

Environment and Communications Legislation
Answers to questions on notice
Agriculture, Water and the Environment Portfolio

Inquiry: Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020

Question No: IQ21-000026

Hearing Date: 19 April 2021

Division/Agency: Agvet Chemicals Fisheries Forestry and Engagement (AFFE)

Topic: RFAs five-yearly review

Hansard Page: 68-69

Question Date: 19 April 2021

Question Type: Spoken

Senator McKenzie asked:

Senator McKENZIE: Has the department been undertaking the five-yearly reviews of the RFAs?

Ms Campbell: The RFAs were extended fairly recently. We haven't hit the first five-year time frame for the RFAs, but—

Senator McKENZIE: When is that?

Ms Campbell: I can check later in the hearing. I think it should be within the next couple of years—the first five-yearly review of the Tasmanian RFA, which was the first RFA that was rolled over.

Answer:

The first five-yearly review of the extended RFAs will be for the Tasmanian RFA. The Tasmanian RFA five-yearly review (considered to be the fifth five-yearly review) is due in 2022. Arrangements for five-yearly reviews are discussed formally by the Parties at each RFA annual meeting, as well as through informal discussions throughout the year. The five-yearly reviews in the other RFA states will progress after the Tasmanian RFA five-yearly review, concluding with the five-yearly review for the Victorian RFAs due in 2025.

Environment and Communications Legislation
Answers to questions on notice
Agriculture, Water and the Environment Portfolio

Inquiry: Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020

Question No: IQ21-000027

Hearing Date: 19 April 2021

Division/Agency: Agvet Chemicals Fisheries Forestry and Engagement (AFFE)

Topic: Legal risk with the passing of the Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020

Hansard Page: 69-70

Question Date: 19 April 2021

Question Type: Spoken

Senator Rice asked:

Senator RICE: Do you think that passing this bill could, in fact, significantly increase the legal risks for the Commonwealth, state and territory governments and industry?

Ms Deininger: We're not from our legal area. I don't think it's really our place to be able to make a commentary in terms of legal risk or the risk of litigation.

Senator McKENZIE: Could you take that on notice, please? This is about a matter of law and less about Leadbeater's possums themselves. I'd appreciate you getting some advice from your legal team on this.

Answer:

Yes. This Bill could increase legal risk for governments. As outlined in the Department of Agriculture, Water and the Environment's submission, the Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020 would limit the Australian Government's regulatory environmental protections ordinarily available if the forestry operation is not undertaken in accordance with the relevant RFA.

Environment and Communications Legislation
Answers to questions on notice
Agriculture, Water and the Environment Portfolio

Inquiry: Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020

Question No: IQ21-000028

Hearing Date: 19 April 2021

Division/Agency: Agvet Chemicals Fisheries Forestry and Engagement (AFFE)

Topic: Friends of Leadbeater's Possum v VicForest appeal case

Hansard Page: 71-73

Question Date: 19 April 2021

Question Type: Spoken

Senator Abetz asked:

Senator ABETZ: As a result, is it not vitally important that we get certainty and, as a result, deal with the implications of the Leadbeater's judgement?

Ms Deininger: Senator, I think we're awaiting the outcome of the Leadbeater's case, and the government will consider the outcome of that case once it's known.

Senator McKENZIE: Are we making a submission to the appeal?

CHAIR: Go ahead, Senator Abetz.

Senator ABETZ: That was going to be one of my follow-up questions, so let's ask it now: are you making a submission for the AGS to submit to the appeal?

Ms Campbell: The Commonwealth is not a party to the appeal.

Senator McKENZIE: That's not the question. You weren't a party to the original case. You weren't a party then—it was VicForests and Leadbeater's—but you made a submission. To Senator Abetz's point, you don't need to be a party to make a submission. His question stands.

Senator ABETZ: Is the Commonwealth going to be intervening?

Ms Campbell: We haven't intervened to date. As to any future action, we'll have to look at that as it arises.

Senator ABETZ: I've got a document here—'Submissions of the Commonwealth, Federal Court of Australia District Registry, No. VID-1228 of 2017'—that has the Commonwealth of Australia as an intervener. Is that the case or not?

Ms Campbell: We did provide a submission to the court back in 2017, yes, and Senator McKenzie has referred to that.

Senator ABETZ: Yes. So we did intervene in 2017. Why wouldn't we be intervening on the appeal, in that case, especially when it leads to uncertainty in circumstances where, as I was able to outline before, the whole RFA idea was to create certainty?

Ms Deininger: Given, as I mentioned earlier, that we're not from our general counsel area, I'd prefer not to get into matters of a detailed legal position. I'm happy to take that particular question on notice, as to why it is that we're not—

Senator ABETZ: Please take it on notice. I find it strange—it's a question of detail as to whether you are intervening or not, and the benefits. I would have thought removing any uncertainty would have been to everybody's benefit—unless the creation of uncertainty was designed to help destroy the industry. I look forward to the answer on that. Has the department provided a brief to the Crown Solicitor, in any way, shape or form, in relation to this original decision by Mortimer?

Ms Campbell: We'll have to take the detail of that on notice.

..

Senator ABETZ: Thank you, Chair. I agree with Senator McKenzie. My next question was going to be about whether we were going to challenge Her Honour's judgement in relation to

the meaning of 'protection' stated in clause 54 of the Central Highlands RFA. You can take that on notice because, clearly, that won't be able to be answered.

...

Senator CICCONE: Why is the Commonwealth's role lacking in in this matter? You were very active—we've had examples in other cases. But with this particular matter before the court in Victoria, why is the Commonwealth choosing not to participate?

Ms Deininger: As we've indicated, we've taken on notice that question around why the Commonwealth hasn't intervened.

Answer:

The Federal Court previously granted leave for the Commonwealth to intervene in a preliminary separate question proceeding in 2018 regarding the application of the exemption in subsection 38(1) of the EPBC Act. In the separate question proceedings the Court upheld the Commonwealth's submissions about the construction of s38 of the EPBC Act, and found against Friends of Leadbeater's Possum (**FOLP**). The Commonwealth has not been a party to the proceedings since the determination of the separate question.

The Commonwealth did not intervene in the Full Federal Court appeal, particularly given that the judgment in the subsequent proceeding on subsection 38(1) of the EPBC Act was consistent with the Commonwealth's submissions on the separate question.

Environment and Communications Legislation
Answers to questions on notice
Agriculture, Water and the Environment Portfolio

Inquiry: Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020

Question No: IQ21-000029

Hearing Date: 19 April 2021

Division/Agency: Agvet Chemicals Fisheries Forestry and Engagement (AFFE)

Topic: Victorian forest code ambiguity

Hansard Page: 73

Question Date: 19 April 2021

Question Type: Spoken

Senator Ciccone asked:

Senator CICCONE: I will be very quick; I'm mindful of time. Just to clarify, is it right that the department accepts there is legal ambiguity with respect to the relationship between the EPBC Act and the RFAs? Is that what I picked up?

Ms Campbell: I understand that Victoria has accepted that there has been some ambiguity in the application of the Victorian forest code, and they have taken steps. They announced, I believe in July, they will review their forest code to look at ambiguities in the code.

Senator CICCONE: What about the Commonwealth?

Ms Campbell: I don't think we accept, necessarily, that there is ambiguity.

Senator CICCONE: You don't think or you don't know? What's the firm view of the Commonwealth? Do you accept there is ambiguity or not?

Ms Deininger: I'm happy to take it on notice, Senator Ciccone. As Ms Campbell has indicated, the Victorian government has taken steps to improve and clarify its code.

Answer:

No, the Department of Agriculture, Water and the Environment does not consider that there is inherent legal ambiguity between the EPBC Act and the RFAs. The department notes that in July 2020 the Victorian Government announced that it will conduct a review of the Victorian Code of Practice for Timber Production (the Code). This is to address ambiguities in the Code that were surfaced in the matter of *Friends of Leadbeater's Possum Inc. v VicForests*.

Environment and Communications Legislation
Answers to questions on notice
Agriculture, Water and the Environment Portfolio

Inquiry: Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020

Question No: IQ21-000030

Hearing Date: 19 April 2021

Division/Agency: Agvet Chemicals Fisheries Forestry and Engagement (AFFE)

Topic: Department's knowledge of the private Senator's bill before tabling in the Senate

Hansard Page: 73

Question Date: 19 April 2021

Question Type: Spoken

Senator Ciccone asked:

Senator CICCONE: Alright. This is my very last question. Were you aware of this private senator's bill before it was tabled in the Senate?

Mr Tregurtha: I wasn't.

Ms Campbell: From my recollection, no. I'd have to take that—

Senator CICCONE: From your recollection. What about the other two?

Ms Deininger: I missed your question, Senator Ciccone.

Senator CICCONE: Were you aware of the private senator's bill before it was tabled in the Senate?

Ms Deininger: I personally wasn't aware of it, no.

Senator CICCONE: Were your team?

Ms Campbell: I think no, but we'll confirm that on notice.

Senator CICCONE: Okay.

Answer:

The Department of Agriculture, Water and the Environment had no knowledge of the McKenzie Bill before tabling in the Senate.

Environment and Communications Legislation
Answers to questions on notice
Agriculture, Water and the Environment Portfolio

Inquiry: Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020

Question No: IQ21-000031

Hearing Date: 19 April 2021

Division/Agency: Agvet Chemicals Fisheries Forestry and Engagement (AFFE)

Topic: Legal advice

Hansard Page: 73-74

Question Date: 19 April 2021

Question Type: Spoken

Senator McKenzie asked:

Senator McKENZIE: I'm pretty sure it's no. I've just got two questions and a lot to put on notice. In your submission, you state:

The McKenzie Bill will result in reduced Australian Government environmental regulatory protections ...

Given that the RFA framework, which you have admitted is the appropriate mechanism for the Commonwealth to deal with issues of noncompliance and which is also stated in the A-G's submission to the court proceedings, don't you then accept that this bill merely backs up that fact—that the RFA system as it exists provides ample opportunity for the Commonwealth to intervene in matters of noncompliance?

Ms Campbell: It provides opportunity as it is now. If the provision 'in accordance with' is taken out, it may reduce our ability to seek—

Senator McKENZIE: What legal advice do you base this on? We've had lots of legal counsel advise this committee, and me in the drafting of this bill, and that is not a risk that has been raised. What is the advice that you're relying on to make that statement?

Ms Campbell: We'll have to take the details of that advice on notice.

Answer:

The Department of Agriculture, Water and the Environment's submission was informed by legal advice.

The information sought by the inquiry compromises privileged Commonwealth legal advice. It is a long-standing practice of successive Australian Governments to not disclose privileged legal advice.