Australian Forest Products Association

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Committee Secretary
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**AFPA Supplementary Submission on the Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020**

This is a supplementary submission that should be read in conjunction with AFPA's earlier submission to this inquiry.

The purpose of this supplementary submission is to provide the Committee with further detail on key matters pertinent to its consideration of this Bill.

**The need to clarify Section 38 (1) of the EPBC Act**

AFPA believes it is important to further address the substantive question of whether the Federal Court ruling in *Friends of Leadbeater's Possum vs VicForests*[1] on 27 May 2020 created legal uncertainty around the correct interpretation of s38 (1) – and the identical clause 6 (4) in the Regional Forest Agreements Act.

Justice Mortimer's Judgment in FOLP v VicForests considers the intended meaning of s38 at length. As the Federal Court's official summary of the Judgment makes clear, Justice Mortimer's interpretation of the term in s 38 (1), "in accordance with an RFA" was a crucial consideration in her Judgment. Having first found that VicForests' operations in question in the Central Highlands had breached the *Victorian Code of Practice for Timber Production 2014, t*he summary states:

> *Non-compliance with these mandatory parts of the Code means that VicForests' past forestry operations in 26 coupes were not conducted "in accordance with" the Central Highlands RFA and its future forestry operations in 41 coupes not yet fully logged are not likely to be conducted "in accordance with" the Central Highlands RFA…*

[1] https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0704

> *Thus the exemption in s 38(1) of the EPBC Act does not apply and the Court has found that VicForests' forestry operations in all 66 coupes are exposed to the ordinary operation of the controlling provisions in the EPBC Act…"*

On 3 July 2020, AFPA wrote to Federal Environment Minister Sussan Ley seeking urgent legislative clarification on the intended interpretation of s38 (1). The letter, ATTACHMENT A, stated:

> *I am writing to express the significant concerns of Australia's native forest industries following the recent Federal Court decision regarding VicForests' operations under the Central Highlands Regional Forest Agreement, and the potential implications this ruling may have on other RFAs nationally….*
>
> *We believe this uncertainty could be signficantly addressed if the Federal Government urgently amended section 38 of the Environment, Protection, Biodiversity and Conservation Act to affirm and clarify the Commonwealth's intent regarding RFA …*
>
> *The intent of the Commonwealth and states for the s38 provision has always been for it to be interpreted to mean "any forestry operation that happens in an RFA area".*

On 10 September 2020 VicForests lodged an appeal to the full bench of the Federal Court. The appeal hearing concluded on 14 April 2021 and is awaiting judgment. VicForests' Notice of Appeal (ATTACHMENT B), states at Ground 1:

1. *The primary judge erred in holding… that the actual conduct of forestry operations must be undertaken in accordance with the contents of the [Central Highlands] CH RFA – that is, in compliance with any restrictions limits, prescriptions, and contents of the Code – in order to secure the benefit in cl 38 (1) of the EPBC Act.*

2. *The primary judge ought to have held that, on the proper construction of s 38 (1) of the EPBC Act and s 6 (4) of the RFA Act, any forestry operations that:*

   a. *Are forestry operations as defined by an RFA as in force on 1 September 2001; and*
   b. *Are conducted in relation to land:*
      i. *in a region covered by the RFA; and*
      ii. *where those operations are not prohibited by the RFA*

   *are exempt from the operation of Part 3 of the EPBC Act.*

VicForests' first ground of appeal seeks to address the same issue AFPA identified from the outset, regarding the potential ramifications of the FOLP v VicForests on the operation of s38 (1) and the potential implications for RFAs nationally.

AFPA maintains that the Judgment has introduced a level of uncertainty into the intended interpretation of s 38 (1) of the EPBC Act, namely, what it means to be a forestry operation in accordance with an RFA" that must be clarified by the Commonwealth to provide certainty for industry.

While the appeal hearing has concluded, it could be several months before a Judgment is handed down, and there is no guarantee that the decision will provide clarify the Commonwealth's intent, especially as the Commonwealth did not intervene in the appeal.

And, even if VicForests' appeal is upheld, there could be a further appeal to the High Court which could see timber harvesting in much of the Central Highlands – the major source of hardwood timber in Victoria – injuncted from harvesting for several months more.

Meanwhile, hardwood timber mills dependent on logs from the Central Highlands face an uncertain future and the prospect of running out of timber if they cannot sign new wood supply contracts with VicForests.

**The Government Solicitor's submission in FOLP v VicForests**

On 11 December 2017 the Australian Government Solicitor lodged a submission to the proceedings on behalf of the Commonwealth. The submission considered in detail the Commonwealth's intended interpretation and operation of s 38 (1). Notably, the AGS submission was that the Court should reject the applicant's (Friends of Leadbeater's Possum) arguments.

AFPA contends that the AGS submission, ATTACHMENT C, supports the position that Justice Mortimer erred in her interpretation of the intended operation of s 38 (1). Furthermore, the submission supports AFPA's contention that the RFA framework requires that there be a process between the parties to an RFA (the Commonwealth and the State) to determine matters of compliance. The submission states:

> ***General scheme of carve-outs in Part 4 of the EPBC Act***
>
> *7. Part 4 of the EPBC Act (which includes s 38) sets out a range of circumstances in which environmental approvals are not needed. Significantly, the provisions of ss 29(1), 30(3), 31, 32, 33, 37, 37M, and 38 all permit the taking of actions described in Part 3 without environmental approvals by reference to particular agreements or arrangements put in place by Commonwealth officials, namely: bilateral agreements (ss 29(1), 30(3), and 31); accredited management arrangements or accredited authorisation processes (ss 32 and 33); bioregional plans (ss 37); conservation agreements (s 37M); and regional forest agreements (s 38, hereafter referred to as RFAs).*
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> *8. A consideration of all of these provisions makes clear that the 'carve-outs' effected by them are consistently expressed to operate by reference to 2 factors: first, the relevant agreement, arrangement, process or plan must be operative (that*

> *is, in force); secondly, the particular action in question (here, 'an RFA forestry operation') must be taken 'in accordance with' the relevant agreement, arrangement, process, or plan (or declaration relating thereto). The second of these factors requires only that the particular action be undertaken 'in conformity with' or 'consistently with' the relevant agreement, arrangement, process, plan or declaration relating thereto.6*
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> *9. None of these carve-out provisions requires that any (let alone every) matter or thing which happens to be dealt with in the relevant agreement, arrangement, process or plan must be the subject of historic and/or extant observance or implementation by the issuing party or parties.* ***The reason for this is clear: in each and every case, the EPBC Act recognises that implementation of any provisions of the relevant agreement, arrangement, process or plan may be dealt with (if at all) by Commonwealth officials, at an executive or legislative level e.g. by exercising a discretion to amend or terminate the relevant agreement, arrangement, process or plan (or declaration relating thereto) in accordance with its terms and/or applicable provisions of the EPBC Act.***
>
> ***10.*** *In each case, the EPBC Act expressly recognises that compliance issues with respect to matters other than the taking of specific 'actions' might arise under the agreement, arrangement, process or plan –* ***but it is clear the legislature intended that any such compliance issues would not defeat the carve-out unless and until the Commonwealth decided to suspend or terminate the relevant agreement, arrangement, process or plan (or declaration relating thereto).*** *[Emphasis added]*

AFPA notes that the Department of Agriculture, Water and Environment's submission to this inquiry is silent on the question of whether the Judgment in FOLP v VicForests has given rise to an ambiguity in the interpretation of s 38 (1), or whether the Commonwealth agrees with Justice Mortimer's Judgment. AFPA also notes the Commonwealth did not intervene in the appeal. Nonetheless, AFPA submits that the AGS's submission does not support Justice Mortimer's interpretation of s 38 (1) and is inconsistent with DAWE's submission to this inquiry.

**The Wielangta case, and the precedent for the Commonwealth urgently intervening to provide certainty for RFAs and clarify its intent**

A key question that has emerged since AFPA lodged its submission to this inquiry is why the Commonwealth should amend legislation when there is an appeal afoot, and that the appeal process should run its course. It is disappointing and unacceptable that this issue is unresolved almost 12 months since the Judgment and industry is no closer to securing the legal certainty that was sought immediately after the May 2020 decision.

As previously stated, there is no guarantee that the appeal process will provide the clarity needed around the correct (and intended) interpretation of s 38 (1).

Furthermore, there are many examples in which the Commonwealth has introduced urgent legislative amendments to address legal ambiguities created by court decisions before the appeals processes have been exhausted. Typically, this has been done in the name of clarifying the Commonwealth's legislative intent, and to provide policy certainty.

Perhaps the most analogous case relevant to this matter is the 2006-07 Federal Court case *Bob Brown vs Forestry Tasmania*[2], commonly known as the Wielangta case.

In that case, the Federal Court ruled in December 2006 that Forestry Tasmania's forestry operations in Wielangta forest had not been (and would not be) conducted "in accordance with an RFA" (as required by s38 of the EPBC Act) because they had failed to provide adequate protections for the swift parrot under the Comprehensive and Representative Reserve system, as required (according to the judge's interpretation) by the Tasmanian RFA.

In January 2007, AFPA's predecessor, the National Association of Forest Industries, had written to Prime Minister John Howard seeking urgent clarification. The letter, ATTACHMENT D, bears considerable similarities to AFPA's letter of July 2020 to Minister Ley. The letter to Prime Minister Howard stated:

> *The decision [in Bob Brown vs Forestry Tasmania], which relates to the protection of threatened species under the Tasmanian Regional Forest Agreement (RFA), has found that Forestry Tasmania does not have exemption from the relevant provisions of the Commonwealth's Environment Protection and Biodiversity Conservation (EPBC) Act and that the forestry operations in Wielangta are not in accordance with the RFA.*
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> *This has created a great deal of uncertainty for the forest industry, not only in Tasmania, but across mainland Australia where 10 RFAs are currently in operation, given the potential impact of the decision. These RFAs, as agreed to by the Commonwealth and the various States, were intended to provide Australia's forest industry and its reliant communities with much needed certainty with respect to access to valuable native forest timber resources.*
>
> *Unfortunately, the ruling has the potential to jeopardise this certainty by undermining the validity of these Agreements, which were developed through extensive stakeholder and community consultative processes and the highest quality rigorous scientific assessments.*

In stark contrast to the Commonwealth's response in the current matter, the Howard Government and Tasmanian Labor Government urgently amended the Tasmanian RFA to clarify the ambiguity and to address industry's concerns.

In announcing the RFA amendment on 23 February 2007, then Minister for Forestry and Conservation Eric Abetz issued a media statement[3] that said:

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[2] https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2006/2006fca1729
[3] https://webarchive.nla.gov.au/awa/20070829022234/http://mffc.gov.au/releases/2007/07017a.html

> *These amendments to just five clauses out of a total of 103, and minor alterations to two of the 14 attachments, will restore the policy intent of the RFA, and will continue to provide certainty to the forest industry in Tasmania while maintaining the protection of rare and threatened species…These changes do not in any way water down the protection of Tasmania's forests or the ecosystems within.*

Shortly before that, on 16 February 2007, Senator Abetz told Senate Estimates[4] why the Commonwealth was preparing to amend the RFA to clarify the Commonwealth's intent:

> *The governments had an intention of what they wanted and expected out of those agreements. They committed it to paper and, whilst we might have views on the interpretation of the written word, the simple fact is we live in a country with a rule of law. The judge has interpreted the words in a particular way.*
>
> *That notwithstanding, the parties to the agreement can say, 'If our wording doesn't give expression to our intent, it's open to us to review the wording to make it absolutely certain that our intent is accurately expressed and that the regional forest agreement can be implemented and the strategic harvesting can continue.'*

Notably, the February 2007 amendment to the RFA was made before the appeal process had concluded because the Howard Government recognised that industry needed certainty and that the decision had misrepresented the parties' intent.

AFPA submits that the same urgency to resolve the uncertainty around the operation of s38 (1) exists today. AFPA urges the Commonwealth to act to protect the jobs of the tens of thousands of Australia whose livelihoods depend on the continued supply of natural regrowth hardwood timber.

**The need for legislative reform**

AFPA believes that Senator McKenzie's Bill provides the clarity needed through a minor amendment to an identical clause in two Acts.

It is also important to note that the Tasmanian and NSW Governments wrote to Minister Ley following the judgment to express their willingness to work with the Government to clarify the uncertainty created by the FOLP v VicForests decision.

In a letter from NSW Deputy Premier John Barilaro to Minister Ley on 16 September 2020, ATTACHMENT E, he states:

> *This [judgment] has created uncertainty for forestry operators in NSW RFA areas, who rely on the three NSW long term RFAS to ensure availability of future wood supply.*
>
> *I would strongly urge you to pursue any necessary actions to provide certainty for the NSW RFAs and reaffirm the intentions of the Commonwealth in relation to RFAs*

[4] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F10039%2F0002%22

*and the EPBC Act. I would very much appreciate any assistance you could provide in progressing this as a matter of urgency.*

In the absence of an alternative proposal, AFPA urges the Parliament to support Senator McKenzie's Bill. AFPA remains open to working with the Government and the Parliament on any alternative approach that achieves the same objective.

Yours sincerely

Mr Ross Hampton
**Chief Executive Officer**