

**SUBMISSIONS ON THE
*ENVIRONMENT AND HERITAGE LEGISLATION
AMENDMENTS BILL (No. 1) 2006***

BY LAWYERS FOR FORESTS INC



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1. Executive Summary

- (a) The federal government has only allowed the public 14 days to make submissions on a 414-page, 696-paragraph Bill which seeks to amend the document that the federal government refers to as "*the Australian government's premier piece of environment and heritage legislation*". The federal government also says that it is one of the "*few environmental laws anywhere in the world that provides a comprehensive national approach to environmental protection and that deals with such a wide range of environment and heritage issues*".¹ Allowing only 14 days is unfair and unreasonable.
- (b) The federal government has failed to take into account the findings and recommendations made at the national Biodiversity Summit 2006, which reviewed the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("**the EPBC Act**") to start the process for reform of the EPBC Act. The federal government released the Bill only 3 weeks after the Biodiversity Summit and just days before the findings and recommendations of the Summit were made public. This is unacceptable.
- (c) The federal government has failed to remove the exemption in the EPBC Act which enables threatened species' habitat to be destroyed through logging and without environmental impact assessment ("**EIA**") under the EPBC Act. The federal government must ensure the EPBC Act complies with the objects of the Act – it must protect biodiversity.
- (d) The federal government has instead introduced new provisions into the EPBC Act which further exempt logging, by expressly excluding it from being considered an adverse impact on matters of national environmental significance. Logging in areas of national environmental significance does have an adverse impact on it, which is proved by the need for the exclusion. The federal government must not put a replaceable industry before extinction, which is forever.

2. 14 days to comment on 414 significant & complex pages of law

- (a) The EPBC Act is a piece of legislation covering 733 pages. On 12 October 2006, the federal government introduced the *Environment and Heritage Legislation Amendment Bill 2006* (Cth) ("**Bill**"), which seeks to amend the EPBC Act. The Bill covers 414 pages and introduces 696 paragraphs of proposed amendments.

¹ Paragraph 1 & 2, Second Reading Speech, 12 October 2006.

- (b) The federal government has given the public only 14 days to make submissions to it on the Bill. Denying the Australian public a reasonable opportunity to comment on an extensive and complex Bill that seeks to amend the Commonwealth's only legislation enacted to protect Australia's natural heritage is unacceptable and incomprehensible. The federal government cannot be of the view that 14 days is sufficient time to properly digest 414 pages of amendments to a significant piece of legislation. The federal government cannot consider that this will result in meaningful submissions from its constituents.
- (c) The federal government should show respect for Australia's natural heritage and the Australian community by immediately announcing an extension of time available to Australians to understand and make meaningful submissions on the Bill.
- (d) Under these difficult circumstances, these submissions cannot address all of the matters that would have been addressed had the federal government given proper opportunity for comment. These submissions address some of the key matters that arise from the Bill in the short time that the federal government has allowed.

3. Public involvement

- (a) Page 16 of the explanatory memorandum states that "*interaction with key stakeholders... have been the basis for many of the key amendments to the [EPBC] Act. These stakeholder groups include... environmental groups*". Similarly, page 17 of the explanatory memorandum states that "*The first six years of operation of the [EPBC] Act have involved continuous dialogue with persons who have either been involved with or have an interest in its operation. The need for many of the amendments has been identified as a result of this dialogue*".
- (b) LFF has never been invited by the federal government to interact with it in respect of the EPBC Act. LFF has been so concerned about the EPBC Act and its implementation that LFF held the successful national Biodiversity Summit on 22 September 2006 at the University of Melbourne. The purpose of the conference was to assess the implementation of the EPBC Act for the first time since its implementation 6 years ago, with a view to starting the process for reform. Information regarding the Biodiversity Summit can be found by going to www.biodiversitysummit.org.au. The Biodiversity Summit resulted in many recommendations being made as to how the EPBC Act can be amended and properly implemented.

- (c) For example, Professor Brendan Mackey² found, among other things, that:

*“One of the fundamental limitations of the EPBC Act is that it does not afford protection to forested lands subject to Regional Forest Agreements. Forests are the most biologically productive ecosystems and support the highest densities of species and populations. There are actually two separate processes that lead to landscapes being species rich. One process relates to the evolution of species via long periods of isolation and relative environmental stability in ancient landscapes (such as the South Western Australian Floristic Region). The other process is called species-energy theory and is a major reason why forests have such high levels of species richness and animal abundance. This theory predicts that species richness and abundance increases with the productivity of ecosystems, that is, where environmental conditions are most conducive to photosynthesis and biomass production. The idea is that there is more energy (and hence habitat resources such as food) in the ecosystem, which can in turn support a larger and denser food chain. Unfortunately, in my professional opinion the Regional Forest Agreements did not deliver the conservation commitments agreed to in the National Forest Policy Statement. Consequently, the long term conservation of Australia’s forest dependant populations, species and ecosystems remains uncertain”.*³

The Bill does not propose to amend the EPBC Act to “afford protection to forested lands subject to the Regional Forest Agreements”. Instead, it proposes to expand the operation of the RFA exemption.

- (d) Dr Michael McCarthy⁴ concluded, among other things, that:

“The top four threats to biodiversity over the past few hundred years have been loss of habitat, introduced species, over-harvesting and inappropriate disturbance regimes. A relatively novel threat is climate change. Managing threats is critical for conservation of biodiversity. We might want to have a list of species that we care about (I am reluctant to call it a threatened species list), effectively a list of socially

² Director, The ANU WildCountry Research & Policy Hub, SRES/College of Science, The Australian National University.

³ www.biodiversitysummit.org.au/mackey.html

⁴ Senior Ecologist, Australian Research Centre for Urban Ecology, Royal Botanic Gardens Melbourne, c/o The School of Botany, The University of Melbourne.

*important species that we particularly do not want to lose. But this is not going to help us help those species that are becoming endangered”.*⁵

Dr McCarthy recommends that the EPBC Act should “*manage threatening processes*”.⁶ However, the Bill does not propose to amend the EPBC Act to bolster the mechanisms to manage key threatening processes, such as “*loss of habitat*” and “*over-harvesting and inappropriate disturbance regimes*”.

(e) Similarly, Dr Jacqueline Peel⁷ explained that “*there are major issues [with the EPBC Act], such as the exemption for Regional Forest Agreements, where attention can be focused on clear deficiencies*”.⁸ The Bill does not propose to amend this clear deficiency.

(f) Finally, Professor Gary Meyers explained that:

“Unfortunately, Australia’s record for species loss is amongst the worst in the developed world. This loss is potentially acute given the number of endemic species in Australia...

*A number of recommendations can be made to move towards habitat protection to conserve biodiversity in Australia... [including that] all Australian species protection legislation must make critical habitat designation mandatory at the time of listing a particular species for protection [and also that] we need to identify particular areas that need protection because they are especially vulnerable or particularly productive and rich in biodiversity. Tropical and temperate old growth forests... are... generally agreed to be both important for the protection of biodiversity and to be particularly vulnerable.*⁹

The proposed amendments do not “*move towards habitat protection to conserve biodiversity*” and does not “*make critical habitat designation mandatory at the time of listing a particular species for protection*” – the EPBC Act authorises destruction of protected species by exempting destruction of its habitat through logging from the requirement to undertake EIA under the EPBC Act.

⁵ www.biodiversitysummit.org.au/mccarthy.html

⁶ *Ibid.*

⁷ BSc/LLB (Hon I), LLM (NYU); Senior Lecturer, Faculty of Law, University of Melbourne.

⁸ www.biodiversitysummit.org.au/peel

⁹ www.biodiversitysummit.org.au/meyers

- (g) LFF is concerned that the federal government has released the Bill only 3 weeks after the conclusion of the Biodiversity Summit and so has not had the opportunity to consider the findings and recommendations made by Australia's leading scientists and academics that work within the regime created under the EPBC Act. From the matters set out at paragraphs 3(c) to 3(f) above it is apparent that some fundamental and consistent recommendations have not been implemented.

4. Destruction of biodiversity provision remains

- (a) In conflict with those recommendations, Section 38 of the EPBC Act remains. Section 38 of the EPBC Act ("**the RFA exemption**") 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 EIA under the EPBC 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 EPBC 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";*¹⁰ and
 - ii. *"to promote the conservation of biodiversity".*¹¹
- (d) LFF has been advocating for the removal of the RFA exemption since the enactment of that section and has brought this to the attention of the government on a number of occasions. The Bill does not remove the RFA exemption and so the federal government continues to support the destruction of threatened species habitat. This includes the destruction of critically endangered species¹² 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 Pty Ltd. The need to protect and preserve biodiversity far out-weighs the economic returns. The federal government should fulfil its ethical obligations to

¹⁰ Section 3(1)(a) of the EPBC Act.

¹¹ Section 3(1)(ca) of the EPBC Act.

¹² As classified by the IUCN: www.redlist.org.

the conservation of biodiversity – the Bill should remove the RFA exemption.

5. Introduction of more destructive provisions

- (a) Despite the overwhelming criticism of the RFA exemption by many of Australia’s leading scientists and academics, the federal government proposes to introduce a further RFA exemption through the Bill.
- (b) At the Biodiversity Summit, Andrew Walker¹³ explained that:

“The principal means by which the EPBC Act seeks to achieve its objectives is through an environmental impact assessment process (EIA). The trigger for EIA is the requirement that ‘controlled actions’ be approved. These are actions with a significant impact, or likely to have a significant impact, on a defined set of matters of national environmental significance... If an action will have or is likely to have a significant impact on a matter of national environmental significance, it is potentially a controlled action and therefore requires referral and possibly approval under the EPBC Act”.¹⁴

- (c) Item 189 of the Bill proposes to introduce a new Subsection 75(2B), where the government is not required to consider any adverse impacts of logging on matters of national environmental significance. This proposed insertion into the EPBC Act is only feeding the fundamental problem with the EPBC Act and must not be allowed.

6. Conclusion and Contact

- (a) The immediate solution is very simple:
 - i. the Bill should amend the EPBC Act to remove the RFA exemption; and
 - ii. the new RFA exemption should not be introduced.
- (b) LFF would be pleased to be informed by the federal government that a reasonable time will be allowed to properly respond to the entirety of the Bill. The executive committee and the members of LFF are voluntary legal professions. Most of them work with legislation and amendments thereto as a key part of their full time positions. LFF is able to form an educated view as to the time it would take to properly make submissions on the Bill. A number of months would be

¹³ Senior solicitor accredited by the Law Institute of Victoria as a Planning and Environment Law Specialist.

¹⁴ www.biodiversitysummit.org.au/walker.html

necessary and would also allow the federal government to consider and take into account the findings and recommendations from the Biodiversity Summit.

- (c) Any communications in respect of this submission should be directed to Vanessa Bleyer, President of Lawyers for Forest Inc.

Vanessa Bleyer
President
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on behalf of the Executive Committee of LFF