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Victorian Regional Forest Agreements third five-yearly review

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Name: (first name and surname)	ANDREW WALKER
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RFA Review - Submission
Department of Environment, Land, Water and Planning
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Please note that submissions received after close of business on 29 January 2018 may not be accepted. Submissions provided without a completed cover sheet will not be accepted.



29 January 2018

RFA Review – Submission
Department of Environment, Land, Water and Planning
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East Melbourne VIC 3002

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LAWYERS FOR FORESTS - SUBMISSION RE THE REVIEW
OF THE VICTORIAN RFAs IN THE PERIOD FROM 1 JULY
2009 – 30 JUNE 2014.

INTRODUCTION

- 1 This submission is made by Lawyers for Forests Inc ("LFF").
- 2 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.
- 3 LFF makes this submission in response to the review on progress with the implementation of the Victorian Regional Forest Agreements ("the RFAs") in the period from 1 July 2009 – 30 June 2014 ("the Review").
- 4 In summary:
 - 4.1 LFF notes that the terms of the scoping agreement include a reference to the Commonwealth and State Governments jointly considering the process to extend the RFAs.
 - 4.2 LFF's submissions focus on this aspect of the Review.

4.3 LFF's position is that:

The Rationale for the EPBC Act "Exemption" is flawed.

- 4.3.1 The RFAs provide logging activities with an "exemption" from the requirement to comply with the *Environment Protection and Biodiversity Conservation Act (1999)* (*Cwth*) ("**the EPBC Act**").¹
- 4.3.2 The exemption was granted on the basis that a comprehensive assessment was undertaken to assess the environmental, economic and social impacts of forestry operations, and the so called Comprehensive, Adequate and Representative reserves ("CAR reserve") established in response.
- 4.3.3 This was not the case.
- 4.3.4 The rationale for and basis of the exemption are therefore flawed.

RFAs are ineffective in achieving the objectives of the EPBC Act and should not be extended

- 4.3.5 Even if it is assumed that the rationale for and basis of the exemption was sound, the RFAs, CAR reserves and Victorian forest management system² have not been effective in achieving the objects of the EPBC Act, including:
 - (a) Providing for the protection of the environment, and especially matters of national environmental significance, including the impacts on listed threatened species and ecological communities;
 - (b) Promoting the conservation of biodiversity;
 - (c) The principles of ecologically sustainable development, including the long term and short term environmental, economic and social impacts of forestry operations.

¹ Technically logging activities do not have the benefit of an exemption under the EPBC Act. Instead, section 38 of the *EPBC Act* permits logging activities to occur without obtaining the approvals that would otherwise be necessary under Part 3 of the EPBC Act. The nature of section 38 is that logging operations occur pursuant to an arrangement akin to a licence. This "licence" is granted on the basis that the RFAs, CAR reserves and State forest management systems provide for ecologically sustainable timber harvesting. However the balance of this submissions refers to section 38 of the EPBC Act as "an exemption," for convenience, and because that term reflects the special treatment given to logging operations under sections 38 (and 75(2B)) of the EPBC Act.

² The RFAs established the CAR Reserve system, and also accredited the Victorian Forest Management system. For convenience, a reference to RFAs elsewhere in this submission should also be read to refer to the CAR Reserve system and the Victorian Forest Management system, unless the context otherwise requires.

- 4.3.6 First, the RFA exemption:
- (a) In effect, delegates the Commonwealth's power to control logging activities under the EPBC Act to the Victorian State Government, so far as the impacts of logging operations are concerned.
 - (b) In effect, therefore also accredits and relies on the Victorian Government's forest management system to seek to ensure that logging operations are undertaken in accordance with the requirements of the EPBC Act, and in particular limits impacts on listed threatened species and ecological communities.
- 4.3.7 However, the Victorian forest management system has not been effective in ensuring that logging operations are undertaken in accordance with the objectives of the EPBC Act, and in particular limits impacts on listed threatened species and ecological communities.
- 4.3.8 This is evidenced by successful (and unsuccessful) Court challenges brought by environmental groups seeking to stop logging operations in both Victoria and Tasmania, and other deficiencies in the terms of the RFAs themselves, the Victorian forest management system, and their implementation.
- 4.3.9 Second, circumstances have substantially changed since the RFAs were executed.
- 4.3.10 The RFAs were executed around 15 years ago. And the CAR reserve system was also established over 15 years ago.
- 4.3.11 Circumstances have changed since then, including through the impacts of climate change and natural disasters such as the Black Saturday bushfires. The Victorian forest management system has also changed, often in response to successful Court challenges, and with less stringent controls introduced.
- 4.3.12 Third, the Commonwealth and the State Governments have not reviewed the effectiveness of the RFAs and/or the Victorian forest management system, in achieving EPBC Act objectives, including the impacts on listed threatened species and communities.
- 4.3.13 Such a review is critical given the deficiencies in the RFAs and the Victorian forest management system, and the substantial changes in circumstances since the RFAs were executed.
- 4.3.14 In summary, the RFAs have not been effective in achieving the objects of the EPBC Act. In any case, neither the Commonwealth nor Victorian Governments have reviewed the effectiveness of the RFAs in achieving those objectives. Accordingly, the RFAs should not be extended.

If, contrary to LFF's submissions, the RFAs are extended, then they should only be extended after a rigorous, robust, transparent and independent review of the effectiveness of the RFAs against the objects of the EPBC Act.

- 4.3.15 LFF's primary position is that the RFAs should not be extended, for the reasons set out above.
- 4.3.16 However, LFF notes that the terms of the scoping agreement include a reference to the Commonwealth and State Governments jointly considering the process to extend the RFAs.
- 4.3.17 The deficiencies in the RFAs are set out in detail in this submission. In particular, the RFAs fail to ensure our native forests are managed in accordance with the objects of the EPBC Act.
- 4.3.18 So, even if, contrary to these submissions, the RFAs were underpinned by a comprehensive assessment of the environmental, economic and social impacts of forestry operations, the time has come to revisit and review that assessment.
- 4.3.19 In the circumstances, it is critical to now review the effectiveness of the RFAs, and in particular in achieving EPBC Act objectives.
- 4.3.20 This requires more than a "tick a box" assessment of whether the RFAs have been implemented. The independent review of the EPBC Act ("**the Hawke review**")³ made this abundantly clear.
- 4.3.21 However, the Review (including the Report on Progress with Implementation of the Victorian Regional Forestry Agreements Period 3:2009 – 2014 ("**2009 – 2014 Report of Progress**")) is limited to an assessment of the implementation of the RFAs.
- 4.3.22 The Review and the 2009 – 2014 Report of Progress are therefore fundamentally flawed.
- 4.3.23 If, contrary to LFF's submissions, the RFAs are extended, then they should only be extended after:
 - (a) A rigorous, robust, transparent and independent review of the effectiveness of the RFAs has been undertaken, and in particular against the objectives of the EPBC Act, including the protection of listed threatened species and ecological communities, and comprehensive on-ground field assessments undertaken to fill knowledge gaps.
 - (b) The review should assess the full range of the environmental, economic and social impacts of logging activities.⁴

³ The Australian Environment Act - Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, October 2009, Final Report, Allan Hawke at [10.21].

⁴ Refer to the discussion at [24.10] – [24.12], below.

- (c) The RFAs, CAR reserves and forest management systems accredited under them are then amended and updated in response to the outcomes of that comprehensive and independent review.

LFF SUBMISSIONS

The Rationale for the RFA exemption is flawed.

The EPBC Act and the RFA Exemption.

- 5 The EPBC Act seeks to control activities which have or will have or are likely to have, a significant impact on matters of national environmental significance.
- 6 Ordinarily, a person or company undertaking such activities has to obtain approval before undertaking those activities, or run the risk of being prosecuted under the EPBC Act, and a substantial penalty being imposed.
- 7 The logging of Victoria's native forests clearly constitutes an activity which has or is likely to have a significant impact on matters of national environmental significance, and in particular has or is likely to have a significant impact on listed threatened species and listed threatened ecological communities.
- 8 However, logging operations are given special treatment.
- 9 This is because Part 3 of the EPBC Act does not apply to forestry operations undertaken in accordance with a RFA.⁵ Further, the Commonwealth Environment Minister, in considering whether an action is a "controlled action" for the purposes of the EPBC Act, is barred from considering the adverse impacts of forestry operations undertaken in accordance with a RFA.⁶

The RFA Process did not involve a comprehensive assessment of the environmental, economic and social impacts of forestry operations.

- 10 The RFA process did not involve a comprehensive assessment of the environmental, economic and social impacts of forestry operations in Victoria's forests.
- 11 In Victoria, 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

⁵ Refer section 38 of the EPBC Act.

⁶ Refer section 75(2B) of the EPBC Act.

Department of Natural Resources and Environment (Victoria) had insufficient data to establish whether the taxon was critically endangered, vulnerable, or at lower risk.

- 12 The RFA process was primarily a desktop study, based on existing (inadequate) knowledge. This led Academic Martin Brueckner from the Edith Cowan University to comment on the public and scientific community response to the Western Australian RFA process as follows:

With regards to the adequacy of the data, it was suggested that many of the 'data sets that were available [were] totally inappropriate [for modelling purposes]'. This is why the same scientists believe that 'there needed to be data collected, not just data compiled'. However, 'there was no scope to go and acquire additional data which were [thought to have been] fundamentally required' for any flora and fauna modelling. Consequently, non-CALM scientists considered 'the outcomes ...[as] quite flawed' and scientific conclusions as 'extremely suspect in the sense that they ... [were] based on inadequate data' and not '... on a fair and comprehensive assessment of the entire forest region nor ... on any assessment of major conservation requirements throughout the forest region'. To one CALM staff member the limited scoping of research projects was quite deliberate and based on the attitude that: 'We don't want a particular sort of information, we don't want good data sets on this, we don't want to know' which explains why CALM stood accused of a blanket approach to forest management⁷.

⁷ Martin Brueckner, 'The Western Australian Regional Forest Agreement: Economic Rationalism and the Normalization of Political Closure' (2007) 66 *The Australian Journal of Public Administration*, 148-158.

- 13 Several other academics have also criticised the robustness of the science underpinning the environmental impact assessment (“EIA”) undertaken in the course of finalising the RFAs, and establishing the CAR reserves.⁸
- 14 Further, significant aspects of Victoria's forest management system were not been updated following the RFA process, and to incorporate knowledge gleaned from the “EIA” undertaken before the RFAs were executed. For example, the East Gippsland, Midlands and Otways Forest Management Plans were prepared before the RFAs were executed, but have not been updated in any significant way following the execution of the relevant RFA, and associated “EIA.”
- 15 In any case, even if LFF's submissions on this point are not accepted, there are overwhelming reasons to now undertake a comprehensive review of the effectiveness of the RFAs in achieving EPBC Act objectives:
- 15.1 The RFAs have not been effective in achieving the objectives of the EPBC Act, for the reasons set out in the following section of this submission.
- 15.2 Circumstances have substantially changed since the RFAs were executed.
- 15.3 The effectiveness of the RFAs in achieving EPBC Act objectives, including their effectiveness in responding to changes in circumstances, has not been reviewed over the 15 year life span of the RFAs.

⁸ David Lindenmayer, David Blair, Lachlan McBurney and Sam Banks “The Need for a comprehensive reassessment of the Regional Forest Agreements in Australia” (2015) 21(4) Pacific Conservation Biology 266 at 266 (and the other papers referred to therein), 269, J Kirkpatrick “Nature Conservation and the regional forest agreement process” (1988) 51 Australian Journal of Environmental Management 31; P Horwitz and M Calver “Credible science? Evaluating the regional forest agreement process in Western Australia” (1998) 5(4) Australian Journal of Environmental Management 213.

RFAs are ineffective in achieving the objectives of the EPBC Act

Court cases.

- 16 Tellingly, conservation groups have been forced to take legal action to seek to protect and preserve endangered species and/or habitat. And, the Courts have made findings to the effect that endangered species have not been protected under the RFAs.
- 17 The important cases are:
- 17.1 *Environment East Gippsland v Vicforests* [2010] VSC 335 (*"the EEG Case"*).
- 17.2 *MyEnvironment Inc v Vicforests* [2012] VSC 91 (*"MyEnvironment"*) and on appeal *MyEnvironment Inc v Vicforests* [2013] VSCA 356 (*"MyEnvironment on appeal"*).
- 17.3 *Brown v Forestry of Tasmania No.4* [2006] FCA 1729 (*"Brown No.4"*), and on appeal: *Forestry Tasmania v Brown* [2007] FCAFC 186⁹ (*"Brown No 4 on appeal"*).
- 18 In the *EEG case*, Justice Osborn considered the operation of the Victorian forest management system. Relevantly:
- 18.1 Environment East Gippsland called a number of witnesses to give evidence, including evidence from ecologists and witnesses who had undertaken field surveys by placing cameras in the field, and detected threatened species.
- 18.2 Vicforests had not undertaken similar surveys.
- 18.3 Justice Osborn considered:
- 18.3.1 The evidence led by Environment East Gippsland and VicForests.
- 18.3.2 The Victorian forest management system (and in particular the operation and effect of the *Flora and Fauna Guarantee Act 1988* (Vic) (**"FFG Act"**) and Action Statements prepared under the FFG Act (**"Action Statements"**).
- 18.3.3 Whether the Victorian forest management system, including relevant Action Statements, were being properly implemented in the Brown Mountain region of Victoria).
- 18.4 Justice Osborn determined that logging operations in the Brown Mountain area were not being conducted in accordance with the law.
- 19 In particular, his honour determined that:
- 19.1 Vicforests had not complied with the requirements of the Long Footed Potoroo Action Statement. This was because the Action Statement called for a Special

⁹ On 23 May 2008, the High Court refused to grant special leave to appeal see [2008] HCA Trans 202.

- Management zone and habitat retention area to be provided on detection of a Potoroo. However no Special Management zone and habitat retention area had been provided.
- 19.2 The evidence established the presence of exceptionally high densities of Greater Gliders and Yellow-bellied Gliders within the relevant coupes and that this established a further requirement under the relevant controls for the provision of a Special Protection Zone or zones.
- 19.3 The Victorian forest management system and application of the precautionary principle required Vicforests to:
- 19.3.1 Undertake surveys for the Large Brown Tree Frog and Giant Burrowing Frog before logging commenced. However, Vicforests had not proposed to undertake those surveys.
 - 19.3.2 Complete the re-evaluation of the management areas for Powerful Owls and Sooty Owls.
 - 19.3.3 In the event of the detection of the Spot-tailed Quoll, the completion of the management areas for the Spot-tailed Quoll in East Gippsland.
- 20 In summary, the *EEG* case established that VicForests had failed to properly implement the Victorian forest management system, including relevant Action Statements, so far as they sought to protect 8 listed threatened species.
- 21 In *MyEnvironment*, the Court considered the application and interpretation of the Central Highlands Forest Management Plan and the Leadbeater's possum Action Statement, and the outcome of the case turned on the interpretation of those documents.
- 22 Relevantly however, in both *MyEnvironment* and *My Environment on appeal*, the Supreme Court and Court of Appeal determined that:
- 22.1 The Victorian forest management system seeks to achieve a balance between environmental protection and timber production.¹⁰
 - 22.2 The terms of the Leadbeater's possum action statement are subordinate to the relevant Forest Management Plan and any relevant management action to the Forest Management Plan.¹¹
- 23 In passing, the Supreme Court and Court of Appeal both noted the substantial change in circumstances that had occurred as a result of

¹⁰ See in particular: *MyEnvironment on appeal* at [15] – [18] per Warren CJ and at [138] – [147] per Tate JA, with whom Garde AJA agreed.

¹¹ *MyEnvironment on appeal* at [108] – [115] per Tate JA, with whom Warren CJ and Garde AJA agreed.

the Black Saturday bushfires, in that the Black Saturday bushfires had:

- 23.1 Substantially destroyed much of the ash forests which comprises the habitat and potential habitat for the Leadbeater's possum; and
 - 23.2 Increased the residual value of the remaining ash forest both as potential habitat and a timber resource.¹²
- 24 There are several important implications which arise from *MyEnvironment* and *My Environment on appeal*:
- 24.1 Action Statements are the primary means by which Victoria's threatened species are sought to be protected, and threatening processes are managed.
 - 24.2 While Action Statements are often ineffective and poorly drafted, they are at least more up to date and generally more detailed than the contents of Forest Management Plans. For example, the Central Highlands Management Plan was prepared in 1998, and the Leadbeater's possum Action Statement considered in *MyEnvironment* was prepared in 2003, (and was subsequently updated in 2014).
 - 24.3 However, and at least so far as the Central Highlands RFA and Leadbeater's possum are concerned, *MyEnvironment* and *MyEnvironment on appeal* determined that the terms of the Central Highlands Forest Management Plan take precedence over the terms of the Leadbeater's possum Action Statement.
 - 24.4 This has serious consequences for the effectiveness of the FFG Act and Action Statements in protecting listed threatened species.
 - 24.5 Relevantly, the RFAs rely on and specifically refer to the FFG Act and Action Statements as part of the Victorian forest management system accredited under the RFAs, and as a mechanism for the protection of rare or threatened flora and fauna species and ecological communities.¹³
 - 24.6 The effectiveness of the FFG Act and Action Statements and the RFAs more generally in protecting rare or threatened flora and fauna species and ecological communities must be reviewed following the Court's conclusions in *MyEnvironment* and *My Environment on appeal*.¹⁴
 - 24.7 Further, circumstances have substantially changed since the RFAs were executed and the CAR reserves established. And, *MyEnvironment* and *My Environment on appeal* note the substantial impact of the Black Saturday bushfires and impacts on both habitat and potential sawlog yields.

¹² *MyEnvironment v VicForests* [2012] VSC 91 at [10] – [12] per Osborn J. See also *MyEnvironment Inc v VicForests* [2013] VSCA 356 at [27] – [29] per Tate JA.

¹³ See: Clauses 36, 43 – 45 of the East Gippsland RFA, clauses 47, 55 – 58 of the Central Highlands RFA, clauses 47, 54 – 58 of the North-East RFA, clauses 48, 55 – 59 of the West Victoria RFA, clauses 48, 55 – 59 of the Gippsland RFA.

¹⁴ There are also other serious deficiencies in the operation of the FFG Act and Action Statements – see [34.1] – [34.5] below].

- 24.8 However the Court in *MyEnvironment* and *My Environment on appeal* were left considering the effect of the Central Highlands Forest Management Plan. This was a document which was prepared in 1998 and had not been updated to reflect the substantial change in circumstances that had occurred as a result of the Black Saturday bushfires.
- 24.9 In short, *MyEnvironment* and *My Environment on appeal* highlight the fact that the Victorian forest management system is woefully inadequate in responding to changes in circumstances.
- 24.10 Finally, the Victorian forest management system does not seek to ensure that listed threatened species are protected, or that the impacts on listed threatened species are limited, or minimised. Instead, it seeks to achieve a balance between environmental protection and timber production.
- 24.11 This, and the failure to update the Victorian forest management system to reflect the substantial changes in circumstances that arose as a result of the impact of the Black Saturday bushfires, highlight the need to review the RFAs and to revisit the question of whether the environmental impacts of logging operations are justified, having regard to the economic and social impacts of logging operations, and substantial changes in circumstances, in the context of EPBC Act objectives.
- 24.12 Relevantly, and as far as LFF is aware, the economic benefits or disbenefits of logging operations have not been properly assessed, having regard to:
- 24.12.1 The subsidies provided to the logging industry.
- 24.12.2 The economic benefits provided by retaining native forests, including the economic benefits of these forests as carbon sinks, water catchments, and tourist attractions.
- 25 Finally, and most tellingly, the Court in *Brown No.4* concluded that the Tasmanian RFAs were ineffective in protecting Australia's biodiversity.
- 26 In *Brown No.4*, Marshall J considered the Tasmanian RFA ("Tasmanian RFA") and its effectiveness in protecting the Wielangta Stag Beetle, the Tasmanian Wedge Tailed Eagle and the Swift Parrot. And Marshall J concluded:
- 26.1 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.
- 26.2 Logging had not been and would not be conducted in accordance with the Tasmanian RFA. This is because it had not been and could not be carried out in accordance with clause 68 of the Tasmanian RFA¹⁵ as, among other things,

¹⁵ Clause 68 provided that "the State agrees to protect the Priority Species..... through the CAR Reserve System or by applying relevant management prescriptions"

the State had failed to protect the Wielangta Stag Beetle¹⁶, the Swift Parrot¹⁷ and the Tasmanian Wedge Tail Eagle¹⁸ through the CAR reserves and by unsatisfactory management prescriptions and will not do so in the future based on previous behaviour.¹⁹

- 26.3 Clause 70 of the Tasmanian RFA²⁰ 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.
- 27 In short, His Honour Justice Marshall made findings of fact that the Tasmanian Government had failed to implement the Tasmanian RFA, and the procedures put in place under the Tasmanian RFA and Tasmanian forest management system were inadequate to protect the Wielangta Stag Beetle, Tasmanian Wedge Tailed Eagle and the Swift Parrot.
- 28 Although Forestry Tasmania successfully appealed against the decision of Justice Marshall,²¹ and the High Court refused to grant Mr Brown special leave to appeal the decision of the Full Court of the Federal Court,²² neither the Full Court of the Federal Court nor the High Court overturned these findings of fact. The appeal was successful on other grounds, as outlined below.²³
- 29 Marshall J 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?

¹⁶ Refer paragraphs 262 and 273

¹⁷ Refer paragraphs 267 and 275

¹⁸ At paragraphs 270 and 281

¹⁹ Refer paragraphs 271 and 282 which are similar to the reasons given at paragraphs 38-40.

²⁰ Clause 70 requires "management prescriptions" identified in recovery plans to be implemented as a matter of priority.

²¹ See *Forestry Tasmania v Brown* [2007] FCA FC 186

²² [2008] HCA Trans 202.

²³ At [30].

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 complying with its obligation to protect the species. To construe Clause 68 otherwise would be to turn it into an empty promise (emphasis added).

30 However, in *Brown No.4 on appeal*, the Full Court of the Federal Court reached a different conclusion. It determined that the Tasmanian 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 and Tasmanian forest management system was sufficient.

31 If anything, the decision of the Full Court of the Federal Court reinforces the ineffectiveness of the RFAs in achieving EPBC Act objectives. This is because:

31.1 According to the Full Court of the Federal Court it is sufficient that the CAR reserves and Tasmanian forest management systems are maintained, and this is sufficient irrespective of the actual impact on the three listed threatened species.

31.2 This conclusion was reached despite findings of fact in *Brown No.4* to the effect that the maintenance of the CAR Reserve system and operation of the Tasmanian forest management system were inadequate in protecting the three listed threatened species.

31.3 Since *Brown No.4*, and most likely in response to and to circumvent the findings of fact in that case, the Commonwealth Government and the Tasmanian Government amended clause 68 of the Tasmanian RFA so that it read:

"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."

32 In summary:

32.1 The *EEG* case demonstrates that there are serious deficiencies in the implementation of Victoria's forest management system, and the protection of listed threatened species.

32.2 *MyEnvironment* and *MyEnvironment on appeal* reinforce:

32.2.1 The need to review the effectiveness of the RFAs and Victorian forest management system in achieving EPBC Act objectives, including the effectiveness of the FFG Act and Action Statements in protecting listed threatened species and communities.

- 32.2.2 The need to analyse the RFAs and the Victorian forest management system, including their effectiveness in responding to changes in circumstances, and to also assess the full range of the environmental, economic and social impacts associated with logging operations.
- 32.3 The reasoning of the Full Court in *Brown No.4 on appeal* and amendment to clause 68 of the Tasmanian RFA highlight the fatal flaw in the operation of the RFA exemption. In the words of Justice Marshall, obligations under the RFAs are “an empty promise” because even if implemented, the RFAs will not impose any actual obligation to protect endangered species. Instead, it is sufficient that the relevant State Government “tick a box” to the effect that the RFA and relevant forest management system has been implemented.

Other Deficiencies in Victoria's RFAs and the Victorian Forest Management System.

- 33 LFF has reviewed the Victorian RFAs. The Victorian RFAs have not been properly implemented, and the Victorian forest management system also fails to protect listed threatened species.
- 34 For example, and in addition to the determinations of the Court in the *EEG case*:
- 34.1 The Victorian RFAs list the FFG Act as part of the Victorian forest management system which has been accredited under the RFAs. They also go on to recognise the actions taken under the FFG Act, including the preparation of Action Statements, is one of the mechanisms by which threatened flora and fauna are protected in Victoria.²⁴
- 34.2 However, it appears that outdated Forest Management Plans take precedence over any Action Statements, for the Central Highlands Forest Management Plan area and the Leadbeater's possum Action Statement at least.²⁵
- 34.3 Further:
- 34.3.1 The most recent version of the Code of Forest Practices has removed the obligation that all forestry operations must comply with the FFG Act and relevant Action Statements. Instead, the 2014 Code requires that the planning and management of timber harvesting operations must comply with the biodiversity conservation methods specified within the Management Standards and Procedures. And,

²⁴ See: Clauses 36, 43 – 45 of the East Gippsland RFA, clauses 47, 55 – 58 of the Central Highlands RFA, clauses 47, 54 – 58 of the North-East RFA, clauses 48, 55 – 59 of the West Victoria RFA, clauses 48, 55 – 59 of the Gippsland RFA. Of course, the *EPBC Act* has replaced the *Endangered Species Protection Act 1992* (Cwth) referred to in the RFAs, further highlighting the extent to which the provisions of the RFAs are outdated.

²⁵ Refer to the discussion of *MyEnvironment* and *MyEnvironment on appeal*, at [22] – [24] above.

while the Management Standards and Procedures²⁶ have incorporated a number of prescriptions from those Action Statements existing in 2014, there is no direct reference to compliance with the FFG Act and Action Statements as made. Nor is it clear how new and amended Action Statements have any force and effect.

34.3.2 The FFG Act outlines a process whereby Action Statements are prepared to outline the strategies to protect listed endangered species, or manage threatening processes. However, Action Statements have not been prepared for a number of listed threatened species or threatening processes:

- (a) There are 653 listed threatened taxa of flora and fauna. 287 Action Statements (or 44%) of Action Statements have been prepared for those listed flora and fauna.
- (b) There are 40 listed threatened communities of flora and fauna. 18 Action Statements (or 45%) of Action Statements have been prepared for those listed threatened communities of flora and fauna.
- (c) There are 43 listed threatening processes, the loss of hollow bearing trees from Victorian native forests. Fourteen Action Statements (or 32.6%) of action statements have been prepared for those threatening processes.²⁷

34.3.3 Even where Action Statements have been prepared they are not implemented, and their provisions are often woefully inadequate. Nor are they enforceable by members of the public. Further, and in any case, logging operations are effectively exempt from the operation of the FFG Act.²⁸

34.3.4 Additional information regarding the failure of the FFG Act and Action Statements to achieve biodiversity outcomes can be found in the LFF "Review of the Flora and Fauna Guarantee Act (1988) Vic, November 2002, attached as Appendix 1 to this submission and the LFF "Submission to the Review of the Flora and Fauna Guarantee Act, 1988 (Vic)," 2017, attached as Appendix 2 to this submission.

²⁶ Management Standards and Procedures for timber harvesting operations in Victoria's State Forests 2014.

²⁷ The Department of Environment Land Water and Planning has prepared a list of potentially threatening processes (December 2016) and a list of threatened species (June 2017). A list of action statements can be found at <https://www.environment.vic.gov.au/conserving-threatened-species/flora-and-fauna-guarantee-act-1988/action-statements>. This site was accessed on 28 January 2018.

²⁸ Refer to the Flora and Fauna Guarantee (Forest Produce Harvesting) Order No2/2004, Victoria Government Gazette No S 180, Tuesday 3 August 2004, and made under section 48(3) of the FFG Act. This authorises a person to take protected flora as a result of or incidental to timber or other forest produce harvesting, unless the flora is within an area of declared critical habitat.

- 34.4 There are no management prescriptions and there is no Action Statement for the Greater Gilder, and despite the Greater Gilder being listed as vulnerable under the EPBC Act in 2016, and placed on the FFG Act list of threatened species on 15 June 2017.
- 34.5 The applicable conservation advices for the Swift Parrot, Greater Glider and Leadbeater's possum approved by the Commonwealth Environment Minister under section 266B of the EPBC Act refer to logging and the inadequate protections at State level as threats to the species. Yet the logging of the habitat for these species continues.
- 34.6 The Victorian Auditor General, in reviewing the management of Victoria's timber resources also noted the lack of transparency in decision-making processes, and the information available.
- 34.7 Relevantly, the Auditor General:
- 34.7.1 Did not review the economic and social benefits and disbenefits of the logging industry.
- 34.7.2 Concluded that there were gaps in the Department of Environment and Primary Industries²⁹ ("DEPI") state forest and timber resource management performance reporting so that it was difficult to assess how well DEPI's and Vicforests' efforts were contributing to sustainable outcomes.³⁰
- 34.7.3 Concluded that DEPI's effectiveness in protecting forest values from harvesting was reduced because it failed in some cases to develop the plans needed to do so, and in many cases has failed to track and review the progress made and the results achieved.³¹
- 34.7.4 Concluded that until recently, DEPI's measurement of how well forest values were being maintained over time was poor, making it difficult to provide assurance about how well values are being protected and that DEPI and Vicforests needed to improve and better document the way they assess the threats and consequences associated with biodiversity management decisions in harvesting areas and develop more transparent processes in managing the risks and trade-offs involved.³²
- 34.8 As far as LFF is aware:
- 34.8.1 The Victorian RFAs required or anticipated that the Victorian State Government would develop Sustainability Indicators, a Statewide

²⁹ As at the date of the report, DEPI was the relevant State Government department administering the Victorian forest management system.

³⁰ "Managing Victoria's Native Forest Timber Resources" Report of the Victorian Auditor General, December 2013 at pp.ix - x.

³¹ Ibid at p.xi.

³² Ibid at p.xi.

Forest Resource Inventory and an Integrated Forest Planning System.

34.8.2 These have been prepared.

34.8.3 However:

- (a) They were prepared well after the RFAs were executed, and well after the timeframes set out in the RFAs.
- (b) They have not been reviewed and assessed by the Commonwealth Government.
- (c) Their implementation has not been reviewed and assessed by the Commonwealth Government.

34.9 Victoria has failed to comply with its obligation to review the RFAs every five years, and its completed reviews have been well behind schedule.

Additional information outlining the failure to meet mandatory review timelines, and associated failures of the Victorian and other RFAs is contained in the report 'One Stop Chop: How Regional Forest Agreements streamline environmental destruction,' attached as Appendix 3 to this submission.

35 Finally, it is almost impossible to argue that RFAs are effective in protecting biodiversity given the terms of the RFAs:

35.1 Those parts of the RFAs which relate to ecologically sustainable forest management and the protection of threatened flora and fauna are "not intended to create legally binding relations."

35.2 There is no requirement in the RFAs themselves that additional forest reserves be created if necessary (for example if after a proper EIA the forest is found to have special conservation value, for example as the last remaining habitat of an endangered listed species).

35.3 Instead, all of the RFAs, apart from the East Gippsland RFA, specify that if the Commonwealth acts to protect additional forest, the Commonwealth will pay the relevant State compensation.³³ And these compensation provision are binding (in contrast to the "obligations" to ensure ecologically sustainable forest management and the protection of threatened flora and fauna), Given this financial impediment, it is not surprising that the Commonwealth has not intervened to expand the CAR reserves.

36 It is important to understand that RFAs encompass a large proportion of Australia's forests, and that these forests are known to be "hotspots for diversity" across and between different species. Consequently, a large proportion of Australia's existing biodiversity, including listed species, is protected only by way of "an empty promise". There is no justification for the continued existence of the

³³ Clause 90 of the Central Highlands RFA, clause 88 of the North-East RFA, clause 96 of the West Victoria RFA, clause 96 of the Gippsland RFA.

RFA exemption under the EPBC Act. This is particularly so when most other forms of development, of smaller scale and less environmental impact, do require referral under the EPBC Act. There is no reason to treat logging, with its extensive impact on Australia's biodiversity, and its threatened species, as a special case.

- 37 Finally, it is important to note that removing the exemption does not of itself constitute a 'halt' to activities. Rather, it affords an opportunity to undertake proper EIA and assess the activity under the Act in order to promote more ecologically sustainable outcomes, including the preservation of threatened species habitat.

If, contrary to LFF's submissions, the RFAs are extended, then they should only be extended after a rigorous, robust, transparent and independent review of the effectiveness of the RFAs against the objects of the EPBC Act

- 38 LFF's primary position is that the RFAs should not be extended, for the reasons set out above.
- 39 However, LFF notes that the terms of the scoping agreement include a reference to the Commonwealth and State Governments jointly considering the process to extend the RFAs.
- 40 The deficiencies in the RFAs are set out in detail in this submission. In particular, the RFAs fail to ensure our native forests are managed in accordance with the objects of the EPBC Act.
- 41 Further:
- 41.1 The RFAs and the CAR reserves were executed and established over 15 years ago.
- 41.2 Circumstances have changed since then, including through the impacts of climate change and natural disasters such as the Black Saturday bushfires.³⁴ Our knowledge has increased. Species and habitat has become increasingly threatened, with many species listed as threatened for the first time, or

³⁴ For example, the Black Saturday bushfires substantially destroyed much of the ash forests which comprises the habitat and potential habitat for the Leadbeater's possum and increased the residual value of the remaining ash forest both as potential habitat and a timber resource: *MyEnvironment v VicForests* [2012] VSC 91 at [10] – [12] per Osborn J. Relevantly, the Leadbeater's possum is listed as critically endangered under the EPBC Act. See also *MyEnvironment Inc v VicForests* [2013] VSCA 356 at [27] – [29] per Tate JA.

“uplisted.”³⁵ Community expectations have changed. The Victorian forest management system has also changed, often in response to successful Court challenges, and with less stringent controls introduced.

- 42 As a result, it is critical to now review the effectiveness of the RFAs, and in particular in achieving EPBC Act objectives.
- 43 This requires more than a “tick a box” assessment of whether the RFAs have been implemented.
- 44 Consistent with the findings of the Hawke review (being an independent review of the operation of the EPBC Act), the RFA review should:
- 44.1 Focus on the performance of the RFAs in achieving their objectives, including protecting biodiversity, and not just report on processes under the agreements.
- 44.2 Specifically address relevant matters of national environmental significance and report on verifiable information.³⁶
- 44.3 Consider the following key matters, and whether the following have been demonstrated:
- 44.3.1 The Victorian Forest Management System is capable of adapting to new information in a timely manner – including systems to ensure harvesting plans are consistent with recovery plans, conservation advice and action statements;
- 44.3.2 Matters of NES are consistently and uniformly incorporated into the state's decision making framework and given appropriate consideration (consistent with information provided under the EPBC Act, such as listing advice);
- 44.3.3 There is an ongoing commitment to regular, comprehensive and statistically powerful assessment, monitoring and analysis against relevant indicators;
- 44.3.4 Data collection records attributes of both the CAR Reserve System and the RFA production forest;

³⁵ See “Regional Forestry Agreements: limitations and current opportunities,” Danya Jacobs, Australian Environment Review July 2017, at p.94, and at footnotes 6 and 7, referring to:

- The Leadbeater's possum which was uplisted to critically endangered in 2015.
- The Swift Parrot which was uplisted to critically endangered in 2016.
- The Greater Gilder was newly listed in 2016 in the vulnerable category.

³⁶ The Australian Environment Act - Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, October 2009, Final Report, Allan Hawke at [10.21].

- 44.3.5 Data collection is carried out at appropriate spatial scales and frequencies;
- 44.3.6 Analysis of data is robust, transparent, consistent with best practice scientific methods and available for peer review;
- 44.3.7 Feedback received through research and compliance and audit processes is incorporated into forest practice systems;
- 44.3.8 Ongoing performance is reported and such reports are publicly available;
- 44.3.9 Forest-based staff are provided with regular training and development opportunities in site assessment, survey and monitoring methods; and
- 44.3.10 Public access to data, planning and reporting information is provided wherever possible.
- 44.4 Provide clear evidence of:
 - 44.4.1 A transparent, systematic and credible process for investigating alleged breaches of forest practice systems and the RFAs;
 - 44.4.2 A regular, independent performance auditing program that is applied to forest plans and their environmental outcomes and is capable of demonstrating compliance with management arrangements and of providing a public feedback loop for best practice management;
 - 44.4.3 A Forest Management Framework that is sufficiently flexible to adapt to emerging threats to forest values and changes in public values; and
 - 44.4.4 A CAR reserve system that is being adequately maintained and managed.³⁷
- 45 Consistent with the findings of the Hawke review, the Commonwealth Environment Minister should also consider whether to suspend the section 38 exemption in full or in part, and apply the protections of the EPBC Act, having regard to the extent to which:
 - 45.1 The RFA reviews are not completed;
 - 45.2 The RFA reviews indicate serious non-performance, including: failure to implement and maintain forestry codes of practice, failure to commit to and implement recovery plans for threatened species in RFA areas, failure to establish management plans for CAR reserves, failure of the relevant forest management system to protect species and failure to investigate alleged breaches of the RFA and correct any proven breaches; or
 - 45.3 The RFA reviews are deemed to be inadequate to judge performance against the relevant RFA.³⁸

³⁷ Ibid at [10.25].

³⁸ Ibid at [10.36].

- 46 Finally, sustainable timber yields must be set and regularly reviewed in light of timber loss through wildfire, as well as the habitat needs of threatened species and communities.
- 47 However, the Review and the 2009 – 2014 Report of Progress are limited to an assessment of the implementation of the RFAs. Tellingly, the 2009 – 2014 Report of Progress makes no reference to the findings of the Hawke review as set out above.³⁹
- 48 The Review and the 2009 – 2014 Report of Progress are therefore fundamentally flawed.
- 49 If, contrary to LFF's primary submission the RFAs are extended, then they should only be extended after:
- 49.1 A rigorous, robust, transparent and independent review of the effectiveness of the RFAs has been undertaken, and in particular against the objectives of the EPBC Act, including the protection of listed threatened species and ecological communities, and comprehensive on-ground field assessments undertaken to fill knowledge gaps.
- 49.2 The review should assess the full range of the environmental, economic and social impacts of logging activities.⁴⁰
- 49.3 The RFAs, CAR reserves and forest management systems accredited under them must be amended and updated in response to the outcomes of that comprehensive and independent review, and, if the review demonstrates that there has been serious non-compliance with the terms of the RFAs, or a serious failure to achieve the objectives of the EPBC Act, the exemption under section 38 be suspended.

³⁹ At [44] – [45] above.

⁴⁰ Refer to the discussion at [24.10] – [24.12], above.

APPENDIX 1

**LFF "REVIEW OF THE FLORA AND FAUNA GUARANTEE ACT (1988)
VIC, NOVEMBER 2002**

APPENDIX 2

**LFF "SUBMISSION TO THE REVIEW OF THE FLORA AND FAUNA
GUARANTEE ACT, 1988 (VIC)," 2017.**

APPENDIX 3

LFF "ONE STOP CHOP: HOW REGIONAL FOREST AGREEMENTS STREAMLINE ENVIRONMENTAL DESTRUCTION"