flora and fauna species and ecological communities.[121]

The situation in Tasmania is similar.

1.99 The committee also asked DAFF to clarify the Commonwealth minister's powers, in the event that new information is made available to the minister about any matter of national environmental significance. DAFF indicated:

> The Minister for Agriculture, Fisheries and Forestry can consult with the State and, with the State's agreement, vary the agreement to address any new information. The agreements recognise the need to continue consulting about priorities in the light of new information. In the event the State fails to agree, there is no mechanism under the RFA for the Minister to take the matter forward.[122]

The committee also sought advice on how Australia's international obligations under the UN Convention on Biological Diversity were being met in regard to endangered species. DAFF indicated that '[i]n all RFAs the parties agree that specified State and Commonwealth legislation and other measures will provide for the protection of threatened species'.[123]

1.100 The committee also asked DAFF what the consequences would be for RFA parties of possible extinctions within RFA regions. The committee was advised there would be no legal consequences, provided the forestry activity 'meets all relevant regulatory and legislative requirements, and is undertaken in accordance with an RFA'.[124]

The committee's view

1.101 Regional Forest Agreements have been a step forward in attempts to manage conflict over forest use in Australia, and have been a vehicle for advancing both knowledge of Australia's forest ecosystems, and management strategies for those forests. However the current inquiry has highlighted continued impediments to further progress.

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121 DAFF, Correspondence to the Committee, 16 April 2009, p. 3.

122 DAFF, Correspondence to the Committee, 16 April 2009, p. 3.

123 DAFF, Correspondence to the Committee, 16 April 2009, p. 4.

124 DAFF, Correspondence to the Committee, 16 April 2009, p. 4.

1.102 The committee recognises that some stakeholders have never accepted the Regional Forest Agreements processes, and remain concerned that the agreements do not deliver adequate environmental protection, both for threatened species and for threatened ecological communities. Doubts about environmental outcomes under RFAs continue to be raised by environmental organisations, by some ecologists and other experts, and in one case outlined above, by the Federal Court.

1.103 The committee believes that it is crucial to building public confidence in the RFAs that the Agreements are transparent. It is also vital that RFA requirements for conservation actions in production forests are clearly understood and are measured and reported on in a timely and accessible way.

1.104 The committee is concerned that neither transparency nor accountability may be adequately being delivered as the system currently stands. Five-yearly reports that were required in the RFA agreements are not being completed. The Wielangta case has demonstrated that actions that stand to risk harm to listed threatened species may be consistent with an RFA. This has raised concerns about whether the RFAs afford a lesser level of protection than that offered in other circumstances by the EPBC Act. While there are complaint systems in place, the criteria against which complaints are evaluated may lead stakeholders to doubt the utility of the process. The fact that no complaints have been received recently by the Australian government regarding the West Australian RFA, despite the issues raised directly with this committee in respect of that jurisdiction, underlines this possibility. It is not clear whether new information about the conservation status and needs of rare species within RFA areas is being given sufficient weight through conservation actions.

1.105 The committee at this stage does not support the abolition of Regional Forest Agreements, nor at this stage does it support the blanket application of EPBC Act processes to activities currently exempted by virtue of the RFAs and the relevant provisions of the RFA and EPBC Acts. The committee does however believe that the current avenues for consultation, accountability and legal challenge may be able to be improved. Proposals were put to the committee, by Professor Godden, Mr Baxter and others, that may have merit. The committee was unable fully to test these ideas. Both the inter-governmental agreements and the law in respect to RFAs are complex and not easily understood. The committee believes the time has come to examine carefully whether there may be opportunities to improve both the agreements, and public confidence in them, through careful reforms, particularly to ensure the standards of environmental protection sought through the EPBC Act are realised within those areas covered by RFAs.

Recommendation 1

1.106 The committee notes that the Minister for Environment has formally asked the Independent Review of the EPBC Act to consider the findings and recommendations of this inquiry (see letter 13 March 2009). Accordingly the committee recommends that the Independent Review consider the findings in this report and recommend proposals for reform that would ensure that RFAs, in respect of matters within the scope of Part 3 of the EPBC Act, deliver

environmental protection outcomes, appeal rights, and enforcement mechanisms no weaker than if the EPBC Act directly applied.

Senator Anne McEwen
Chair