# SUBMISSION TO THE SENATE ENVIRONMENT, COMMUNICATIONS AND THE ARTS COMMITTEE ENQUIRY INTO THE OPERATION OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999*

**BY LAWYERS FOR FORESTS INC**

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## 1. Background to Submission

(a) Lawyers for Forests Inc ("**LFF**") is a not for profit organisation incorporated in October 2000. It is an association of voluntary legal professionals working towards the protection and conservation of Australia's remaining old growth and high conservation value forests.

(b) LFF welcomes the Senate Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999* ("**the Act**"). The Act has now been in operation for almost 10 years. It is time to review its effectiveness.

(c) LFF writes this submission due to its strong concern that the Act is not meeting its objects and the principles of ecologically sustainable development (as set out in sections 3 and 3A of the Act) for the following reasons:

i. Logging operations conducted 'in accordance' with a Regional Forestry Agreement ("**RFA**") are exempt from the operation of the Act. This means that the logging of old growth and high conservation value forest is exempt from proper Environmental Impact Assessment (**"EIA"**) under the Act. As a result, the impacts of logging on threatened species and their habitat is not properly scrutinised. This is a particular concern given the extent of areas logged and the impact of those logging operations on Australia's biodiversity.

ii. The right to challenge decisions made under the Act is being significantly undermined by matters relating to costs, for example the threat of security for costs against applicants and costs being ordered on an unsuccessful application.

iii. Climate change is not mentioned as a relevant factor in Ministerial decision-making under the Act. The Act also insufficiently addresses the impacts of climate change and land clearing on our environment.

iv. The Act does not sufficiently provide for procedural fairness and public consultation to allow community feedback as to lessons learnt from the operation of the Act and the effectiveness or otherwise of responses to key threats identified within the Act. Further, the *Environment and Heritage Legislation Act (No.1)* 2006 (Cth) (**"the 2006 Act"**) removed a number of rights for the public to participate in decision-making processes under the Act.

## 2. Executive Summary

Logging Activities under RFAs should not be Exempt under the Act

(a) The explicit exemption of logging activities conducted under RFAs from the operation of the Act directly enables threatened species and threatened species' habitat to be destroyed through logging and without proper EIA. As a matter of logic, the mere existence of this exemption admits that destruction of protected habitats can and does occur as a direct result of logging pursuant to RFAs. Logging activities under RFAs should not be exempt under the Act because such an exemption is fundamentally adverse to the objects of the Act.

The Act should Provide Access to Justice

(b) In order for the Act to be effective, any party with standing must be given the opportunity to litigate under the Act and to exercise the rights given to them by the Act. Such rights must not be allowed to be rendered nugatory by oppressive costs orders or security for costs applications.

(c) The system of judicial review provided for by the Act should be reformed to recognise both the importance, and the increasing volume and specialisation of public interest environmental litigation. The Act should provide mechanisms and protections to ensure that the rights granted to persons with standing under the Act are meaningful and accessible.

The Act should Adequately Address Climate Change and Land Clearing

(d) The Act must acknowledge and act upon changes in the scientific understanding of climate change over the last 10 years. Climate change should be a mandatory factor for consideration in Ministerial decision-making under the Act and climate change and land clearing "triggers" should be inserted into the Act.

The Act should provide for Procedural Fairness and Public Consultation

(e) The Act should contain concrete and realistic procedures and timelines which provide stakeholders with sufficient notice to participate in a proper discourse with the Department to ensure that the Act is reflective of community sentiment and that decisions are made which take into account all relevant considerations. Further, the public participation rights removed under the 2006 Act should be re-instated.

## 3. Logging under RFAs should not be Exempt under the Act

(a) Section 38 of the Act provides that:

> *"Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA".*

(b) This means, among other things, that the following areas can be destroyed by logging without environmental impact assessment under the Act:
   i. National Heritage places;
   ii. declared Ramsar wetlands;
   iii. habitats of threatened species or endangered communities; and
   iv. habitats of listed migratory species.

(c) The RFA exemption is inconsistent and entirely contradicts the purposes of the Act which include:
   i. "*to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance*";[1] and
   ii. "*to promote the conservation of biodiversity*".[2]

(d) LFF has been advocating for the removal of the RFA exemption since the enactment of that section. LFF has brought this to the attention of the Federal Government on a number of occasions, most recently in its submission on the *Environment and Heritage Legislation Bill (No.1)* (Cth) 2006 ("**the Amendment Bill**"). By not removing this exemption, the Federal Government continues to support the destruction of threatened species habitat, including the destruction of critically endangered species'[3] habitat such as the Baw Baw frog and the Leadbeaters possum, which are endemic to the Baw Baw area in Victoria. Much of the logged habitat is woodchipped and made into Reflex copy paper by Australian Paper (wholly owned by Paperlinx). The need to protect and conserve biodiversity far outweighs any anticipated economic returns from logging threatened species habitat.

(e) The Commonwealth Government should not prioritise the demands of a replaceable industry over the extinction of iconic species. It especially should not do this by the operation of automatic and arbitrary exemption provisions.

(f) The argument is often made that EIA was carried out in the course of undertaking the Comprehensive Regional Assessment ("**CRA**") and implementing the Comprehensive Adequate and Representative ("**CAR**") reserve system under the RFA process.

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[1] Section 3(1)(a) of the Act.
[2] Section 3(1)(ca) of the Act.
[3] As classified by the IUCN: www.redlist.org.

(g) However this argument assumes:
   i. the RFA process involved a rigorous scientific analysis of Australia's forests, and identified those forests worthy of protection;
   ii. the States updated their forestry controls to incorporate knowledge gleaned from the process of developing RFAs;
   iii. the RFAs and State forest management systems are effective in protecting Australia's biodiversity.

(h) However none of these assumptions are correct.

RFA process did not involve a rigorous analysis of Australia's forests

(i) In Victoria, for example, the west Victoria CRA contains an acknowledgement of its deficiency. Volume 2 of the report at page 26 lists 38 endangered taxa. For five (or 13.2%) of these it is stated that the former Department of Natural Resources and Environment (Victoria) had insufficient data to establish whether the taxon was critically endangered, vulnerable, or at lower risk.

State forest management systems were not updated following the RFA process

(j) Nor have States updated their forestry controls to incorporate knowledge gleaned from the process of undertaking the CRA. Again, for example in Victoria, a number of Forest Management Plans ("**FMPs**") (the East Gippsland, Midlands and Otways FMPs) were prepared before the CRA was undertaken. However they were not updated following the completion of the CRA and entry into the relevant RFA.

RFAs and State forest management systems do not adequately protect Australia's biodiversity.

(k) Finally, the effectiveness of the RFAs in protecting endangered species (namely the Wielangta Stag Beetle, the Tasmanian Wedge Tailed Eagle and the Swift Parrot) was the subject of judicial consideration in *Brown v Forestry of Tasmania No. 4* [2006] FCA 1729.

(l) In *Brown v Forestry Tasmania No.4*, His Honour Justice Marshall made the following findings of fact:
   i. Logging of the Wielangta Forest has and will have a significant impact on the Wielangta Stag Beetle, the Swift Parrot and the Tasmanian Wedge Tailed Eagle.
   ii. Logging had not been and would not be conducted in accordance with the Tasmania RFA. This is because it had not been and could not be carried out in accordance with

clause 68 of the Tasmanian RFA[4] as, among other things, the State had failed to protect the Wielangta Stag Beetle[5], the Swift Parrot[6] and the Tasmanian Wedge Tail Eagle[7] through the CAR Reserve System and by unsatisfactory management prescriptions and will not do so in the future based on previous behaviour.[8] The Court also found that clause 70 of the Tasmanian RFA[9] was breached because there had never been a recovery plan for the Wielangta Stag Beetle and the plans for the Tasmanian Wedge Tailed Eagle and the Swift Parrot had expired and, in any event, had never been fully implemented.

(m) In short, His Honour Justice Marshall made findings of fact that the Tasmanian Government had failed to implement the RFA, and the procedures put in place under the RFA were inadequate to protect the three endangered species referred to above.

(n) Although Forestry Tasmania successfully appealed against the decision of Justice Marshall,[10] neither the Full Court of the Federal Court nor the High court overturned these findings of fact. The appeal was successful on other grounds.

(o) In reaching his decision at first instance, Justice Marshall stated:

> "An agreement to 'protect' means exactly what it says. It is not an agreement to attempt to protect, or to consider the possibility of protecting, a threatened species. It is a word found in a document which provides an alternative method of delivering the objects of the Act in a forestry context.
> ……..
>
> "The method for achieving that protection is through the CAR Reserve System or by applying relevant management prescriptions. Does that mean the State's obligations are satisfied if, in fact, the CAR Reserve System or relevant management prescriptions do not protect the relevant species?
>
> "I do not think so. If the CAR Reserve System does not deliver protection to the species, the agreement to protect is empty in the absence of relevant management prescriptions performing that role. If relevant management prescriptions do not perform that role, the State should ensure that it does, otherwise it is not

[4] Clause 68 provides that "the State agrees to protect the Priority Species……. through the CAR Reserve System or by applying relevant management prescriptions"
[5] Refer paragraphs 262 and 273
[6] Refer paragraphs 267 and 275
[7] At paragraphs 270 and 281
[8] Refer to paragraphs 271 and 282 which is similar to the reasons given at paragraphs 38-40.
[9] Clause 70 requires 'management prescriptions' identified in recovery plans to be implemented as a matter of priority.
[10] See *Forestry Tasmania v Brown* [2007] FCA FC 186

complying with its obligation to protect the species. To construe Cl 68 otherwise would be to turn it into an empty promise."

(p) However the Full Court of the Federal Court disagreed with this reasoning. It determined that the RFA does not impose an obligation to deliver protection to endangered species. Instead, the Full Court was satisfied that the mere maintenance of the CAR Reserves constituted the protection necessary for the three species.

(q) So, despite a finding of fact that the RFA was not being implemented, and actions taken under the RFA failed to protect the three listed species, the result of the decision of the Full Federal Court is that Forestry Tasmania continues to have the benefit of the RFA exemption.

(r) The reasoning of the Full Court shows the fatal flaw in the RFA system. In the words of Justice Marshall, obligations under the RFAs are "an empty promise". Even if they were implemented, they do not impose any obligation to protect endangered species. There is therefore no justification for the continued existence of the RFA exemption and the Act should be amended to remove the exemption. The impact of logging activities within old growth and high conservation value forests should be properly considered under the Act.

(s) LFF has reviewed the Victorian RFAs. Like the Tasmanian RFA, the Victorian RFAs have not been properly implemented, and the Victorian forest management systems also fail to protect endangered species.

## 4. The Act Should Provide Access to Justice and Merits Review

(a) Section 487 of the Act extends standing to individuals and environmental organisations who have engaged in systemic conservation-related activities for at least 2 years to challenge decisions under made under the Act. This section is an essential provision as the Act relies on proponents referring proposals to the Department of Environment, Water, Heritage and the Arts (**"the Department"**) for approval. It is therefore essential for the Act to provide public-minded individuals and organisations with rights to ensure that proponents do refer proposals to the Department, and decisions under the Act are made in accordance with the law.

Limitations of Section 487 Rights

(b) The limitations of the litigation rights granted under Section 487 are twofold. Firstly, most decisions may only be challenged on the basis of the correctness of the process (judicial review) rather than on the substance of the decision (merits review). Secondly, there

are enormous practical deterrents to litigation in this area, including exposure to significant costs penalties.

Access to Merits Review

(c) Access to merits review of decisions is vital to the effectiveness of the Act. The fact that generally only judicial review is available allows a significant amount of discretion and power to the Minister personally and expressly enables decisions to be made on the wrong foundations. Third parties are denied the opportunity to question the logic underlying the decision.

(d) The accountability provided by allowing judicial review under the Act is useful in the sense of ensuring that decisions under the Act are made in accordance with the law. However, the fact that this accountability is limited only to whether the decision is formally and procedurally correct admits the possibility that the wrong bases may underlie decisions without being subject to challenge. Judicial review does not require the Minister to make the best decision in the situation, or even to make a good or sensible decision. Judicial review of the substance of the decision only occurs when for example the decision is '...so unreasonable that no reasonable [decision-maker] ... could ever have come to it'[11].

Costs Orders and Security for Costs

(e) Although Section 487 grants standing to conservation groups and individuals, this right to litigate public interest matters is at risk of being rendered nugatory by costs.

(f) Security for costs provisions designed to deter frivolous actions have been invoked by the logging industry to attempt to stymie legitimate litigation. An example of the use of this technique in a general civil context was the forced abandonment of the Tasmanian branch of the Environmental Defender's Office defamation case against Timber Communities Australia and others due to a security for costs order[12].

(g) An unarguable case can be struck out through the appropriate process. Security for costs applications are not the mechanism to bring an end to such cases. In any event, security for costs should be expressly prohibited against applicants with Section 487 standing who bring cases under the Act.

(h) In addition, applicants in arguable cases that are not successful should not face significant costs orders. This possibility acts to deter applicants from bringing valid public interest litigation. In

[11] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 223–4
[12] Roland Browne, *EDO Bulletin*, (2004) Environmental Defender's Office (Tas) <http://www.edo.org.au/edotas/newsletter/bulletin18.pdf> at 22 September 2008

such circumstances, that is, where an applicant with an arguable case is ultimately unsuccessful, the Act should provide that each party bear their own costs.

## 5. The Act Should Adequately Address Climate Change and Land Clearing

(a) Climate change is arguably the most serious environmental issue facing Australia and the world today. Awareness about the extent of climate change and of the catastrophic consequences of not acting have been growing exponentially in recent years, as has the body of scientific knowledge about these consequences. In recent years whilst the Act has been operational, the Commonwealth Government has acknowledged the seriousness of climate change by creating a department which is supposed to deal specifically with the issue.

(b) LFF is deeply concerned about climate change for various reasons including that the logging of native forests contributes heavily to climate change by releasing stored carbon. Recent research has shown that Australia's old-growth forests are particularly effective "carbon sinks", with anywhere between three and twenty times the carbon storage capacity attributed to them by official *Intergovernmental Panel on Climate Change* estimates[13].

(c) Despite this increasing awareness and knowledge about climate change, the Act still contains no requirement that the Minister explicitly consider climate change as a factor in decision-making. As the law currently stands, if the Minister were to make a decision in which climate change is clearly a relevant factor, the Minister is still entitled to ignore any climate change implications of the decision. Such a decision would not be able to be challenged under the Act on the grounds of, for example, failure to take into account a relevant factor because the Act does not deem climate change to be relevant to decision-making.

(d) The Act should empower and require the Minister to explicitly consider climate change as a factor in any decision under the Act. The Act should also include a climate change trigger where a proposal will emit (directly or indirectly - including through embodied energy) a significant amount of greenhouse gases.

(e) Apart from logging, the clearing of native vegetation generally also has a significant impact on Australia's environment, including the destruction of endangered species habitat, and the release of greenhouse gases. Certain land clearing proposals should therefore require referral under the Act, and the Act amended to include a trigger requiring referral of such proposals.

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[13] *Green Carbon, The Role of Natural Forest in Carbon Storage*, Brendan G Mackey, Heather Keith, Sandra L Berry and David B Lindenmayer (2008) ANU E Press ("the Mackey Report")

(f) The Act should therefore be amended to include the following triggers:
   i. a trigger where a proponent clears more than 100 hectares over any five year period;
   ii. a trigger where a proponent removes vegetation which provides habitat for listed threatened species or listed critical habitat;
   iii. a trigger where "high impact" activities trigger referral irrespective of the hectares of native vegetation proposed to be removed. The "high impact" activities should be listed in Regulations and include developments with (or that are likely to have) a significant impact.

## 6. The Act Should Provide for Procedural Fairness and Public Consultation

(a) The Department has shown disregard for the principles of procedural fairness and community participation in its approach to any potential reform of the Act.

(b) In 2006 when the most recent set of amendments were passed to the Act, the Department only allowed the public 14 days to make submissions on the Amendment Bill. The Amendment Bill was a 414-page, 696-paragraph Bill which sought to amend the Act that the Commonwealth Government refers to as "*the Australian government's premier piece of environment and heritage legislation*". The public were not granted any extensions of time within which to lodge submissions, and as a result the public was denied a reasonable opportunity to comment on an extensive and complex Bill that substantially amended the Commonwealth's only legislation enacted to protect Australia's natural heritage.

(c) Furthermore, the 2006 amendments to the Act failed to take into account the findings and recommendations made at the national Biodiversity Summit 2006, which occurred approximately 3 weeks prior to the release of the Bill, and which reviewed the Act with a view to independently commencing a process for reform of the Act (www.biodiversitysummit.org.au). This failure meant that the former Howard Government enacted the amendments to the Act without the opportunity of considering the findings and recommendations made by Australia's leading scientists and academics working within the regime created under the Act.

(d) Most significantly, LFF is concerned that the 2006 Act reduced a number of rights of the public to participate in decision making processes under the Act. These include:
   i. Removing the right for the public to request the emergency listing of a place on the National Heritage List.

ii. Removing the right to appeal to the Administrative Appeals Tribunal against the decision by the Minister for Environment (Cth) ("**the Minister**") in relation to a permit issued, refused, varied, revoked or the conditions of a permit under Part 13A of the Act, or a decision to issue or refuse to issue a certificate under Section 303CC(5) of the Act, or to make, refuse to make, vary or revoke a declaration under Sections 303FN, 303FO and 303FP of the Act[14].

(e) Rights which were removed under the 2006 Act should be reinstated. The scope of merits review should also be expanded for the reasons outlined in paragraphs 4(c) - (d) above.

(f) Generally, any public consultation under the Act should require a reasonable time for such participation. At this stage it does not.

## 7. Other Concerns

(a) LFF has a number of other concerns with the Act and the administration of the Act. These include:

i. The lack of resources provided to the Department to implement the Act. Of particular concern is the lack of resources provided to enforce the conditions of approvals, and to scrutinise the effectiveness of and enforce management plans prepared under such approvals.

ii. The failure for the Act to provide members of the public with the right to review draft conditions, appeal against conditions, and enforce conditions.

iii. The introduction of the new section 158A under the 2006 Act. This section operates to prevent the Minister from (amongst other things) revoking or varying a previous approval notwithstanding that a "listing event"[15] has occurred. This section operates to prevent the Minister from imposing stricter controls in the event that the land developed, or adjacent land, is subsequently found to have increased environmental or heritage significance. This is entirely inappropriate and offends against the objects of the Act. The Minister should be able to revoke or amend the development approval in these circumstances.

iv. The Act fails to consider the cumulative impact of proposals.

v. LFF is concerned that the 2006 Act introduced section 37A, which provide that the Minister may declare that certain actions do not require approval under Part 9 of the Act. This mechanism has the potential to exclude certain actions from proper and appropriate EIA.

vi. LFF is also concerned that the 2006 Act expanded the potential scope for bilateral agreements and bilaterally

[14] Refer Section 303GJ(2) of the Act.

[15] For example, the property becoming a Word Heritage Property, or a species becoming threatened species - refer section 158A(1).

accredited authorisation processes[16]. State and Territory EIA processes are not necessarily sufficiently robust, and again, this mechanism has the potential to exclude certain actions from proper and appropriate EIA.

vii. The process for registering critical habitat is under-utilised, and there is no public process whereby members of the public can put forward an area for nomination. Further, the 2006 Act provided that the Regulations can add additional considerations (or prohibit consideration of certain considerations). This provides scope for economic interests to become paramount over biodiversity conservation objectives.

## 8. Conclusion

(a) The Act should be amended in the following ways:

i. Most significantly, logging activities undertaken under RFAs should not be exempt under the Act and Section 38 of the Act should be repealed;

ii. Security for costs should be expressly prohibited against applicants with Section 487 standing who bring proceedings under the Act;

iii. The Act should provide for merits review of Ministerial decisions in addition to judicial review;

iv. Where an applicant with an arguable case is ultimately unsuccessful, the Act should provide that each party bear their own costs;

v. The Act should empower and require the Minister to explicitly consider climate change and land clearing as factors in any decision under the Act;

vi. The Act should include a climate change trigger where a proposal will emit (directly or indirectly - including through embodied energy) a significant amount of greenhouse gases;

vii. The Act should set down consistent and realistic timetables for public consultation;

viii. Rights removed under the 2006 Act should be reinstated.

the Executive Committee
Lawyers for Forests Inc

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[16] Refer to sections 33 and 46 of the Act.