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No. 91 2001–02

Regional Forest Agreements Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 91 2001–02

Regional Forest Agreements Bill 2002

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8 March 2002

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Regional Forest Agreements Bill 2002

Date Introduced: 13 February 2002

House: Senate

Portfolio: Forestry and Conservation

Commencement: Sections 1 and 2 commence on Royal Assent. However, the operational aspects of the Bill (sections 3-12 and Schedule) commence on a day to be fixed by Proclamation, or failing that, six months after Royal Assent.

Purpose

To give legislative effect to certain provisions of the Commonwealth-State Regional Forest Agreements - particularly provisions on compensation and exclusion of specified Commonwealth laws - and provide legislative recognition of the existence and work of the Forest and Wood Products Council.

Background

The Regional Forest Agreements Bill (the RFA Bill) is the fourth Bill of that name introduced into Parliament. A Bill was first introduced in mid 1998 but its passage was interrupted by October 1998 Federal election. The Bill was reintroduced in the same form in November 1998 but the House of Representatives and the Senate still remained deadlocked over amendments by the end of 1999.

An amended version was introduced in August 2001 but no substantive debate took place before the proroguing of Parliament in October 2001.¹ The current (2002) version of the Bill largely replicates the October 2001 Bill with the important exception of the insertion of a Schedule and particularly item 1 of that Schedule.

This background section traces the origin of the Regional Forest Agreements Bill 1998 and summarises the main sticking points behind the failure of the Parliament to pass that Bill in 1999. What differences there are between the 1998 and 2002 versions of the Bills are discussed in the main provisions section.

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Regional Forest Agreements

In 1992, the Commonwealth and the States and Territories signed the National Forest Policy Statement (NFPS). The NFPS outlined agreed objectives and policies for the future of Australia's public and private native forests.² As part of implementing the NFPS governments agreed that forest regions would go through a comprehensive assessment process of all forest values - environmental, heritage, economic and social - leading to the establishment a comprehensive and adequate reserve (CAR) system, agreements on forest management, and the signing of Regional Forest Agreements (RFAs) between the Commonwealth and the relevant State.

Collectively, the RFAs are intended to provide a blueprint for the future management of Australian forests, and the basis for an internationally competitive and ecologically sustainable forest products industry.³ They are intended to clearly identify those forest resources available for multiple use, including resources for sustainable timber harvesting. As shown in the following table, ten RFAs have been signed across 4 states.

Table 1: Regional Forestry Agreements

Region	Date Signed
East Gippsland, Victoria	February 1997
Tasmania	November 1997
Central Highlands, Victoria	March 1998
South-West Western Australia	May 1999
Eden, NSW	August 1999
North East Victoria	August 1999
Gippsland, Victoria	March 2000
West Victoria	March 2000
North-East NSW	March 2000
Southern NSW	April 2000
Queensland	Not signed

As part of the RFA process, a joint Commonwealth-State Forest Industry Structural Adjustment Package (FISAP) was established to help forest industry businesses and

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workers adjust to reductions in the native forest resources available to industry resulting from the RFAs. Around \$100 million of Commonwealth FISAP funding is available over 1996-2003. However, in Queensland there has only been limited funding due to the failure of the respective governments to sign a RFA.⁴ In Western Australia only a 'negligible amount' has been released by the Commonwealth to date due to the alleged failure of the Western Australian Government to implement the RFA,⁵ although the Commonwealth has recently announced its intention to advertise for expressions of interest from businesses involved in the WA hardwood forestry industry for 'direct' Commonwealth financial assistance.⁶

Table 2: Forest Industry Structural Adjustment Package (FISAP) payments

	NSW	Vic.	QLD	WA	Other payments	Total
Allocation	\$60.00m	\$18.80 m	\$5.00 m	\$15.00 m		\$98.80 m
Estimate spent to 31/12/01	\$22.07 m	\$6.24 m	\$0.33 m	\$0.14 m	\$ 8.31 m	\$37.10 m
Unspent	\$37.93 m	\$12.56 m	\$4.67 m	\$14.86 m		\$61.70 m

Notes

Figures are millions of dollars.

The \$8.82 million of 'other payments' includes rescheduling assistance payments in Tasmania, past Agriculture, Forestry and Fisheries Departmental Costs, payments under the Wood and Paper Industry Strategy, direct Interim Hardship payments and expenditure and running costs by the Department of Employment, Workplace Relations and Small Business on the Forest Industry Labour Adjustment Package (FILAP) not attributed to individual states and monies returned to consolidated revenue by that portfolio. AFFA assumed administrative responsibility for FILAP with effect from 1 July 2001.

Tasmania received substantial funding over \$100 million as part of the RFA process for that State and this is not included in the above. Tasmania does not have an ongoing FISAP program.

Estimate spent to 31/12/01 - estimate only as latest confirmed figures are as at 30 June 2001. Includes FILAP attributed to individual states.

Source

Personal communication, Commonwealth Department of Agriculture, Forestry and Fisheries, February 2002.

While the contents of the respective RFAs vary somewhat, a key feature of all the RFAs except East Gippsland has been the compensation provisions. Typically, these provide that

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if, in order to protect environment or related values in native forests, the Commonwealth breaches the RFA in a way that curtails the use of land outside the reserve system, or the sale or commercial use of forest products sourced from land outside the reserve system, the Commonwealth will pay compensation to the State concerned acting as a trustee for the person or company who has suffered loss.

The origin and content of the 1998 Regional Forest Agreements Bill

In February 1998, Senator Bob Brown, obtained a legal opinion that concluded the Tasmanian RFA was 'statement of intent only and has no legal effect'.⁷ If correct, one of the obvious consequences of this opinion was that the RFA's compensation provisions would not be legally enforceable. Around this time, the Government started to prepare the 1998 Bill. In response to a Question on Notice from Senator Brown on 2 April 1998, as to the Government's rationale for the Bill, Senator Hill stated that⁸

Only part three of the Tasmanian and Central Highland RFAs is expressed to be legally binding. The primary reason for the legislation is to give effect to some key provisions which are not expressed to be legally binding...thereby providing greater certainty about the operation of RFAs.

The compensation provisions are contained in Part three of the RFAs. The implication of Senator Hill's statement is that the Government considered, at least on the balance of probabilities, that the compensation provisions were legally enforceable without any legislation. However, later statements by the Government indicate that questions over the legal enforceability of the compensation provisions in the RFA were a motivating factor behind the Bill.⁹

...the Commonwealth has introduced its Regional Forest Agreement Bill, to ensure that the compensation provisions of RFAs are legally enforceable against the Commonwealth.

The initial version of the Regional Forest Agreements Bill was introduced into Parliament in mid 1998. Its passage through Parliament was halted by the Commonwealth election in October 1998. It was re-introduced in November 1998 and passed by the House of Representatives in February 1999.

The Bill was very short with only 8 sections covering only about 4 pages. Key provisions were:

- definitions of what constituted an RFA and an RFA forestry operation
- that RFA forestry operations were exempted from the operation of various Commonwealth environment and export control laws, and
- that the Commonwealth was liable to pay compensation where this was required under the relevant provisions of an RFA.

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The key sticking points in the 1999 Parliamentary debate

On 9 December 1998, the Bill was referred to the Senate's Rural and Regional Affairs and Transport Legislation Committee. The Committee reported on 25 February 1999. The Chairman's report recommended that the Bill be passed unamended. Separate dissenting reports were given by the ALP, the Democrats and the Australian Greens. The ALP and the Democrats considered that more time was required to address various aspects of the Bill. The Greens opposed the Bill outright.

While the Bill was introduced into the Senate in February 1999, substantive debate did not begin until August. The Senate made significant amendments to the Bill (the Senate amendments) but these were rejected by the House of Representatives in October 1999. The Senate insisted on the amendments and again sent the Bill back. The Government continued to oppose the Senate amendments and with the Houses deadlocked, the 1998 Bill was not debated again in either 2000 or 2001.

There were five main sticking points between the Government position and the Senate.

An objects clause

As introduced in 1998, the Bill had no objects clause or similar statement of intent. The ALP introduced an objects clause that made specific reference to the NFPS.¹⁰ The purpose of the clause was 'to ensure RFAs are consistent with the NFPS'. The consistency was to be judged with reference to a number of criteria, which were directly derived from the list of 'national goals' contained in NFPS. The criteria also required that the precautionary principle be applied in a RFA. The Democrats proposed an amendment to the ALP's objects clause that would require an RFA to be consistent with the 1995 National Competition Policy Agreement¹¹ but this was not supported by the ALP.

In opposing the ALP's objects clause of Senate amendments, the Government said¹²

...we have grave concerns about an objects clause because that just opens up the opportunity for people who seem to have heaps and heaps of money to take someone to court after the event when they have committed their billion bucks in a paper making plant and say, 'You cannot do this because RFA No. 5 in Victoria does not meet the objects of the act.' That is a great opportunity for a couple of lawyers to make a lot of money. The fact of life is that investors do not want that problem; they want uncontested arrangements. That is what you achieve with an objects clause: you start to create opportunities for litigation. That is why I think it was totally unnecessary. But we were prepared to have some limited objects that we felt would not open the legislation to that sort of litigation, and we said so.

On this basis, the 2002 Bill actually contains a short objects clause. This is discussed in the main provisions section of this Digest.

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Parliamentary scrutiny and disallowance

The ALP successfully moved a Senate amendment that, amongst other things, would mean that an RFA made after 1 March 1999¹³ would only be an RFA for the purposes of the Act if it were made in accordance with proposed parliamentary scrutiny provisions. This meant that if an RFA did not comply with this requirement, the Act would not apply to it, thus defeating the Government's purpose in relation to the enforceability of RFA provisions.

At the heart of the scrutiny provisions was the requirement for RFAs to be tabled and the ability of either House to disallow them within 15 sitting days of tabling. The rationale for this amendment was that the¹⁴

Regional forest agreements have a long term and massive impact on our forests. Therefore, it is quite reasonable that the Senate and this House ask for better scrutiny. It is reasonable that the regional forest agreements be subjected to public scrutiny before their final ratification. In Western Australia, the Regional Forest Agreement was signed off before anybody else saw it. There was no public scrutiny. That is the way this operates.... The Senate disallowance, in my view, is the best mechanism for making sure there is proper public scrutiny of these very important agreements.

The Government opposed the disallowance provisions for two reasons. The first related to the possibility of an opened-end delay.¹⁵

The RFA process itself involves both comprehensive scientific assessment and comprehensive stakeholder engagement. On what basis will a house of parliament be better placed to determine whether an RFA is appropriate or not?... if the RFA is disapproved, there is no requirement under the proposed amendment for the disapproving house to specify what aspects of the RFA are not acceptable...so one could envisage extensive rounds of submission and resubmission of a draft RFA without any positive resolution. These proposed amendments are a recipe for uncertainty....it will produce yet another process that has no obvious merit.

The other reason was the question of whether a disallowance process would be invalid due to inconsistency with section 99 of the Commonwealth Constitution. Section 99 provides that

the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

Advice from the Australian Government Solicitor indicated that, amongst other things, as the disallowance procedure would only apply to post-March 1999 RFAs, this would constitute section 99 preferential treatment.¹⁶ This view was rejected by the ALP.¹⁷

However, this issue may well be moot in the Senate's debate of the 2002 RFA Bill. In the September 2001 Senate report of the 2001 Bill, the ALP's position was that disallowance provisions were no longer required because all but the Queensland RFA had been signed

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and thus Parliament was no longer being asked to 'endorse' yet to be negotiated agreements as they were under the 1998 Bill.¹⁸

Application of the *Environmental Protection and Biodiversity Conservation Act 1999* to RFA regions

Subclause 5(3) of the 1998 Bill excluded the operation of the environment assessment provisions of the *Environment Protection (Impact of Proposals) Act 1975* (EPIPA) and the ability of the Governor-General to invoke the protective measures of the *World Heritage Properties Conservation Act 1983* (WHCPA).

After the Bill had passed the House and been introduced into the Senate but before substantive debate on the Bill had commenced in the Senate, the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBCA) was passed, which repealed both the EPIPA and the WHCPA, although the EPBCA was not to come into effect until July 2000. Part 3 of the EPBCA effectively replaced the EPIPA assessment provisions and WHCPA invoking measures mentioned above.

Section 38 of the EPBCA enabled a person to undertake RFA forestry operations without being subject to the requirement for environmental approvals under Part 3 of the EPBCA. However, under section 42, section 38 did not apply to forestry operations

- in a property included in the World Heritage List; or
- in a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention; or
- that are incidental to another action whose primary purpose does not relate to forestry.

A Senate amendment incorporated similar language to that of EPBCA section 42 into subclause 5(3) of the 1998 Bill. Without these amendments subclause 5(3) would have likely negated section 42 EPBCA on the general principle that, where there is inconsistency between two pieces of legislation, the more recent legislation should prevail.

The Senate amendment was opposed by the Government¹⁹ and was not incorporated into the 2001 Bill. However, an amendment to the same legal effect has been incorporated into the 2002 RFA Bill (item 3 Schedule 1), so this issue may no longer be a sticking point between the Senate and House of Representatives.

Compensation

With the exception of the East Gippsland RFA,²⁰ all RFAs contain provisions for the Commonwealth to pay compensation in certain circumstances should the Commonwealth take action inconsistent with the RFA to protect environment and heritage values in native forests.

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The RFAs essentially state that compensation will be payable where, in relation to land outside the CAR system, the 'foreseeable and probable consequence' of the Commonwealth's actions are to 'prevent or substantially limit' the use of that land for forestry operations, sale of forest products, mining operations, sale of mining products, or road building for transport of forest products. In general, the activities prevented or limited were to have been undertaken or intended to have been undertaken at the time of the announcement of the Commonwealth's proposed action. The RFAs provide that the intention to undertake activities is to be established 'on the basis of contracts, documentation of management history or other records establishing clear intent and in existence immediately prior to the announcement of the proposed Commonwealth action'. Compensation is only payable for 'the amount of reasonable loss or damage'. If the Commonwealth and the relevant state cannot agree on whether a compensation claim should be paid or how much should be paid, the RFAs provide that the matter is to be referred to an arbiter.²¹ Presumably there are reasonably standardised methodologies by which professional arbiters calculate what 'reasonable loss or damage' means in any given situation.

As introduced by the Government, the 1999 Bill (and carried over to the 2002 Bill) provided that 'the Commonwealth is liable to pay any compensation that the Commonwealth is required to pay a State in accordance with the compensation provisions of an RFA.' The Senate altered this to 'the Commonwealth is liable to pay any compensation *in relation to actual losses arising from the loss of legally exercisable rights* that the Commonwealth is required to pay a State in accordance with the compensation provisions of the RFA for a *breach amendment or termination of any RFA*.' The ALP stated that²²

...the opposition supports the concept of compensation and is happy to clarify any legal uncertainties. Equally, we have an obligation to protect the interests of the taxpayers of this country. We believe the bill is deficient in failing to properly define the extent of the Commonwealth's potential compensation liability. Senate amendments (10) to (13) do this, chiefly by linking compensation to 'actual losses arising from the loss of legally exercisable rights'.

This amendment was rejected by the Government, saying it²³

...also rejects the Senate amendments which propose to alter the compensation clause in the bill in a way that not only is confused but will have no effect, as the liability to pay compensation continues to arise out of the terms of the RFA itself. It is unclear as to what the term 'losses arising from the loss of legally exercisable rights' actually means. It is clearly designed to open opportunities for litigation and create uncertainty in terms of the compensation a dispossessed company would otherwise anticipate.

As the Bill contains no change to previous versions and the ALP has continued to push for provisions limiting liability to 'actual losses', this issue may continue to be a sticking point.

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An Industry Advisory Council

The 1998 Bill as introduced made no provision for an advisory industry council. Whilst in government, the ALP planned to establish a council to 'drive' the implementation of its *Wood and Paper Industry Strategy*,²⁴ released in December 1995. Chaired by the responsible Commonwealth Minister, the Council membership was to be drawn from industry, unions, the States, local government, the scientific community and the conservation movement.²⁵

The members of the Council were announced in January 1996, but it appears the Council was abolished after the new Government came to power.²⁶ However, during the Coalition's second term, the Government and industry stakeholders developed what was to become the *Forest and Wood Products Industry Action Agenda – Forest and Wood Futures* (the Action Agenda). The Government's September 2000 response to the Action Agenda included a commitment to establish a Forest and Wood Products Council.

The Council has met 3 times since November 2000, with its last meeting being in September 2001. The Council is chaired by the Forestry and Conservation Minister, the Hon Wilson Tuckey. There is one union representative on the Council, with the remainder being timber industry representatives, including in the furnishings and timber merchants sector. There are no conservation or tourism representatives amongst designated observers to the Council.

The issue of an industry council was also examined by the Senate committee inquiring into the 1998 Bill. The Chairman's report recommended a council be established, although it did not make any recommendations as to whether it should have a statutory basis or what its role and membership should be.

In relation to the 1999 Parliamentary debate, the major issues of contention between the Government and the Senate related to the Council's membership and functions. Under the Senate's amendments to the Bill, the provisions relating to the Council (termed a Wood and Paper Industry Council) ran to some 20 sections. The Council's functions reflected a very proactive body, able to undertake studies and report to the Minister on its own initiative. It was to be a large body of at least 15 people, with membership from a very wide range of interest groups beyond the timber processing sector, including unions, downstream timber users, conservation and tourism. The Chair and Deputy Chair were to be drawn from either timber processors / user groups or union representatives.

The Governments view on this was²⁷

[we agree] that a wood and paper industry council should be established, but we on this side of the chamber do not agree that it is necessary to spell out all the fine detail of the membership and structure of that committee. We would sooner have a flexible approach to this and a committee which is structured to deal with the principles required in this area but which can have the flexibility to change membership and direction and to do things that are in the best interests of the timber industry. The amendments put before us ignore the fact that rigidly setting something in concrete in

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legislation such as this effectively removes any flexibility that such an industry council may have. It is not necessary for it to be put into legislation.

It appears from the 2001 Senate report that the ALP may not continue to insist on retaining the 1999 Senate amendments with respect to the Council's membership and functions.

Main Provisions

New section 3 sets out the 'main objects' of the Bill. The are:

- (a) to give effect to certain obligations of the Commonwealth under Regional Forest Agreements;
- (b) to give effect to certain aspects of the Forest and Wood Products Action Agenda and the National Forest Policy Statement; and
- (c) provide for the existence of the Forest and Wood Products Council.

The 1998 Bill had no objects clause.

New section 4 contains a list of definitions. Notably, the definition of RFA or Regional Forest Agreement remains the same as that in the 1998 Bill as originally introduced. The definition of RFA forestry operations has changed. In relation to NSW, Victoria and Tasmania they are defined as

forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and [relevant State]) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA)

In relation to WA, it is defined as

harvesting and regeneration operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Western Australia) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA)

There is no definition for Queensland. The Commonwealth and the Queensland Governments have been unable to reach an agreement over a draft agreement²⁸ and hence no RFA has been signed.

New section 5 provides that the Bill legally binds the Commonwealth. This is unchanged from clause 4 of the 1998 Bill.

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New section 6 provides that certain Commonwealth legislation, or parts of them, do not apply to RFA wood or RFA forestry operations. The *Explanatory Memorandum* to the Bill comments that this exclusion

is because the environmental and heritage values of these regions have been comprehensively assessed under relevant legislation during the RFA process and the RFAs themselves contain an agreed framework on ecologically sustainable development of these forest regions over the next 20 years.

The effect of **new subsection 6(1)** is that measures under the *Export Control Act 1982* do not apply to RFA wood. **New subsection 6(2)** excludes any other 'export control law' applying to RFA wood, unless the relevant law expressly refers to RFA wood. Export control law is defined as 'a provision of a law of the Commonwealth that prohibits or restricts exports or which has the effect of prohibiting or restricting exports'. Note that the export controls on woodchips from regions covered by RFAs have already been lifted by the combined effect of the Export Control (Hardwood Woodchips) Regulations 1996 and the Export Control (Regional Forest Agreements) Regulations 1997.

New subsection 6(3) provides that 'the effect of RFA forestry operations must be disregarded for the purposes section 30 of the *Australian Heritage Commission Act 1975*' (AHCA). Essentially, under section 30, the Commonwealth is constrained from taking any action which adversely affects a place in the Register of the National Estate, unless there is no feasible and prudent alternative to this action. Section 30 does not provide any protection against the actions of non-Commonwealth entities such as individuals, companies or local or State Governments. The AHCA is itself currently the subject of repealing legislation (the Environment and Heritage Legislation Amendment Bill (No.2) 2000) and associated Bills. If the AHCA is repealed, protection of Australian Heritage will mainly occur under Part 3 of the EPBCA.

New subsections 6(1)-(3) are essentially the same as clause 5 of the 1998 Bill.

New subsection 6(4) provides that Part 3 of the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBCA), which deals with what matters require Ministerial approval before they can proceed, does not apply to an RFA forestry operation that is undertaken in accordance with an RFA. This reflects a similar provision in section 38 of the EPBCA. However the effect of **new subsection 6(4)** is modified by item 3 of Schedule 1. Item 3 provides that **new subsection 6(4)** will **not** apply to forestry operations or RFA forestry operations affecting a World Heritage property, Ramsar wetland or forestry operations 'incidental to another action whose primary purpose does not relate to forestry'. This is discussed further in the main provisions section of this digest under item 3 of Schedule 1.

New section 7 provides that the Commonwealth can only terminate an RFA in the way set in the termination provisions of the relevant RFA. One effect of **new section 7** is that if the termination provisions of an RFA which is in force are amended after the Bill commences, the Commonwealth could only legally terminate the RFA under the 'old'

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termination provisions rather than the new version. **New section 7** would have to be amended to allow a valid Commonwealth termination under any new provisions.

New section 7 is unchanged from clause 6 of the 1998 Bill.

New section 8 deals with compensation for breach of a RFA by the Commonwealth. It provides that the Commonwealth is legally liable for any compensation it is required to pay to a State pursuant to compensation provisions contained in the relevant in force RFA. The fact that the RFA expires or is terminated after the breach occurs does not effect the Commonwealth's liability. If necessary, compensation may be recovered by a State through a court action as a debt. Compensation is payable from funds appropriated by Parliament.

New section 8 is unchanged from clause 7 of the 1998 Bill.

New section 9 provides that the Minister must publish a notice in the Gazette when a RFA is entered into or ceases to be in force. The notice must provide details of the relevant region and the dates of entry into force or cessation.

New section 9 is unchanged from clause 8 of the 1998 Bill.

New section 10 deals with the tabling in Parliament of RFAs, amendments to RFAs, RFA annual reports and RFA review reports. **New subsections 10(1)-(2)** require that the Minister must cause a copy of an RFA to be tabled in each House of the Parliament within 15 sitting days after the RFA is entered into or the Bill comes into force, whichever is the later. However, a RFA that has already been tabled in a House before the Bill comes into force does not have to re-tabled in that House. Amendments to RFAs must also be tabled in each House within 15 sitting days after the amendment is made, or the Bill comes into force, whichever is the later. The Minister must also table RFA annual reports and RFA review reports within the same timeframe.

New section 10 is an entirely new section compared to the 1998 Bill, having emerged from the negotiations in 1999.

New section 11 deals with the Forest and Wood Products Council (the Council).

New subsection 11(1) requires that the Minister 'must take all reasonable steps to ensure that, at all times, there is in existence a committee known as the...[Council]...and established under executive power of the Commonwealth'.

New subsections 11(2)-(3) set out the objects and functions of the Council. These mainly relate to providing advice to the Minister about the implementation of the *Forest and Wood Products Industry Action Agenda – Forest and Wood Futures* (the Action Agenda) and carrying out any tasks specifically allocated to them under the Action Agenda. Other objects and functions focus on liaison and cooperation between 'different sectors of the forest and wood products industry'.

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In performing its functions, **new subsection 11(4)** limits the Council to activities that could be legislatively conferred on the Council under the Constitution. In particular, the Council may perform its functions 'in relation to matters arising in the course of, or that concern' interstate or overseas trade, constitutional corporations or any or all of the Territories. It is noticeable that no reference is made to the external affairs power, although this is not explicitly excluded by **new subsection 11(4)**.

New subsections 11(5)-(6) require the Minister to hold meetings of the Council on request by a majority of the Council and at least twice each calendar year.

New subsections 11(7)-(9) require the Council to undertake a review in the second half of 2004 of whether it should continue to exist and, if so, what its functions and procedures should be.

The Council must 'consult with stakeholders in the forest and wood products industry' in undertaking the review. The Council must present its review report to the Minister, who must cause the report to be tabled in both Houses of the Parliament within 15 sitting days after receipt from the Council. While the review must be finished by 31 December 2004, no deadline for the preparation or presentation of the review report to the Minister is contained in **new section 11**.

New section 11 is an entirely new section compared to the 1998 Bill.

New section 12 inserts **schedule 1** which contains various amendments to the EPBCA.

Item 1 of schedule 1 repeals existing section 38 of the EPBCA and replaces it with a new version. It simply updates references to the Bill as the Regional Forest Agreements Act 2002 as opposed to the existing Regional Forest Agreements Act 1999.

Item 2 of schedule 1 defines the term 'forest operations' to mean any of the following done for commercial purposes:

- (a) the planting of trees;
- (b) the managing of trees before they are harvested;
- (c) the harvesting of forest products;

and includes any related land clearing, land preparation and regeneration (including burning) and transport operations. For the purposes of paragraph (c), **forest products** means live or dead trees, ferns or shrubs, or parts thereof.

Item 3 of schedule 1 provides that **new subsection 6(4)** of the Bill will **not** apply to forestry operations or RFA forestry operations affecting a World Heritage property, Ramsar wetland or forestry operations 'incidental to another action whose primary purpose does not relate to forestry'. The effect of item 3 is to preserve the status quo under the EPBCA that currently requires the Environment Minister's approval before any forestry

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operations significantly impacting on World Heritage properties or Ramsar wetland can proceed.

Items 4-8 of schedule 1 make a number of consequential amendments.

Appendix - Background on recent reductions in logging volumes in Victoria and Western Australia

Between 3 February 1997 and 31 March 2000, the Victoria and Commonwealth Governments have signed Regional Forest Agreements (RFAs). When some of these RFAs were signed, estimates were given on the possible creation of a significant numbers of new jobs in the forest processing industries. Under the East Gippsland RFA, signed in February 1997, it was expected that:

The Victorian proposals to use low-grade wood, previously left on the forest floor, have a capacity to create up to 400 new jobs in new industries such as veneer and particle board manufacture²⁹

Under the Central Highlands RFA, signed in 1998 it was expected that:

Proposals for further value adding pave the way for the creation of about 300 new jobs in the region³⁰

It would appear that the forest resources database upon which the five RFAs were predicated, and upon which sustainable yield figures were calculated, may have been inadequate. The Statewide Forest Resource Inventory (SFRI), intended to provide a comprehensive and consistent database for establishing sustainable yields for each Forests Management Areas (FMAs), was initially started in 1994. Three million dollars was allocated in May 2000 to fast track the SFRI and it is expected to be completed in 2004.

In 2001 the Victorian Government established an Expert Data Reference Group comprised of Professor Jerry Vanclay and Dr Brian Turner. The Group reported to the Government on 31 October 2001 and found that 'because of uncertainties in the yield estimates for many FMAs, the Department of Natural Resources and Environment is not well placed to make long term commitments to industry.'³¹ They went on to say 'it is also evident that the resource assessments and yield forecasts for many FMAs have deficiencies that need to be redressed. Renewed emphasis must be placed on inventory and yield forecasting work, and resource estimates should be revisited as additional data become available. Unfortunately, deficiencies in current estimates mean that future estimates may differ substantially from the current estimates.'³² The Report included a table which showed licensed sawlog volume, a calculation for estimated sustainable yield and the reduction in cut to achieve sustainable yield. The reductions varied across the State but averaged 34% with some of the greatest reductions required in Midlands FMA and Central Gippsland FMA of 83% and 50% respectively.

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On 21 February 2002 the Victorian Premier, the Hon Steve Bracks, announced that logging in native forests across the State would be reduced by one third (31%) and that \$80 million would be provided to help forest workers and regional communities. A new body, VicForests, would be established to manage Victoria's native forests. The three largest cuts in log volume yield would be in Midlands (79%), Central Gippsland (50%) and East Gippsland (43%).³³ The reduction in logging rates apply to sawlogs production not woodchip production which is considered to be a by-product of sawlog operations. However the Premier is reported as saying that he expected woodchipping to be reduced in line with sawlog production.³⁴

The Victorian forest industry predicted losses of up to 1500 jobs (direct and indirect) as a result of the cut in logging rates.³⁵ Graeme Gooding of the Victorian Association of Forest Industries said that the industry was appalled by the revised figures, but he applauded the government for acting to address the issues when warnings to the previous government had fallen on deaf ears.³⁶ He said that instead of reducing logging rates Mr Bracks should have opened up more areas for controlled logging.³⁷ Federal Minister for Forestry and Conservation, Senator Ian MacDonal, stated that 'the Victorian Government has adopted a whole new process of assessment which has removed from the areas available for logging a very considerable part of the Victorian forest, that was always originally intended to be available.'³⁸ He indicated that the Commonwealth would investigate whether Victoria has breached the Regional Forest Agreements. He said that "Already investment strategies are being questioned and industry will be looking for investments in other states which are prepared to honour resource commitments and intergovernmental agreements."³⁹

Timbers workers at a rally before Victorian Parliament on 28 February 2002 called for legislation to guarantee the survival of their industry. Later in the day, the Victorian Premier told Parliament that he would introduce a new Forests Act to give resource security to the forest industry.⁴⁰ The Government was not committed to legislate for minimum timber volumes. Lindsay Hesketh of the Australian Conservation Foundation, said the Government was engaging in industry restructuring, not tackling conservation issues and that sawmills were being phased out to feed woodchip exports.⁴¹

On 27 February 2002, the Western Australian Government reaffirmed an indicative sustained yield of 140,000 cubic metres per annum of jarrah sawlogs.⁴² This is a reduction from the 324,000 cubic metres per annum figures included in the Regional Forest Agreement for the South-West Forest Region of Western Australia. The reduction was necessary because of the Government's decision in 2001 to end logging in all old growth forests had significantly reduced the available resource. The WA Forestry Minister, Kim Chance, said that 194 direct jobs had been lost since this decision and up to 300 jobs could go before the industry restructuring was completed.⁴³ According to press reports 37 mills will close in the south west region.⁴⁴ Ten mills will be invited to provide business cases so that the Government can decide which will receive final allocations in line with the final sustained yield over the next 10 years. This yield figure is to be developed by the Conservation Commission through the new Forest Management Plan.⁴⁵

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Endnotes

- 1 However, the Senate Regional and Rural Affairs and Transport Legislation Committee did inquire into the Bill. The reference to the committee was on September 20 2001 with a reporting date of 25 September. The Committee's report is at http://www.aph.gov.au/senate/committee/rrat_ctte/forest/forest_report.pdf
- 2 The text of the NFPS can be found at the Commonwealth's RFA website at: <http://www.rfa.gov.au/rfa/national/nfps/index.html>
- 3 See Environment Forest Taskforce, *Information sheet No. 1* at <http://www.rfa.gov.au/rfa/overview.html> .
- 4 The Hon Wilson Tuckey 'Tuckey announces financial support for Queensland native hardwood industry' *Media Release* 2 October 2000. For a discussion of the legalities of the Commonwealth position on Queensland funding see J Brown, 'Beyond Public Native Forest Logging', *Environmental and Planning Law Journal* Vol 18(1) February 2001 pp. 71–92 and especially pp. 81–82.
- 5 Mairi Barton 'Payment urged in timber standoff' *West Australian* 6 June 2001
- 6 The Hon Wilson Tuckey and the Hon Geoff Proser 'Commonwealth to call for expressions of interest from WA Hardwood forestry industry for direct Commonwealth financial assistance' *Joint Media Release* 7 September 2001.
- 7 Opinion of Gary Corr, Barrister at Law, dated 6 February.
- 8 Senator the Hon Robert Hill, *Senate Debates* 28 May 1998 p. 3437.
- 9 The Hon Wilson Tuckey 'WA Conservation Council legal opinion misses the point' *Media Release* 28 June 1999.
- 10 Note that the ALP's objects clause also included the establishment of an industry council, but this is dealt with elsewhere in this digest.
- 11 See *Senate Debates* 25 August 1999 at p. 7671.
- 12 The Hon Wilson Tuckey, House of Representatives *Debates* 9 December 1999 p. 13219.
- 13 Presumably this date was chosen as approximately coinciding with the release of the Senate Committee's 1999 report on the Bill.
- 14 The Hon Carmel Lawrence, House of Representative *Debates* 13 October 1999 p. 11451.
- 15 Senator the Hon Judith Troeth *Senate Debates* 26 August 1999 p. 7820.
- 16 Guy Aiken, AGS Senior General Counsel and Philip White, AGS Counsel. Advice to Derek White, Department of Agriculture, Forestry and Fisheries, dated 10 August 1999.
- 17 The Hon Duncan Kerr House of Representatives *Debates* 13 October 1999 p. 11449.
- 18 At p. 20.
- 19 Senator the Hon Judith Troeth, *Senate Debates* 1 September p. 8103.
- 20 This was the first RFA to be agreed. It was signed in February 1997.

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- 21 Most RFAs provide that if the Commonwealth and the state cannot agree on an arbiter, one will be appointed by Law Council of Australia.
- 22 Mr Laurie Ferguson, House of Representatives *Debates* 13 October 1999 p. 11444.
- 23 The Hon Wilson Tuckey, House of Representatives *Debates* 13 October 1999 p. 11442.
- 24 Wood and Paper Industry Strategy, 1995, p. 25
- 25 Ibid, p.26
- 26 The Hon Bob Collins, House of Representatives *Debates* 19 March 1997 p. 1842.
- 27 Senator Winston Crane, Senate *Debates* 24 August 1999 p. 7644.
- 28 The Hon Wilson Tuckey, 'Tuckey Calls on Beattie to sign "a proper RFA" to protect small timber towns' *Media Release* 23 February 2000.
- 29 See <http://www.rfa.gov.au/rfa/vic/east/index.html>
- 30 See <http://www.rfa.gov.au/rfa/vic/central/index.html>
- 31 Vanclay, JK and Turner, BJ 2001. *Evaluation of Data and Methods for Estimating the Sustainable Yield of Sawlogs in Victoria* Report of the Expert Reference Group 31 October 2001 p. 1.
- 32 Ibid, p. 47.
- 33 Miller, C 'Logging cutback to save dwindling forests' *The Age* p 3 21 February 2002.
- 34 Miller, C 'Call to match cuts in logging with reduced woodchipping' *The Age* p. 5 26 February 2002.
- 35 Miller, C 'Job Losses we had to have , says Bracks' *The Age* p. 3 22 February 2002.
- 36 *ibid.*
- 37 'Government should extend coups not cut rates: timber industry' *AAP* 22 February 2002.
- 38 Senator the Hon Ian MacDonald 'Breach of faith in Victoria forest shock' *Media Release* 21 February 2002.
- 39 Senator the Hon Ian MacDonald 'Industry doubt over future Victorian investment' *Media Release* 22 February 2002.
- 40 'Bracks announces logging bill' *AAP* 28 February.
- 41 Miller, C 'State offers loggers some hope' *The Age* p 6 1 March 2002.
- 42 The Hon Judith Edwards MLA and the Hon Kim Chance MLC 'Government announces shape of future jarrah industry' *Media Statement* 27 February 2002.
- 43 'Timber towns pay price of WA's logging policy' *AAP* 28 February 2002.
- 44 *ibid.*
- 45 Edwards, J and Chance, K *op cit.*

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