



**Inquiry into the effectiveness of threatened species and  
ecological communities' protection in Australia**

Lawyers for Forests Inc (LFF) makes this submission in response to the invitation to do so from the Standing Committee on Environment and Communications.

This submission addresses terms of reference (b), (e), (f) and (g).

In this submission, LFF makes the following key recommendations:

- It is vital that the Commonwealth develop a national, strategic framework to protect Australia's remaining native forests, which will result in the protection of threatened species.
- Recovery Plans should focus on protection of native forests, as well as preventing further extensive logging. These actions should be incorporated into legal obligations.
- The EP<sup>1</sup>BC Act should include an 'emergency' listing process for species.
- Section 38 of the EPBC Act, which exempts RFAs from EPBC Act compliance, should be removed.

**(b) Development and implementation of recovery plans**

Background

1. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**) divides threatened species into five categories: extinct, extinct in the wild, critically endangered, endangered, vulnerable, or conservation dependent.<sup>1</sup>

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<sup>1</sup> EPBC Act s179.

2. Under s 269A of the EPBC Act, the Minister may make a written Recovery Plan for the purposes of the protection, conservation and management of a listed threatened species or a listed threatened ecological community.
3. The Minister may adopt a plan made by a State, a self-governing Territory or an agency of a State or self-governing Territory as a national recovery plan<sup>2</sup>. The Minister may also make a Recovery Plan jointly with a State or Territory<sup>3</sup>.
4. In Victoria, the *Flora and Fauna Guarantee Act 1988* (Vic) (the **FFG Act**) is another crucial piece of legislation used for the protection of threatened species. Under s 19 of the FFG Act, "Action Statements" must be prepared for any species or community that is listed as threatened under the FFG Act.
5. Under s 269A of the EPBC Act, the Commonwealth agrees to adopt State Action Statements as Recovery Plans where they meet the requirements of the EPBC Act. Furthermore, if a species is restricted to Victoria, any new or revised Action Statements will be jointly prepared to fit the requirements of a Recovery Plan.

### Summary of Concerns

6. LFF is extremely concerned about the following:
  - (a) Recovery Plans are not being developed to adequately respond to the listing of threatened flora and fauna.
  - (b) A significant number of Recovery Plans are considerably out of date and in urgent need of review. For example, that relating to the Leadbeater's Possum, Victoria's faunal emblem.
  - (c) The lack of implementation of most Recovery Plans.

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<sup>2</sup> EPBC Act s269A(7).

<sup>3</sup> EPBC Act s269A(3).

### Development of Recovery Plans

7. Currently, 446 species of fauna and 1344 species of flora (1790 total) are listed as threatened under the EPBC Act, however, only 666 Recovery Plans have been made or adopted under the EPBC Act, with another 196 being “prepared” as at 29 March 2012.<sup>2</sup> This means that less than 40% of listed threatened species currently have Recovery Plans in place for their conservation and protection.
8. Furthermore, many species listed as endangered or critically endangered still do not have Recovery Plans at all.
9. For example, the Shy Susan (*Tetratheca gunnii*) was transferred from endangered to critically endangered in October 2001, but still has no Recovery Plan. Other examples of critically endangered species without any Recovery Plans include Gilbert’s Potoroo, Western Swamp Tortoise, Orange-bellied Parrot, Mountain Mistfrog and the Wimmera Rice-Flower.
10. It is clear that there are insufficient Recovery Plans to cover all the listed threatened species. Either more resources need to be dedicated to ensure all listed species have Recovery Plans, or the process needs to be changed.

### Content, Effectiveness, Review and Implementation of Recovery Plans

11. The system for preparation of Recovery Plans is failing in many cases to address the decline of listed threatened species. Reform is required in order that Recovery Plans become better tools for conservation. Recovery Plans should be made in consultation with appropriately qualified experts in order to be scientifically sound, and should be reviewed on a regular basis and in the aftermath of extreme weather events.
12. Problems with the content of Recovery Plans are demonstrated by the Recovery Plan prepared for the Leadbeater’s Possum (the LBP Recovery Plan). The LBP Recovery Plan was prepared in 1997 and has not been

reviewed since that time. The major problems with the LBP Recovery Plan in particular (although these issues span plenty of Recovery Plans) are that:

- (a) The Recovery Plan is far too vague to be effective in that it fails to clearly specify key actions and legal obligations;
- (b) The Recovery Plan has not been reviewed since 1997, despite major changes in the Victorian forest landscape including the February 2009 fires; and
- (c) There is a lack of implementation of the Recovery Plan at a state level.

### *Content*

13. Studies have shown that there has been no significant difference between changes in species status for species with Recovery Plans, and those without Recovery Plans<sup>4</sup>. Further, since the commencement of the EPBC Act, 49 species have been transferred to a more threatened status than previously. LFF is of the opinion that this lack of progress is at least partially due to the lack of legal obligations which accompany Recovery Plans, and their failure to outline clearly actions that need to be taken to preserve a species.
14. LFF is particularly concerned about the impact of logging on the Leadbeater's Possum. To be effective, the Recovery Plan must address the problems associated with logging the forest which forms the possum's habitat.
15. Logging is extremely problematic to conservation of biodiversity because of the species-rich nature of forests. LFF is extremely concerned about the current rates of logging in Victoria, and throughout Australia, particularly because of the devastating effect logging has on threatened species. Indeed vegetation clearing is widely considered the most important factor for species decline and extinction<sup>5</sup>.

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<sup>4</sup> MC Bottrill, JC Walsh, JEM Watson, LN Joseph, A Ortega-Argueta & HP Possingham, 'Does recovery planning improve the status of threatened species?' *Biological Conservation*, 2011, 144: 1595-1601.

<sup>5</sup> CJA Bradshaw, NS Sodhi & BW Brook, 'Tropical turmoil - a biodiversity tragedy in progress', *Frontiers in Ecology and the Environment*, 2009, 7: 79-87; BW Brook, NS Sodhi & CJA Bradshaw, 'Synergies among extinction drivers under global change', *Trends in Ecology and Evolution*, 2008, 25: 453-460; HK Gibbs, AS Ruesch, F Achard, et al. 'Tropical forests were the primary sources of new agricultural land in the 1980s and 1990s', *Proceedings of the National Academy of Sciences*, 2010, 107: 16732-16737.

16. Approximately 75% of Australia's area is arid land and desert, and despite our relatively small population, the forest-richer coastal areas have seen a rapid decline in forest cover over the past few decades. Victoria has been the most logged State, with over 66% of native vegetation having been cleared since European settlement (compared to approximately 38% loss across Australia)<sup>6</sup>.
17. There has also been significant fragmentation of forests and vegetation, which has had a considerable impact on biodiversity. This fragmentation is extremely detrimental because it reduces the ability for species to migrate throughout forests, and also increases the capability for invasion of foreign species.
18. Most of the land clearing that has occurred has been for agriculture. However clearing of native forests for what the unlawful conversion into plantations has also had a significant impact on biodiversity. Although there is value for biodiversity as plantations age, the creation of forest monocultures and the lack of biodiverse native forests seriously impacts both flora and fauna species. Evidence suggests that as Australia's production of wood is higher than demand, logging of native forests is no longer necessary<sup>7</sup>.
19. Recommendation – Recovery Plans should focus on protection of native forests, as well as preventing further extensive logging. These actions should be incorporated into legal obligations.

### *Review*

20. All Recovery Plans should be revised on a regular basis to reflect scientific developments in the area, and other changes that affect threatened species, such as extreme weather events. LFF is concerned that despite major changes in the Victorian forest landscape as a result of bushfires and logging, relevant

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<sup>6</sup> CJA Bradshaw 'Little left to lose: deforestation and forest degradation in Australia since European colonization', *Journal of Plant Ecology*, 2012, 5(1): 109-120.

<sup>7</sup> J Ajani, 'Australia's transition from native forests to plantations: the implications for woodchips, pulpmills, tax breaks and climate change', *Agenda*, 2008, 15: 21-38.

Recovery Plans are not being updated. This lack of review is one factor in the potential extinction of many listed threatened species in Australia.

21. The LBP Recovery Plan states that “implicit in the adoption of management actions contained in this document and their subsequent implementation is the recognition that they are dynamic and *subject to continuing review*” (emphasis added). However the Recovery Plan has not been amended since its creation in 1997. This is despite major changes to habitat, including the Victorian Black Saturday bushfires of 2009.
22. The Victorian Black Saturday bushfires of 2009 resulted in 430,000 hectares of land being burnt. It is estimated that 98,932 hectares of that area was parks (including 90% of that being national parks), and another 3,921 hectares of private bushlands. It is also estimated that over 27 listed threatened species are found within the affected areas. Therefore the fires would have had a devastating effect on many of these species. The fires had a particular effect on the Leadbeater’s Possum, severely depleting its habitat.
23. Despite this, and despite the fact that bushfires may have had some benefit to the Leadbeater’s Possum through the creation of new hollow-bearing trees, much of the area was ‘salvage logged’ following the fires.<sup>8</sup> Such actions demonstrate the urgent need to review Recovery Plans following events such as large-scale bushfires so that as much habitat can be protected as possible.

### *Implementation*

24. Any actions that are specified in Recovery Plans need to be more thoroughly implemented.
25. For example, the LBP Recovery Plan makes reference to actions including:
  - (a) Fire modelling

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<sup>8</sup> Ben Butler, ‘State-owned VicForests logging firm “non-viable”’, January 3, 2011, accessed at <http://www.theage.com.au/business/stateowned-vicforests-logging-firm-nonviable-20110102-19d0k.html>.

- (b) The establishment of a reserve system across the species' range based on habitat suitability
  - (c) Applying guidelines during logging coupe planning and harvesting, and the adoption of modified or alternative silvicultural systems.
26. The above actions, which are key to the survival of the Leadbeater's Possum, are yet to be implemented. For example, the LBP Recovery Plan states, as one of its objectives, the identification and implementation of a permanent reserve system.<sup>9</sup> The LBP Recovery Plan makes reference to 'an ample supply of old hollow trees' as being the basis of this reserve system. However, the establishment of this reserve has experienced lengthy delays.
27. Furthermore, some of the actions specified in the LBP Recovery Plan are being flagrantly disregarded. For example, the requirement to apply guidelines during logging, coupe planning and harvesting. Following the 2009 Victorian bushfires, VicForests salvage logged the burnt forests. This has resulted in a reduction of suitable habitat for the possum due to the decline in availability of hollow-bearing trees.<sup>10</sup> Current logging methods and rates of logging are having major effects on the Leadbeater's Possum, along with other species that depend on tree hollows.

#### Lack of reporting on Recovery Plans

28. Despite over \$17 million being invested by the federal government in recovery planning between 2001-2011<sup>11</sup>, there has been little to no reporting on the success of Recovery Plans. LFF believes there must be greater communication between federal and state agencies, and species experts.

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<sup>9</sup> Malcom McFarlane, Jill Smith & Kim Lowe, 'Leadbeater's Possum Recovery Plan', published by the Department of Natural Resources and Environment (2 July 1997) p.3.

<sup>10</sup> Australian National University Fenner School of Environment and Society, 'Leadbeater's Possum', accessed at [http://fennerschool-research.anu.edu.au/cle/research\\_projects/vchstudy/lbpossumhp.php#human](http://fennerschool-research.anu.edu.au/cle/research_projects/vchstudy/lbpossumhp.php#human) on 14 December 2012.

<sup>11</sup> MC Bottrill, 'Does recovery planning benefit threatened species? And what should we do if it doesn't?' Decision Point, 2011, 5(5).

29. This would not be difficult to implement. For example, in a submission to the review on the EPBC Act<sup>12</sup>, the State of Victoria said: "Victoria has extensive environmental monitoring data sets and would be happy to discuss improved data collection and sharing with the Commonwealth." There also needs to be greater or more synthesised data on species trends, such as long term population data, in order to properly evaluate the effectiveness of the Recovery Plans.

### *Inequality between Recovery Plans*

30. Recovery Plans for different species do not attract equal amounts of attention, and therefore are unable to yield equal results. More attention is devoted to species that are more threatened, are more 'likeable', have more scientific information regarding them and have been listed under the EPBC Act for longer.

31. Furthermore, some taxonomic groups are under-represented by both Recovery Plans and the listing processes. 65.5% of amphibians, 57.9% of birds, 42.2% of fish and 41.9% of mammals that are listed have current Recovery Plans. On the other hand, only 22.5% of invertebrates, 27.0% of plants and 29.6% of reptiles have Recovery Plans.

32. It is unlikely that these biases represent genuine differences in the need for Recovery Plans, but rather represent differences in scientific knowledge and understanding about these threatened species.

33. As previously stated, many critically endangered species do not yet have Recovery Plans. In fact, only 31.7% of critically endangered species have Recovery Plans, compared to 42.8% of endangered species.

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<sup>12</sup> A Submission to the Review Secretariat for Environment Protection and Biodiversity Conservation Act 1999 on behalf of the State of Victoria, 2009 <<http://www.environment.gov.au/epbc/review/submissions/pubs/172-dept-of-sustainability-and-environment-victoria.pdf>>.



### Single-species Recovery Plans vs. ecosystems of national significance

34. LFF is concerned that the EPBC Act focuses too heavily on single species and ecological communities and does not include 'ecosystems of national significance' as a matter of national environmental significance: those that provide habitat that is critical to the long term survival of a significant number of threatened species under the Act."<sup>13</sup> "Recovery up to an ecosystem level would broaden the scope of Commonwealth involvement in biodiversity conservation. This shift is consistent with Australia's international obligations under the Biodiversity Convention, which calls for protection of ecosystems, as well as individual species."<sup>14</sup>
35. Further, Recovery Plans should be drafted while considering future changes and impacts of climate change on species and ecological communities.

#### **(e) Timeliness and risk management within the listings processes**

##### Background

36. There are currently 1790 species listed as threatened under the EPBC Act. These listed species therefore only represent approximately 1% of all the species found in Australia<sup>15</sup>. In LFF's view, this is not representative of threatened species in Australia. This is most likely caused by the ad hoc and lengthy process currently used to add a threatened species to the list.

<sup>13</sup> Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*, Final Report, October 2009, Recommendation 8.

<sup>14</sup> Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*, Final Report, October 2009, 4.26.

<sup>15</sup> Department of Sustainability, Environment, Water, Population and Communities, 'Number of Living Species in Australia and the World', 2009 <<http://www.environment.gov.au/biodiversity/abrs/publications/other/species-numbers/2009/pubs/02-nlsaw-introduction.pdf>>.

## Listing processes

37. In order for a new species or ecological community to be added to the threatened list of the EPBC Act, it must be nominated and then assessed by the Threatened Species Scientific Committee according to their *Guidelines for Assessing the Conservation Status of Native Species*<sup>16</sup>. These guidelines include thresholds for each category of the threatened list (critically endangered, endangered and vulnerable) including population numbers, geographical distribution, number of mature individuals and probability of extinction.
38. The Minister approves the final listing of species to be added to the national list of threatened species. Alternatively, the Minister may list a species as threatened or endangered in one or more States, but not in others. For example, in April 2012, Federal Environment Minister Tony Burke listed the koala as 'vulnerable' in Queensland, New South Wales and the Australian Capital Territory following recommendations made by the Threatened Species Scientific Committee<sup>17</sup>. However he stated that "in some areas in Victoria and South Australia, koalas are eating themselves out of suitable foraging habitat and their numbers need to be managed... That is why the scientific committee recommended to me to list the Queensland, New South Wales and Australian Capital Territory populations as threatened, rather than to list the koala as nationally threatened across its full range."
39. Since the EPBC Act's enactment, there have been 30 previous nominations for species to be added to the threatened species list under schedule 1 which have

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<sup>16</sup> Threatened Species Scientific Committee, '*Guidelines for Assessing the Conservation Status of Native Species according to the Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act) and EPBC Regulations 2000*', <<http://www.environment.gov.au/biodiversity/threatened/pubs/guidelines-species.pdf>>.

<sup>17</sup> T Burke, '*Koala protected under national environmental law*', Media release, April 2012, <<http://www.environment.gov.au/minister/burke/2012/mr20120430.html>>.

been unsuccessful<sup>18</sup>, and another 8 unsuccessful nominations for ecological communities<sup>19</sup>.

## **Critique on the timeliness and risk management within the listing process**

### Emergency listings

40. Assessment of new nominations begin in October each year, and according to the DSE, the time frames for assessing new listings are approximately 1–2 years for species and 2–3 years for ecological communities<sup>20</sup>. It is obvious that for many species, 1-3 years could mean the difference between survival and extinction, therefore the time span is too long.
41. There is currently no scope within the EPBC Act for the Minister to make emergency listings of species and ecological communities.
42. The independent report of the EPBC Act conducted by Dr Hawke, as mentioned above, recommends that the Act be amended to give the Minister the power to make “emergency” listings of species and ecological communities provided that it meets the criteria and that there is a severe and imminent threat to the species or ecological community<sup>21</sup>.
43. This was supported by submissions made by the New South Wales Scientific Committee<sup>22</sup>, the Department of Sustainability and Environment (Vic)<sup>23</sup> and the World Wide Fund (WWF)<sup>24</sup>.

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<sup>18</sup> Department of Sustainability, Environment, Water, Population and Communities, '*Unsuccessful species nominations*', as at 2012 <<http://www.environment.gov.au/biodiversity/threatened/unsuccessful-species.html>>.

<sup>19</sup> Department of Sustainability, Environment, Water, Population and Communities, '*Unsuccessful threatened ecological communities nominations*' as at 2012

<<http://www.environment.gov.au/biodiversity/threatened/unsuccessful-communities.html>>.

<sup>20</sup> <http://www.environment.gov.au/biodiversity/threatened/listing-assessments-fpal-process.html>

<sup>21</sup> Department of the Environment, Water, Heritage and the Arts, '*The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*', Final Report, October 2009, Recommendation 16.

<sup>22</sup> NSW Scientific Committee, '*Submission to the Independent Review of EPBC Act 1999*', December 2008 <<http://www.environment.gov.au/epbc/review/submissions/pubs/150-nsw-scientific-committee.pdf>>.

<sup>23</sup> State of Victoria, '*A Submission to the Review Secretariat for Environment Protection and Biodiversity Conservation Act 1999*', January 2009 <<http://www.environment.gov.au/epbc/review/submissions/pubs/172-dept-of-sustainability-and-environment-victoria.pdf>>.

44. Recommendation – create ‘emergency’ listing process.

#### Review process of listings

45. Following review, threatened species can have their status altered to reflect changes in their current threatened condition, for example the Tasmanian Devil was transferred from vulnerable to endangered in May 2009. The review process is important to keep the listings up to date with the ever evolving status of flora and fauna.
46. However, since the enactment of the EPBC Act, only 77 species have had their threatened species status altered. Of the 1790 species listed, these 77 species represent just 4.3% of the total threatened species which have been reviewed. This reflects an inadequate review process of listings.

#### Single national list of threatened species

47. The independent report also suggested: “That Australian, State and Territory governments move to a single national list of threatened species, including marine species and ecological communities.”<sup>25</sup>
48. This idea was supported by the submission to the review on behalf of the State of Victoria<sup>26</sup>, in which they stated that streamlining the two lists could significantly reduce duplication of effort in this area.
49. However, a streamlined national list of threatened species could be inappropriate for particular species. For example, as mentioned above, the

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<sup>24</sup> World Wide Fund Australia, ‘Response to the Australian Government’s Discussion Paper seeking views to inform the Independent Review of the Environment Protection & Biodiversity Conservation Act 1999’, January 2009 <<http://www.environment.gov.au/epbc/review/submissions/pubs/181-world-wildlife-fund-australia.pdf>>.

<sup>25</sup> Department of the Environment, Water, Heritage and the Arts, ‘The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999’, Final Report, October 2009, Recommendation 5.

<sup>26</sup> State of Victoria, ‘A Submission to the Review Secretariat for Environment Protection and Biodiversity Conservation Act 1999’, January 2009 <<http://www.environment.gov.au/epbc/review/submissions/pubs/172-dept-of-sustainability-and-environment-victoria.pdf>>.

population of koalas is threatened in New South Wales and Queensland, but apparently not in Victoria. Therefore, a single national list could have the effect of homogenising the listings for each state, such that a species is under-protected where it is endangered, but over-protected where it is not endangered.

#### Inequality between taxonomic groups within the listing

50. There is a significant difference in the number of listings between taxonomic groups. Specifically, plants, fish, reptiles and invertebrates are significantly under-represented in the EPBC Act in comparison to mammals, birds and amphibians. This is probably because mammals, birds and amphibians are all comparatively well studied in Australia.
51. In fact, just 0.009% of all fish species and 0.0004% of all invertebrates are listed under the EPBC Act. This is in stark contrast to 24.1% of mammal species, 12.9% of bird species and 12.8% of amphibian species. This is despite fish and invertebrates making up approximately 98% of all Australian fauna species.
52. While it could be argued fish and invertebrates are less threatened in Australia, it seems more likely that the lack of knowledge on these taxonomic groups has resulted in inadequate listings where they are needed.
53. Recommendation – there needs to be an increase in the scientific knowledge of fish, invertebrates, plants and reptiles. This knowledge should then be utilised for the appropriate listing of species under the EPC Act and development of Recovery Plans for those species.

#### **(f) The historical record of state and territory governments on these matters**

54. The Flora and Fauna Guarantee Act 1988 (Vic) (**FFG Act**) is Victoria's principal legislation regulating the protection of the State's threatened species and

ecological communities. LFF is concerned that the FFG Act is not being appropriately implemented by the Victorian State government.

55. This has typically included long delays in making Action Statements for listed species, lack of review of Action Statements, and a failure to use key powers afforded to the Minister under the FFG Act such as the ability to make critical habitat declarations and interim conservation orders.
56. Further, LFF is very concerned about the conduct of Victoria's state logging corporation, VicForests. In LFF's opinion, VicForests has consistently disregarded obligations imposed on it by Action Statements and Forest Management Plans.

#### Action Statements

57. Action statements are required to implement management tools to conserve and manage listed species, communities, or potentially threatening processes. Action Statements are brief management plans for the conservation of individual flora or fauna species. Action Statements are designed to apply for three to five years, after which time they will be reviewed and updated.
58. Under section 19 of the FFG Act, the Secretary must prepare an Action Statement as soon as possible after a taxon, community or threatening process is listed. However, in practice, the delay between listing and preparation of an Action Statement can take many years. Many species listed under the FFG Act do not have an Action Statement at all.
59. Additionally, the lack of enforcement and monitoring of the effectiveness of Action Statements has made it difficult to determine whether the listing process is an effective or efficient means of protecting threatened species or their habitat.

## Critical Habitat Determinations and Interim Conservation Orders

60. Critical Habitat Determinations are required to trigger one of the few active conservation powers within the FFG Act, namely, the making of Interim Conservation Orders. Interim Conservation Orders are designed to give 'immediate and comprehensive protection' so that areas can be immediately protected whilst a long-term strategy is established.
61. The Victorian government has consistently failed to make critical habitat determinations. In fact, only one critical habitat determination has ever been made. The determination was subsequently withdrawn by the Department due to a land use conflict.
62. LFF understands that Environment East Gippsland Inc sought that a critical habitat determination and/or interim conservation order be made in respect of Brown Mountain in East Gippsland. The government failed to make such determination or order, and EEG was compelled to seek injunctive relief from the Supreme Court of Victoria to stop logging of Brown Mountain due to the presence of threatened species at Brown Mountain as VicForests refused not to log it – EEG succeeded in the Supreme Court action and protected Brown Mountain and the species that inhabit it.
63. In LFF's opinion, the Victorian government is under-utilising these key powers to the detriment of threatened species.

### **(g) Any other related matter**

64. In LFF's opinion, the "RFA exemption" (s 38 of the EPBCA) should be removed.

### Background

65. In 1992, the Commonwealth, State and Territory governments all signed the National Forestry Policy Statement. This statement outlined broad goals for the conservation of Australia's forests.

66. From this statement, Regional Forestry Agreements (RFAs) were developed. RFAs are twenty year agreements between Commonwealth and State governments which relate to particular areas of forest. Their main objectives are:
- (a) Identifying a comprehensive, adequate and representative (CAR) reserve system; and
  - (b) Provide for conservation of those CAR reserves; and
  - (c) Provide for the ecologically sustainable management and use of forests.
67. Part 3 of the EPBC Act states that particular actions, or proposals involving the Commonwealth, which affect matters of national environmental significance require environmental approval.
68. These actions include those that would affect World Heritage properties, National Heritage places, wetlands of international importance, listed threatened species and ecological communities, listed migratory species, protection of the environment against nuclear actions, the marine environment and the Great Barrier Reef Marine Park.
69. Under s 38 of the EPBC Act, part 3 does not apply to actions that are undertaken in accordance with a Regional Forestry Agreement. Therefore RFAs are extremely important instruments to the protection and conservation of threatened species.

#### Criticism of s 38

70. In a review of the success of RFAs in Victoria by LFF in conjunction with the Wilderness Society (Victoria) in 2011<sup>27</sup>, it was found that there has been serious non-compliance and a lack of enforcement of the RFAs. There has also been a lack of independent review, public consultation or adaptive

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<sup>27</sup> Lawyers for Forests Inc. and the Wilderness Society (Victoria) Inc., 'Forests Law Reports: Evaluation of Victoria's Forestry Conservation Framework', 2011.



management. These views are supported by other independent bodies and reports.

### Lack of compliance

71. Several clauses of RFAs have not been complied with<sup>28</sup>. These include terms to report on progress every five years<sup>29</sup>, terms to manage cultural values, both Aboriginal and non-Aboriginal<sup>30</sup>, terms to publish future reports of internal audits of compliance with the Code of Forest Practices for Timber Production<sup>31</sup>, and terms to produce, publish, review and update a “Forest Management Plan” in the West Victoria RFA<sup>32</sup>.
72. The Australian Forest and Climate Alliance<sup>33</sup> and the Hawke review<sup>34</sup> both pointed out that there has been a clear lack of compliance with the terms of the RFAs. It has been suggested that future non-compliance should result in sanctions<sup>35</sup>.

### Lack of enforcement

73. Terms of the RFAs are difficult to enforce. This is partially because they are exempt from part 3 of the EPBC Act, and also because their enforcement requires significant activism on the Commonwealth’s part.

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<sup>28</sup> *ibid.*

<sup>29</sup> *East Gippsland Regional Forest Agreement (EG RFA) between the Commonwealth and Victorian Government (1997) cl 25; Central Highlands Regional Forest Agreement (CH RFA) between the Commonwealth and Victorian Government (1998) cl 35; North East Regional Forest Agreement (NE RFA) between the Commonwealth and Victorian Government (1999) cl 35; West Victoria Regional Forest Agreement (WV RFA) between the Commonwealth and Victorian Government (2000) cl 36; Gippsland Regional Forest Agreement (G RFA) between the Commonwealth and Victorian Government (2000) cl 36.*

<sup>30</sup> *East Gippsland RFA cl 34; Central Highlands RFA cl 45(d); North East Victoria RFA cl 45(b); West Victoria RFA cl 46(b); Gippsland Victoria RFA (2000) cl 46(b).*

<sup>31</sup> *East Gippsland RFA cl 28; Central Highlands RFA cl 43; North East Victoria RFA cl 43; West Victoria RFA cl 44; Gippsland Victoria RFA cl 44.*

<sup>32</sup> *West Victoria RFA cl 67*

<sup>33</sup> *Australian Forests and Climate Alliance, ‘Regional Forest Agreements should be abolished’, 2012 <<http://forestsandclimate.net/rfas>>.*

<sup>34</sup> *Department of the Environment, Water, Heritage and the Arts, ‘The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999’, Final Report, October 2009.*

<sup>35</sup> *Department of the Environment, Water, Heritage and the Arts, ‘The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999’, Final Report, October 2009, Recommendation 38.*

74. Furthermore, RFAs contain some terms which are legally enforceable, and others which are not. The terms which are not legally enforceable would require the Commonwealth to sue for breach of contract, and therefore in reality it is unlikely that such terms would be enforced.
75. The terms which are legally enforceable often contain few obligations, and therefore lack effectiveness. This point was emphasized in *Forestry Tasmania v Brown* [2007] FCAFC 186, in which the Full Court of the Federal Court of Australia concluded that clauses within the Tasmanian RFA did not truly obligate Tasmania to protect endangered species including the Tasmanian Wedge-tailed Eagle.
76. The decision effectively rendered the terms of the Tasmanian RFA redundant, and the case highlights the fact that there are few if any legal mechanisms to ensure compliance with the terms.

#### Lack of independent review

77. Because of the lack of compliance to terms requiring review, information regarding their effect, particularly in relation to threatened species, is severely lacking.
78. All Victorian RFAs require an annual report on achievements for the first five years, and then another report every five years. However, no report has been issued since 2003. Therefore, there is little clarity on what the RFAs are doing to ensure environmental conservation, and particularly species protection.

#### Lack of public consultation

79. The independent review of the EPBC Act<sup>36</sup> concluded following consultation to the public and other bodies that there is significant dissatisfaction with the

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<sup>36</sup> Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999 – Fact Sheet 4*, Final

outcomes of the RFAs. This concern is emphasised due to the lack of review regarding the RFA outcomes.

#### Lack of adaptive management

80. RFAs lack a system of adaptation in response to new information. For example, the Victorian RFAs have not considered the loss of forest resources due to fire; this is despite over 3.3 million hectares of forests having been lost to bushfires in the past 10 years<sup>37</sup>. This has meant that unburnt areas have been more heavily logged to compensate for the loss.
81. Furthermore the RFAs have not considered the future effects of climate change on forests, or the amount of water available. It has also been pointed out that RFAs have not adapted to consider the current availability of plantation wood, and consequently native forests continue to be heavily logged<sup>38</sup>.
82. LFF recommend that s 38, which exempts RFAs from EPBCA compliance should be removed.

**Lawyers for Forests Inc**

14 December 2012

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Report, October 2009 <<http://www.environment.gov.au/epbc/review/publications/pubs/fact-sheet-4-regional-forest-agreements.pdf>>.

<sup>37</sup> Department of Sustainability and the Environment (Vic), 'Bushfire History', July 2012

<<http://www.dse.vic.gov.au/fire-and-other-emergencies/major-bushfires-in-victoria>>.

<sup>38</sup> Australian Forests and Climate Alliance, 'Regional Forest Agreements should be abolished', 2012 <<http://forestsandclimate.net/rfas>>.