State forests, national interests:
A review of the Tasmanian RFA

This report was commissioned by the The Wilderness Society and prepared by the Environmental Defenders Office Tasmania.

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THE WILDERNESS SOCIETY

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[T]he establishment of RFAs … constitutes a form of assessment and approval for the purposes of the Environment Protection and Biodiversity Conservation Act. Correspondingly, like other activities assessed and approved under the Act, RFAs should be regularly monitored and audited to ensure they continue to meet the agreed conditions of that approval.[1]

In 1997, the Commonwealth and Tasmanian governments entered into the Tasmanian Regional Forest Agreement ***(the RFA)***. Like other Regional Forest Agreements, the RFA was designed "as a means of managing forest resources to deliver environmental outcomes as well as economic and resource security to the forest sector."[2]

The extent to which the two key objectives of RFAs — providing long-term security to the forest industry and protecting the natural and cultural values of forest areas — have been delivered remains a contentious issue.

Unlike other activities with the potential to significantly impact on threatened species and ecological communities, forestry operations carried out under a Regional Forest Agreement are not required to obtain approval under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* ***(EPBC Act)***. The existence of this exemption presumes that the assessment and approval processes endorsed by the RFA provide equivalent standards of protection, monitoring and enforcement to those expected under the EPBC Act.[3] This report assesses whether this presumption is justified in practice.

In 2013, the Australian Network of Environmental Defenders Offices and Lawyers for Forests published *One Stop Chop*[4], a critical analysis of the operation of Regional Forest Agreements across Australia. That review concluded that the exclusion of RFA forestry activities from the operation of the EPBC Act had reduced the protections afforded to biodiversity, particularly threatened species and ecological communities.

> *RFAs have never delivered the benefits claimed for them, for a mix of political, economic, cultural and legal reasons.*
>
> *From a legal perspective, the main reason the RFAs have failed is that the States do not take the regulatory and legal actions required to adequately protect matters of national significance. This failing cannot be addressed by differently wording the RFA and strengthening States' obligations: rather, the failure is fundamental to the concept of the RFAs and of devolving control of matters of national environmental significance from the Commonwealth to the States.*[5]

Despite this finding, the Federal government remains committed to streamlining regulation, reviewing RFAs and delegating approval powers to the State government — described by the government as the 'one-stop shop' agenda.

1 Hawke Review, above n5, s. 10.10-11, p197
2 Commonwealth Government. 2009. *Hawke Review Fact Sheet 4: Regional Forest Agreements.* Available at http://www.environment.gov.au/system/files/resources/5f3fdad6-30ba-48f7-ab17-c99e8bcc8d78/files/fact-sheet-4-regional-forest-agreements.pdf
3 See, for example, the judgment of Justice Marshall in *Brown v Forestry Tasmania and Other* (No 4) [2006] FCA 1729 at [310].
4 Feehely, J., Hammond-Deakin, N. and Millner, F. 2013. *One Stop Chop: How Regional Forest Agreements streamline environmental destruction,* Lawyers for Forests, Melbourne Australia ***(One Stop Chop)***. Available at www.edotas.org.au/wp-content/uploads/2013/10/One-Stop-Chop-Final-report.pdf
5 One Stop Chop, p5

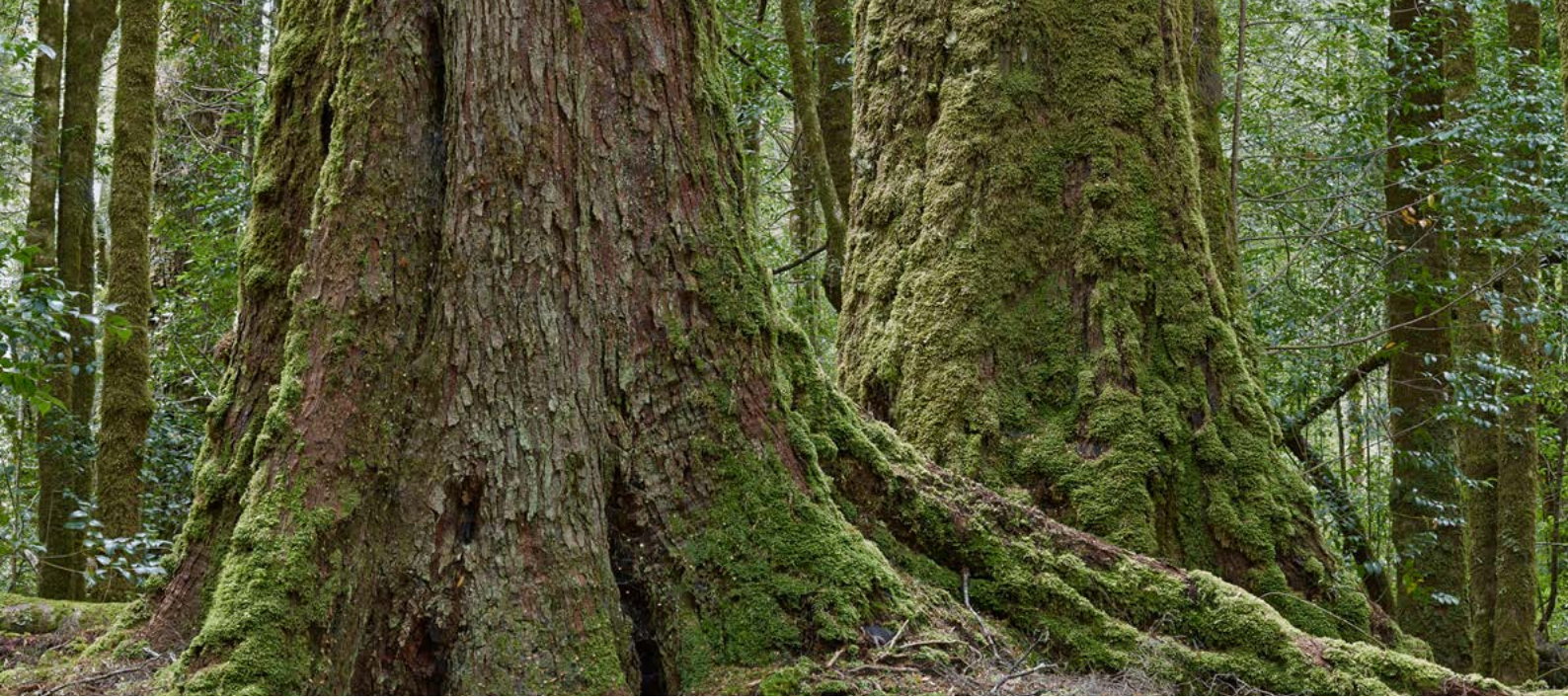

IMAGE: Tarkine production forest | Rob Blakers

A review of the Tasmanian RFA commenced in April 2015. The invitation for public comment on the review notes the government's commitment to renew the RFA. While not endorsing that commitment, this report has been prepared in that context.

Achieving an appropriate balance between reservation of land to protect biodiversity and securing a sustainable supply of timber remains a difficult task. This task will be central to discussions in relation to the appropriateness of the RFA and any future RFA arrangements. However, it is also important to ensure that forest management practices which are endorsed by the RFA are appropriately assessed, monitored and enforced. For that reason, this report does not seek to discuss wood supply or reservation issues, focusing instead on ways to secure more effective on-ground efforts to protect natural and cultural values.

Part 2 provides an overview of the Tasmanian legal framework implementing the RFA, while Part 3 assesses the degree to which that legal framework satisfies the standards required by the EPBC Act and the Regional Forest Agreement.

As shown in Table 1, the report concludes that, generally speaking, Tasmania's laws do not achieve equivalent standards to those under the EPBC Act. In particular:

- current "duty of care" provisions effectively prevent forestry officers from refusing to certify forest practices plans, or certifying subject to stringent conditions, on the basis of concerns regarding impacts on threatened species and ecological communities
- the Commonwealth government is largely unable to take action in response to failings in the forest practices system which lead to adverse impacts on matters of national environmental significance
- lack of enforcement means there is little effective deterrence against non-compliance
- monitoring of biodiversity losses and on-ground compliance is inadequate
- delegating assessment to internal forestry officers and under-resourced councils, based on standardised management prescriptions, continues to compromise the protection of threatened species in Tasmania's forest estate
- the current regime that regulates forestry does not effectively apply the precautionary principle to ensure new information is factored into decision making
- the forest practices system provides very limited public access to information or opportunities for public participation in decision-making processes
- opportunities for third parties to challenge forestry decisions that will impact on threatened species and ecological communities are extremely limited. Given the lack of rigorous monitoring and enforcement programmes within government, the absence of third party appeal rights may result in a number of breaches going unenforced.

Given the lack of environmental integrity and transparency required by the forest management framework, unless significant changes are made the

IMAGE: Tarkine production forest | Rob Blakers

RFA regime will not achieve 'ecologically sustainable forest management'. Instead, the exclusion of forestry operations under the RFA regime from the operation of the EPBC Act may compromise the protection of matters of national environmental significance and threaten Australia's ability to comply with international obligations.

Part 4 of the report discusses options to address these concerns, and outlines a number of key recommendations to improve the regulation of forestry activities to better protect threatened species and ecological communities.

The principal recommendation is that the RFA exemption be removed.

Other key recommendations include:

- If the RFA exemption is retained, allowing the Federal Minister to suspend or cancel the operation of the exemption for forestry operations in Tasmania where she or he is satisfied that reporting requirements have not been met or environmental outcomes are not being achieved
- Alternatively, replacing the RFA exemption with provision for RFAs to be 5 year strategic assessments under the EPBC Act. Endorsed RFAs would be re-assessed at 5 yearly intervals and could be amended where impacts on matters of national environmental significance were greater than initially estimated
- Removing the duty of care thresholds in the Forest Practices Code to ensure larger areas can be reserved where necessary to protect natural and cultural values
- Giving statutory effect to the suite of planning and management tools adopted by the Forest Practices Authority
- Removing restrictions in the *Nature Conservation Act 2002* preventing the Forest Practices Authority from refusing to certify a forest practices plan that will adversely impact on threatened species where a compensation agreement cannot be reached
- Amending the Native Forest Estate Policy to remove the "public benefit" exemption from broadscale clearing restrictions
- Introducing a Vegetation Management Act for the assessment of clearing other than for commercial forestry operations
- Requiring all forest practices plans and applications to clear vegetation to be referred to Threatened Species experts within DPIPWE for assessment
- Allowing decisions in relation to forest practices plans and other vegetation clearing to be appealed to the Resource Management and Planning Appeal Tribunal

TABLE 1:

Comparing Tasmania's forestry legislation against key Commonwealth Standards

		Comments
Precautionary principle		Tasmania's forest practice regulations do not require the application of the precautionary principle
Ecological sustainable development		The commitment to ESFM is repeated throughout the RFA and forest practices legislation. Planning tools are designed to ensure forest practices are sustainable, however on-ground application is inconsistent and can be compromised by overriding legislative provisions restricting the application of biodiversity measures.
Adherence to international obligations —Threatened species		Threatened species assessments are undertaken by Forest Practices Officers, generally without relevant qualifications. Training is provided, but there is limited oversight from threatened species experts to ensure that appropriate prescriptions are applied. While this situation has been improved by the development of a suite of planning tools, these tools are not reflected in legislation and are implemented inconsistently. Duty of care thresholds also limit the effectiveness of measures to protect threatened species.
Adherence to international obligations —World Heritage values		Forestry activities in World Heritage areas remain subject to the EPBC Act. However, forestry activities outside the World Heritage area are exempt from the EPBC Act, despite recognition that clearing on adjacent properties could impact on World Heritage values.
Retention of native forest		The 95% threshold has yet to be reached. Changes to the Native Forest Estate Policy may compromise the achievement of the retention goal. Lack of coordination of data for non-forestry vegetation losses may also compromise achievement of the retention goals
Enforcement options		A range of enforcement tools exist, however limited monitoring activity results in inconsistent enforcement action being taken
Access to information		Access to information regarding FPA assessment procedures and data sets has improved markedly, however it remains difficult to get timely access to FPPs and supporting material
Public participation		Immediate neighbours are generally notified of impending forestry operations, but often given limited opportunities to comment on or influence the management prescriptions.
Third party appeals		No third party appeal rights

Strong	Meets or exceeds Commonwealth standards
Good	Meets Commonwealth standards in most aspects
Fair	Does not meet Commonwealth standards in most aspects
Weak	Does not meet Commonwealth standards

NOTE: Ratings are based on an assessment of statutory obligations, rather than government practice. In some instances, the policy and practice of the responsible regulator goes beyond these legislative requirements. While we encourage government to implement best practice, without supporting statutory obligations there is no way to ensure that the standards are met. Part 3 provides more detail about how each criteria has been assessed.

PART 1: Background

On 8 November 1997, after more than 2 years of negotiation, scientific analysis and public consultation, the Commonwealth and Tasmanian Governments entered into the Tasmanian Regional Forest Agreement (the RFA) for a period of 20 years.

The stated objectives of the RFA were to protect forest areas while maintaining an economically and environmentally sustainable forest industry.[6] While the principal mechanism for protecting forest areas was reservation, reservation alone does not deliver security for biodiversity. Instead, "biodiversity outcomes of RFAs are also determined by the forest management practices applied to harvest strategies."[7] As a result, the RFA required forests to be managed in accordance with the principles of Ecologically Sustainable Forest Management ***(ESFM)***, implemented through Tasmanian forestry legislation.

Significant commitments made under the RFA include:

- Establishing a Comprehensive, Adequate and Representative (CAR) Reserve System to provide for the protection of biodiversity, buffer zones and reservation of priority species, National Heritage Estate values and key ecological communities (Clauses 49-57)
- Ensuring forestry operations on private land are subject to the Forest Practices Code (Clause 58)
- Adoption of a broad policy framework to "maintain an extensive and permanent Native Forest Estate and to maintain the sustainability of the total Forest Estate" (Clause 60).
- The Supplementary RFA, implementing the Tasmanian Community Forest Agreement 2005, further specified that 95% of 1996 levels of Native Forest were to be retained, and that broadscale clearing was to be phased out by 1 January 2015 in order to achieve that goal.
- Protecting priority species through the CAR Reserve System or by applying relevant management prescriptions (clause 68).
- This obligation was amended in 2007, following the decision in *Brown v Forestry Tasmania*. The revised clause provides that priority species will be deemed to be protected, provided the CAR system and relevant management prescriptions have been applied. That is, the revised protection requirements can now be satisfied where procedural compliance is demonstrated, rather than evidence of actual protection for a threatened species.
- Conducting five yearly reviews of the operation of the RFA, reporting against agreed milestones (Clauses 44-47).

A detailed overview of the history, context and content of RFAs is provided in the earlier *One Stop Chop* report.[8]

Under the EPBC Act, activities that are likely to have a significant impact on matters of national environmental significance are 'controlled actions' and will require approval from the Commonwealth Environment Minister. Significantly, section 38 of the EPBC Act provides that such approval is not required in respect of forestry activities that are carried out in accordance with the RFA.[9]

6 J Tribe. 1998. 'The Law of the Jungles: Regional Forest Agreements', 15 *Environment and Planning Law Journal 136*

7 Department of the Environment, Water, Heritage and the Arts. October 2009. *The Australian Environment Act — Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Final Report* (the ***Hawke Review***), 10.17. Available at www.environment.gov.au/epbc/review/publications/final-report.html. The Weilangta decision (see below) exemplifies this concern — the three species considered to be at risk in that case all occurred within CAR reserves, but were found by Justice Marshall not to be adequately protected by the forest management system.

8 Feehely, J., Hammond-Deakin, N. and Millner, F. 2013. *One Stop Chop: How Regional Forest Agreements streamline environmental destruction, Lawyers for Forests, Melbourne Australia* (***One Stop Chop***). Available at www.edotas.org.au/wp-content/uploads/2013/10/One-Stop-Chop-Final-report.pdf

9 See *Regional Forest Agreement Act 2002* (Cth), s.6(4)

This provision is often described (including in this report) as the 'RFA exemption'. However, the independent review of the EPBC Act (the ***Hawke Review***)[10] noted:

> *Rather than being an exemption from the Act, the establishment of RFAs … actually constitutes a form of assessment and approval for the purposes of the [EPBC] Act. Correspondingly, like other activities assessed and approved under the Act, RFAs should be regularly monitored and audited to ensure they continue to meet the agreed conditions of that approval.*[11]

The "conditions of that approval" presume that the biodiversity conservation objectives of the EPBC Act will be upheld in assessments and approvals issued under the RFA regime. This report assesses whether this occurs in practice.

Purpose and scope of review

This report has been prepared in anticipation of the third review of the Tasmanian RFA that will consider what action will be taken when the current RFA expires in 2017. This review presents a welcome opportunity to discuss whether the RFA regime is delivering on its objectives.

In the context of the current operation of the RFA, and the explicit commitment of the government to renew the RFA, this report seeks to address the following fundamental questions:

- Does the current RFA regime deliver equivalent standards of protection to those likely to be achieved if the EPBC Act applied directly to forestry operations in Tasmania?
- What, if any, amendments could be made to the RFA, the EPBC Act or Tasmanian laws to achieve the environmental protection objectives of the RFA?

To answer the first question, the report compares the operation of Tasmania's forestry laws against the following key standards identified from the EPBC Act and RFA:

1. Application of the precautionary principle, including adapting management practices in light of new information
2. Promoting ecologically sustainable development
3. Meeting international obligations in relation to listed threatened species and ecological communities[12]
4. Retention of 95% of 1996 levels of native forest estate
5. Practical, effective enforcement options
6. Access to information about proposed forestry operations
7. Opportunities for public participation
8. Opportunities for third parties to challenge decisions in relation to forestry operations

In assessing these issues, the report focuses primarily on biodiversity, particularly those threatened species and ecological communities which are listed as matters of national environmental significance under the EPBC Act.

We acknowledge that the RFA[13] addresses a broader range of issues, such as archaeology and cultural heritage, infrastructure requirements, noise and dust emissions, employment opportunities and funding arrangements. However, this report does not seek to examine the economic or strategic benefits of RFAs, but rather to explore whether any such benefits are being delivered in a way that provides adequate protection for the environment.

The report also focusses primarily on vegetation clearance related to forestry operations, rather than clearance for other purposes (such as conversion for agricultural purposes or clearing associated with residential or tourism activities). These activities are discussed throughout the report in respect of fragmentation, and several recommendations are made regarding improving the coordination of vegetation clearing assessments. However, in general, the impact of clearing that is not directly related to forestry activities will remain subject to the EPBC Act.

10 Department of the Environment, Water, Heritage and the Arts. October 2009. *The Australian Environment Act — Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Final Report* (the ***Hawke Review***). Available at www.environment.gov.au/epbc/review/publications/final-report.html

11 Hawke Review, above n5, s. 10.10-11, p197

12 By virtue of s.42 of the EPBC Act, forestry activities conducted in World Heritage areas or Ramsar wetlands remain subject to the approval requirements under the EPBC Act. As a result, this report does not address the extent to which the RFA regime upholds international obligations in respect of those issues in any detail

13 Including the Supplementary Regional Forest Agreement effected by the Tasmanian Community Forests Agreement in 2005.

PART 2: Overview of Tasmanian framework

The RFA effectively accredits Tasmania's forest practices system, including legislation, policies, codes of practice and general management documents, as appropriate to implement and achieve Ecologically Sustainable Forest Management.

The principal elements of Tasmania's system are:

Maintaining the CAR reserve and forest estate

- *Forest Management Act 2013*
- *Forestry (Rebuilding the Forest Industry Act) 2014*
- *Nature Conservation Act 2002*
- *National Parks and Reserves Management Act 2002*

Forest management

- *Forest Management Act 2013*
- *Forest Practices Act 1985*
- *Forest Practices Regulations 2007*
- *Forest Practices Code 2000*
- *Land Use Planning and Approvals Act 1993*
- *Nature Conservation Act 2002 (Schedule 3A)*
- *Threatened Species Protection Act 1995*
- *Reserve Activity Assessments*

These elements are outlined briefly below.

2.1 Forest Management Act 2013

The *Forest Management Act 2013* replaced the *Forestry Act 1920*, following the introduction of legislation to implement the Tasmanian Forests Agreement in 2013. Key elements of the *Forest Management Act 2013* include:

- Forestry Tasmania (a government business enterprise) continues to be responsible for managing Tasmania's public commercial forest estate, renamed "Permanent Timber Production Zone" land.
- Existing forest reserves and approximately 100,000 ha of former production land became reserved under the *Nature Conservation Act 2002*. Responsibility for management of this land was transferred to the Parks and Wildlife Service.
- Forestry Tasmania must make the minimum aggregate quantity of timber available to industry each year from the Permanent Timber Production Zone (the 'wood production supply'). The minimum aggregate supply (currently 137,000 cubic metres) can be altered by regulation.[14]
- Forestry Tasmania may prevent access to forestry roads (including by foot) by members of the public.[15]

14 Section 16, *Forest Management Act 2013*
15 Section 23, *Forest Management Act 2013*

2.2 Forestry (Rebuilding the Forest Industry) Act 2014

The *Forestry (Rebuilding the Forest Industry) Act 2014* was introduced to repeal the *Tasmanian Forests Agreement Act 2013*, following the Liberal government's election in 2014. Key elements of the legislation include:

- Approximately 400,000 ha of land identified as Future Reserve Land under the Tasmanian Forests Agreement Act was declared "Future Potential Production Forest Land" (***FPPF land***) and pledged for access to the timber industry for future growth.[16]

- FPPF land may be exchanged for production forest land. The Crown Lands Minister is to consider a request to exchange in light of the size, location and conservation values of the land (though there is no "like for like" requirement). The Minister must also consider the impact of the proposed exchange on the availability of special species timber, and any implications for Forestry Tasmania's efforts to obtain Forest Stewardship Council certification. If the Crown Land Minister accepts the request, the Forestry Minister is to make a 'land exchange order', which must be accepted by both Houses of Parliament before taking effect.[17]

- From April 2020, FPPF land may be converted to production forest. The decision to convert is made by the Crown Land Minister, having regard to the reasons for the conversion request, the size, location and conservation values of the FPPF land, an assessment of forest resources and the social and economic impacts of the proposed conversion and any implications for Forestry Tasmania's efforts to obtain Forest Stewardship Council certification.[18]

- The Forestry Minister is to develop a special species timber management plan, in consultation with industry and the public.

- From 2017, permits may be granted for special species harvesting in the FPPF land, provided the proposal is consistent with the special species management plan and the required timber is not available outside the FPPF land.

16 Approximately 26,000 ha of FPPF land is located within the area added to the Tasmanian Wilderness World Heritage Area in 2013, but is not subject to the *National Parks and Reserves Management Act 2002*. As a result, the FPPF land is not proposed to be covered by the revised management plan for the Tasmanian Wilderness World Heritage Area — see section 3.3 below

17 Section 6, Forestry (Rebuilding the Forest Industry) Act 2013 and s.11A, *Forest Management Act 2013*

18 Section 7, *Forest Management Act 2013*

IMAGE: Logging equipment in the Styx Valley | Rob Blakers

2.3 Forest Practices Act 1985

All "forest practices", including activities in State forests and on private land and clearing for purposes other than commercial forestry, are subject to the *Forest Practices Act 1985*. Subject to some limited exemptions[19], the following forest practices cannot be conducted without a certified forest practices plan, prepared in accordance with the *Forest Practices Code*:

- clearing more than 1 ha of vegetation

- clearing more than 100 tonnes of vegetation

- clearing and conversion of any volume of a threatened native vegetation community (listed in Schedule 3A of the *Nature Conservation Act 2002*)

- clearing any volume of vegetation on vulnerable land (including habitat for listed threatened species, land within a waterway buffer or land susceptible to land slide).

The *Forest Practices Code* prescribes how forest practices should be conducted, including standards for forestry planning, harvesting, conservation, establishment and maintenance of forests, construction of roads and quarries and the use of chemicals and pesticides within forests.

Significantly, the Code sets out a landowners' duty of care in relation to the conservation of natural and cultural values. The Forest Practices Authority has adopted a *Guiding Policy for the operation of the Forest Practices Code* (the ***Guiding Policy***). Clause 8.4 of that policy is set out below.

19 Set out in regulation 4 of the *Forest Practices Regulations 2007*

IMAGE: Baby Devil | Dan Fellow

8.4 Duty of care

The contribution of forest owners to the conservation of environmental and social values and the sustainable management of Tasmania's forests is determined by –

1. *All measures that are required under relevant legislation[20]; and*

2. *The prescribed duty of care under the Forest Practices Code, which include:*

    - *all measures that are required to protect soil and water values as detailed in the Forest Practices Code; and*

    - *the exclusion of forest practices from areas containing other significant environmental and social values at a level of up to an additional 5% of the existing and proposed forest on the property for areas totally excluded from operations or at a level of up to an additional 10% where partial harvesting of the reserve area is compatible with the protection of the values.*

The conservation of values beyond the duty of care in the Forest Practices Code is deemed to be for the community benefit and beyond what can reasonably be required of landowners and should be achieved on a voluntary basis through relevant governmental and market-based programs and incentives.

Agreed Procedures between the Department of Primary Industries, Parks, Water and Environment (***DPIPWE***) and the Forest Practices Authority[21] provide for DPIPWE to provide advice to the FPA regarding application of the duty of care provisions. However, the Agreed Procedures note that, for public land (including Permanent Timber Production Zone land), the duty of care thresholds must not be exceeded. DPIPWE "may use other mechanisms to enhance the conservation outcomes", but cannot require reservation or exclusion of more than the threshold areas in order to achieve such outcomes.

Documents disclosed in February 2015 under the *Right to Information Act 2009* to Environment Tasmania give an indication of the manner in which the 'duty of care' provisions are impeding recommendations for higher retention rates than those referred to in the Guiding Policy and the Code (see opposite).

20 Listed in Table 1 of the Guiding Policy — legislation includes LUPAA, EMPCA and the *Threatened Species Protection Act 1995*

21 The Agreed Procedures are discussed in more detail at 3.3 below, and are available at http://www.fpa.tas.gov.au/__data/assets/pdf_file/0010/57718/FPA_and_DPIPWE_agreed_procedures_2014.pdf.

CASE STUDY:

Duty of care to protect threatened species

In March 2015, Environment Tasmania released a report, *Pulling a Swiftie* (the ***Swift Parrot Report***[22]), detailing the assessment of five proposed forestry operations within the area of eastern Tasmania identified as an Important Breeding Area for the endangered Swift Parrot (*Lathamus discolor*). The total population of Swift Parrot has been estimated at less than 2,500, with recent studies finding that, without significant conservation efforts to reverse population decline, the species is "on a trajectory to extinction".[23]

Key threats to the survival of the Swift Parrot include loss and fragmentation of breeding habitat, particularly through logging of mature hollow-bearing trees.[24] Documents disclosed to Environment Tasmania through a Right to Information request included specialist advice addressing cumulative loss of such habitat across eastern Tasmania:

"…There has been ongoing loss of breeding habitat over the past 20 years on public and private land within the 'southern forests' area of Tasmania (see PI type, Hanson et al. (2013), mature habitat layers). Cumulatively this loss is significant in terms of both area and the impact on the potential of the species to reproduce and to forage…. Ongoing priority research into population monitoring of the swift parrot (undertaken by DPIPWE) indicates that in some years the majority of the population relies on sub-sections of the southern forest region to breed. Monitoring has identified that during these years almost all the remaining habitat in these areas is occupied by the birds…"

"Ensuring adequate foraging and nesting habitat within foraging range of each other is key to the maintenance of breeding habitat in which birds can successfully breed in the region"

Each of the five forestry proposals examined in the Swift Parrot report had been referred to DPIPWE for expert advice, as the proposals were not able to meet endorsed standard management prescriptions for protection of the Swift Parrot. In each case, the specialist advice raised concerns that loss of foraging and breeding habitat and further fragmentation of suitable habitat was "likely to interfere with the recovery objectives" and result in ineffective conservation management for the species.

IMAGE: Swift parrot in Altona North | Chris Tzaros

Despite these concerns, the final DPIPWE advice to the FPA in respect of several of the proposed coupes was that the duty of care threshold and voluntary contributions by Forestry Tasmania would "*make a reasonable contribution to the conservation of the species*."

The advice in respect of another of the proposed coupes was that proposed management prescriptions, while less than those set out in the Threatened Fauna Advisor, were likely to be stronger than prescriptions imposed in a formal assessment "*given [the] current operational environment*."

The examples described in the Swift Parrot Report demonstrate the extent to which the duty of care provisions influence the assessment of forestry proposals, and highlight concerns that such assessments may not result in the imposition of stringent management prescriptions.

22 Pullinger, P. 2015. *Pulling a Swiftie: Systemic Tasmanian Government approval of logging known to damage Swift Parrot habitat*. Report prepared for Environment Tasmania, March 2015. Available at www.et.org.au/swiftie

23 Heinshon, R et al. 2015. "A severe predator-induced population decline predicted for endangered, migratory swift parrots (Lathamus discolor)" 186 *Biological Conservation* 75-82

24 Threatened Species Scientific Committee. 2011. *Commonwealth Listing Advice on Lathamus discolor (Swift Parrot).* Available at http://www.environment.gov.au/biodiversity/threatened/ species/pubs/744-listing-advice.pdf

Forest practices plans (***FPPs***) are detailed documents describing how specific forestry operations are to be carried out, including road specifications, location of planned harvesting areas, reforestation provisions, stocking standards for revegetation and measures for the protection of natural and cultural values, such as exclusion areas, wildlife corridors, habitat clumps and scheduling harvesting to avoid breeding seasons.

Other key elements of the Act include:

- establishing the Forest Practices Authority to oversee the forest practices system
- providing for delegation of day-to-day responsibility for forest practices (including certification of forest practices plans) to Forest Practices Officers (***FPOs***)
- declaration of Private Timber Reserves to exempt areas of private land from the operation of the planning system
- requiring forest practices to be carried out in accordance with the Forest Practices Code and specific Forest Practices Plans
- providing for a limited range of disputes to be determined by the Forest Practices Tribunal[25]

The Forest Practices Code has been under review for a number of years. A comprehensive review of the biodiversity provisions was completed in 2009, however implementation was suspended during negotiations in respect of the Tasmanian Forests Agreement. To date, no amendments have been made to the Code to reflect the findings of that review. However, a broad range of improved planning and biodiversity management tools have been developed by the Forest Practices Authority and are being implemented through the assessment of applications to certify FPPs.

A further review was finalised by the Forest Practices Authority and Forest Practices Advisory Council in early 2015. The review concluded that no major revision to the Code was required, but the "Guiding Policy" discussed above should be formally incorporated into the Code. These proposed amendments were released for public comment in March 2015.[26]

25 The Tasmanian government's 2014 budget announced the abolition of the Forest Practices Tribunal: http://www.premier.tas.gov.au/budget_2014/budget_releases/boards_and_committees_savings. However, no further details regarding this proposal have been released and no legislative amendments to give effect to the abolition have been put forward.

26 At the time of writing, the review is ongoing

2.4 Land Use Planning and Approvals Act 1993

The *Land Use Planning and Approvals Act 1993* (***LUPAA***) regulates land use activities in Tasmania by requiring planning permits to be issued in respect of most use and development.

However, forestry practices in State forests or on private land that has been declared to be a Private Timber Reserve are not subject to LUPAA.[27] Forest operations on private land that have not been declared a Private Timber Reserve will still be subject to LUPAA and may require a permit. In most rural areas, vegetation clearing will be "permitted" provided a forest practices plan has been certified in respect of the activity. Therefore, it is rare that planning authorities have power to refuse forest practices proposed in their municipality.

However, since 2009, responsibility for assessment of vegetation clearing associated with planning and building applications has been delegated to local government, even where the clearing involves significant volumes or vegetation, vulnerable land or threatened native vegetation communities. Whether such clearing will be classified as permitted, discretionary or prohibited will depend on the provisions of the particular planning scheme.

2.5 Nature Conservation Act 2002

The *Nature Conservation Act 2002* is primarily concerned with the reservation and protection of land, and managing the taking of wildlife (other than threatened species). The key provisions relevant for the forest management system include:

- The purposes for which Conservation Areas and Regional Reserves may be declared specifically include special species timber harvesting (variously qualified by "sustainable use" and "while protecting the natural and cultural values of the land").[28]
- Schedule 3A establishes a list of threatened native non-forest vegetation communities, pursuant to the commitment at clause 48 of the Supplementary RFA. Applications to clear and convert any listed

27 Section 20(7), *Land Use Planning and Approvals Act 1993*

28 These reserve purposes were amended by the *Forest Management (Consequential Amendments) Act 2013* and the *Forestry (Rebuilding the Forest Industry) Act 2014*

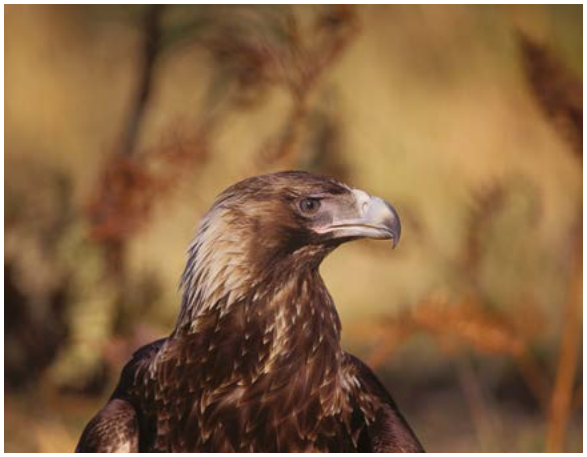

IMAGE: Wedge-tailed Eagle | Dave Watts

native vegetation community are subject to special considerations under the *Forest Practices Act 1985* (see below).

- Any person who has had an application for a Private Timber Reserve declaration or certification of a Forest Practices Plan refused on the basis that the application will adversely impact on natural and cultural values may apply for compensation from the State government. Such compensation cannot be paid unless the landowner agrees to enter into a conservation covenant over the land.

- Section 44 currently provides that if an application for compensation is refused, the applicant may reapply for a forest practices plan over the land. Worryingly, s.44(8) provides that the Forest Practices Authority has no power to refuse the subsequent application in those circumstances. The consequences of this are discussed in more detail in section 3.3 below.

2.6 National Parks and Reserves Management Act 2002

The *National Parks and Reserves Management Act 2002* is the legislation under which management plans are developed for any reserve land. Activities on reserved lands are managed in accordance with approved management plans, which in turn are to be consistent with the management objectives set out in the Act.

For Conservation Areas and Regional Reserves, these management objectives include special species timber harvesting. A number of forest areas previously reserved as forest reserves under the *Forestry Act 1920* as part of commitments made in the Tasmanian Community Forests Agreement 2005, including the North Styx, have now been proclaimed as Conservation Areas and Regional Reserves under the *National Parks and Reserves Management Act 2002*. This transition has meant that areas previously protected from forest practices are now available for special species timber harvesting (subject to a forest practices plan and restrictions under the *Forestry (Rebuilding the Forest Industry) Act 2014)*.

As discussed above, the *National Parks and Reserves Management Act 2002* does not apply to the Future Potential Production Forest land.

2.7 Threatened Species Protection Act 1995

Generally, activities which involve:

- "taking" (including killing or removing) a threatened species from any land; or

- disturbing a threatened species on land covered by an interim protection order, conservation covenant or land management plan,

may only be carried out in accordance with a permit issued under the *Threatened Species Protection Act 1995.* However, forestry operations carried out in accordance with a certified forest practices plan are exempt from this requirement.[29]

Instead, the Forest Practices Code provides that threatened species and inadequately reserved plant communities (presumably including any native vegetation community listed in Schedule 3A of the *Nature Conservation Act 2002*) will be managed "*in accordance with procedures agreed between the Forest Practices Board [now Authority] and DPIWE [now DPIPWE]*." These agreed procedures are discussed in more detail at 3.3 below.

29 Section 51(3), *Threatened Species Protection Act 1995*

PART 3: Assessment against Commonwealth standards

The RFA effectively accredits Tasmania's forest practices system, including legislation, policies, codes of practice and general management documents, as appropriate to implement and achieve Ecologically Sustainable Forest Management.

This part addresses the key Commonwealth standards, exploring how those standards are applied under the EPBC Act and the Regional Forest Agreement and the extent to which the implementation of the Tasmanian forest practices system achieves the same standards.

Importantly, assessments (and the "ratings" assigned in Table 1) are based on statutory obligations, rather than government practice. In some instances, the policy and practice of responsible agencies within the Tasmanian forest practices system go beyond current legislative requirements. For example, the prescriptions and comprehensive assessment processes set out in the various biodiversity planning tools developed by the Forest Practices Authority are not explicitly required to be implemented under the *Forest Practices Act 1985*. While it is encouraging to see practical efforts to adopt best practice forest management, without supporting statutory obligations there is no way to ensure that consistent standards will be implemented across the forest estate.

3.1 The precautionary principle

Commonwealth

Australia is a signatory to a number of international agreements which require the application of the precautionary principle as a key component of sound environmental decision making.[30]

Pursuant to Australia's international commitments, the EPBC Act explicitly requires the Minister to "take account of the precautionary principle" in a range of decisions, including listing species, developing management or recovery plans and assessing and approving actions that may have a significant impact on a matter of national environmental significance.[31]

For the purposes of this standard, the precautionary principle is:

> *lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.*[32]

A significant aspect of the implementation of the precautionary principle is the capacity to respond to new information. To this end, clause 62 of the RFA provides that the parties commit to continuous improvement and "*the establishment of fully integrated and strategic forest management systems capable of responding to new information*."

Forest practices system

Despite reference in the RFA definition of ecologically sustainable forest management to the precautionary principle, there is no explicit and mandatory mechanism requiring forest practices officers or the Forest Practices Authority to apply the precautionary principle or otherwise respond to significant new information.

30 For example, United Nations (1987) "Report of the World Commission on Environment and Development: Our Common Future"; *1992 Rio Declaration on Environment and Development; 1992 Convention on Biological Diversity; 1992 UN Framework Convention on Climate Change;*

31 Section 391, EPBC Act

32 Section 391(2), EPBC Act

Neither the *Forest Practices Act 1985* nor the *Forest Practices Code* explicitly require decision makers to apply the precautionary principle in deciding whether to certify forest practices plans, or what management prescriptions to apply.

The flexible approach adopted by the Forest Practices Authority to its biodiversity assessment practices (that is, relying on planning and management tools, rather than amending the Forest Practices Code) allows for new information to be readily adopted in practice. The considerable effort that has gone into the development of these tools, and training to implement them, is to be commended. However, this approach also means that there is no statutory basis on which to insist that a precautionary approach be adopted, or that new information be incorporated into decision making tools.

The lack of flexibility in the RFA itself is evidenced in the way that the agreement deals (or, rather, does not deal) with climate change. The second review of the RFA noted the need for significant new information regarding the contribution, both positive and negative, that forests and the forest industry make to climate change to be factored into forest management. In its response, the Tasmanian government stated that it "recognises the importance of forests for sequestering carbon". The Forest Carbon study completed in 2013 further confirmed the value of Tasmania's forests as carbon stores. However, neither the RFA nor Tasmania's forestry legislation has been amended to reflect this knowledge. The proposed "Guiding Principles" (see 2.3 above) provide:

> ***8.15 Forest carbon***
> Forest practices will be conducted in a manner that enhances the sequestration and storage of carbon by avoiding unnecessary damage to forest growing stock and soils, by maintaining site productivity and by ensuring the prompt reforestation and growth of forests after harvesting.

This recognition of forest carbon storage capacity is welcome, but provides no guidance on what measures will be adopted to assess forest stock, avoid "unnecessary damage" to forest stock and identify compensation opportunities in relation to avoided deforestation.

In general, the 20 year time frame for RFAs has meant that they are inflexible and unable to respond effectively to new data that should influence forest management, such as the impact of bushfire or drought on sustainable yields, unexpectedly high rates of decline in biodiversity and emerging biosecurity threats. The RFA exemption will apply provided that forestry operations are conducted in accordance with the *current* RFA, irrespective of whether new knowledge indicates that compliance with the terms of the RFA will have significant impacts on matters of national environmental significance.

The 20 year time frame for RFAs has meant that they are inflexible and unable to respond effectively to new data that should influence forest management.

3.2 Ecologically sustainable development

Commonwealth
Australia is also a signatory to a number of international agreements which promote sustainable development as a key goal.[33]

Consequently, the objects of the EPBC Act also explicitly "promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources." The Minister must take the principles of ecologically sustainable development, including integration of economic, environmental and social considerations, conservation of biological integrity and inter-generational equity, into account when assessing an application for an action which is likely to have a significant impact on a MNES.[34]

The National Forest Policy Statement and clause 62 of the RFA adopt the idea of Ecologically Sustainable Forest Management.

33 For example, United Nations (1987) "Report of the World Commission on Environment and Development: Our Common Future"; *1992 Rio Declaration on Environment and Development; 1992 Convention on Biological Diversity; 1992 UN Framework Convention on Climate Change*;
34 Section 136(2), EPBC Act

IMAGE: Southport logging 2014 | Vica Bayley

Forest practices system
Unlike other legislation forming part of Tasmania's resource management and planning system, the *Forest Practices Act 1985* is not explicitly subject to the objective of promoting sustainable development. However, the Forest Practices Authority is required to advance the objective of the forest practices system:

> *[T]o achieve sustainable management of Crown and private forests with due care for the environment and taking into account social, economic and environmental outcomes …*

The *Forest Management Act 2013* also requires Forestry Tasmania to perform its functions

> *in a manner that is consistent with the principles of forest management set out in the Forest Practices Code, as a contribution to the sustainable management of Tasmania's forests*.[35]

While RFA forestry operations are required to adhere to the principles of ecologically sustainable forest management, these provisions are included in the non-binding section of the RFA.

Issues in relation to the application of the minimum annual timber supply are not addressed in this report. The means by which sustainable yields are calculated should form the basis of discussions in relation to any future RFA.

3.3 International obligations

Commonwealth
The EPBC Act ratifies a number of international agreements to which Australia is a signatory, including:

- World Heritage Convention
- Convention on Wetlands of International Significance (the Ramsar Convention)
- Convention on Biological Diversity
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- Convention on Migratory Species (and associated agreements CAMBA, JAMBA or ROKAMBA)[36]

Australia has committed to taking measures to avoid or minimise harm to listed places, species and communities protected under these Conventions.

35 Section 15, *Forest Management Act 2013*

36 Bilateral migratory bird agreements with Japan (JAMBA), China (CAMBA) and the Republic of Korea (ROKAMBA)

Under the EPBC Act, this is achieved by:

- including each of those matters as a matter of national environmental significance and requiring Commonwealth approval before taking any action that is likely to significantly impact on that matter;

- explicitly preventing the Minister from acting inconsistently with Australia's obligations under these Conventions when deciding whether to approve or refuse an action, or when imposing conditions.[37]

The Minister "must seek to ensure" that documentation for impact assessments addresses the likely impact on MNES[38] and must act consistently with any management plans developed to protect and conserve listed species.

The Department of Agriculture, Fisheries and Forestry has said of the approach to threatened species in RFAs:

> *With the exception of the Tasmanian RFA, there are no obligations within the RFAs imposing a legally enforceable obligation upon the State to ensure the protection of species or ecological communities listed in the EPBC Act. However, in all the RFAs, the parties agree that specified State and Commonwealth legislation and other measures, such as the establishment of CAR reserves, will provide for the protection of rare or threatened flora and fauna species and ecological communities.*[39]

The RFA exemption does not apply to forestry activities conducted on listed World Heritage places or Ramsar wetlands.[40] As a result, such forestry activities will require assessment and approval under the EPBC Act. In contrast, forestry activities undertaken on properties adjacent to listed World Heritage areas or Ramsar wetlands will not require approval.

Forest practices system

Neither the *Forest Practices Act 1985* nor the *Forest Practices Code 2000* explicitly requires forest practices to be carried out consistently with international obligations. However, a range of practices are intended to meet those obligations.

Threatened species

As outlined above, the assessment and management of threatened species in forest practices plans is subject to agreed procedures between the Forest Practices Authority and experts within the Department of Primary Industries, Parks, Water and Environment.

The agreed procedures are implemented through the forest practices system[41] as follows:

1. FPOs consult the FPA Biodiversity Values Database[42] to see whether:

    a. the proposed coupe is in the known range for any relevant threatened species, or contains potential habitat for the species; and

    b. the proposed coupe (and surrounding areas) contains potential habitat.[43]

2. If any actual or potential habitat is identified, the FPO consults the *Threatened Fauna Advisor*[44] to determine what further information is required and what management prescriptions should be applied. For example, where Tasmanian devils are expected to inhabit the area, forest planners are expected to conduct a coupe survey to identify potential denning habitat and focus vegetation retention requirements in those areas with highest potential, "where operationally practicable".[45]

3. If necessary, FPOs should consult with experts in the Forest Practices Authority or DPIPWE to determine whether any additional management prescriptions are required.

37 Sections 137 (World Heritage), 138 (Ramsar wetlands), 139 (threatened species) and 140 (migratory species).
38 Sections 97 and 102, EPBC Act; Schedule 4, *EPBC Regulations 2000*
39 Department of Agriculture, Fisheries and Forestry. 2009. "Senate Environment, Communications and Arts Committee Inquiry into the Operation of the EPBC Act: DAFF Response to Committee Questions of 30 March 2009". Available at www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eca_ctte/completed_inquiries/2008-10/epbc_act/submissions/sublist.htm
40 Section 42(a) and (b), EPBC Act
41 Agreed Procedures for the Management of Threatened Species under the Forest Practices System: http://dpipwe.tas.gov.au/conservation/threatened-species/agreed-procedures-for-the-management-of-threatened-species-under-the-forest-practices-system
42 www.fpa.tas.gov.au/fpa_services/planning_assistance/advisory_planning_tools/Biodiversity_values_database
43 www.fpa.tas.gov.au/__data/assets/pdf_file/0004/78646/Threatened_fauna_range_and_habitat_descriptions_Dec_2014.pdf
44 www.fpa.tas.gov.au/fpa_services/planning_assistance/advisory_planning_tools/threatened_fauna_advisor/threatened_fauna_advisor
45 See, http://www.fpa.tas.gov.au/__data/assets/pdf_file/0005/98726/Fauna_Tech_Note_10_Identifying_Tasmanian_devil_and_spotted-tailed_quoll_habitat.pdf

In *Brown v Forestry Tasmania* (the *Wielangta* case)[46], Justice Marshall questioned the success of management prescriptions in protecting threatened species. In particular, referring to evidence that Forestry Tasmania had ignored recommendations from the Senior Zoologist in relation to swift parrot habitat, Justice Marshall concluded that, in practice, "*recommendations from senior zoologists in accordance with the Advisor are negotiable, if Forestry Tasmania objects*" (at [289]). He further noted (at [282]):

> *On the evidence before the Court, given Forestry Tasmania's satisfaction with current arrangements, I consider that protection by management prescriptions in the future is unlikely.*

Following this decision, clause 68 of the RFA was amended to require only that the RFA "provide for", rather than achieve, maintenance of threatened species. On appeal the Full Court of the Federal Court did not dispute Justice Marshall's conclusions regarding the nature of the impacts or the success of management prescriptions. However, the Full Court held that the revised RFA embodied a compromise between environmental and economic considerations. The Full Court noted that the compromise would necessarily limit forestry operations but, given the nature of forestry activities, the RFA could not guarantee that the environment, including threatened species, would be protected.[47]

The *Wielangta* case provides a clear statement that Tasmania's individual threatened species are not guaranteed protection under the RFA and would benefit from the more detailed assessments and customised, concrete and enforceable conditions that usually result from the EPBC Act process.

In rare situations where forestry activities have been subject to the planning system, the Resource Management and Planning Appeal Tribunal has also questioned the sufficiency of the Forest Practices Code provisions to protect threatened species. For example:

- In *Gunns Ltd v Kingborough Council*[48], the Tribunal considered that the Forest Practices Code provided "a useful guide, if not necessarily an exhaustive test", and held that a planning scheme could adopt higher standards for forestry operations than those prescribed in the Forest Practices Code where necessary to protect threatened species.

IMAGE: Tasmanian Devil | Dave Watts

- In *Giles & Weston v Break O'Day Council*[49], the Tribunal considered that the Code provisions were not sufficiently specific to protect threatened species habitat and concluded that, even with full compliance with the Code, there was an unacceptable risk that proposed logging would adversely impact on the Giant Velvet Worm.

The agreed procedures require the Forest Practices Authority to monitor the efficacy of management prescriptions for the protection of threatened species. An independent expert panel has noted in relation to this requirement:

> *[I]t is unclear whether and how this process actually happens. What monitoring of efficacy of prescriptions for the protection of threatened species has been done? How adequate/ defensible are the data to address the question of adequacy of prescriptions?*[50]

The Forest Practices Authority has undertaken considerable work over the past five years to update its planning tools, and to provide forest practices officers with training in how to apply appropriate

46 *Brown v Forestry Tasmania and Other (No 4)* [2006] FCA 1729
47 *Brown v Forestry Tasmania* [2007] FCAFC 186
48 [2005] TASRMPAT 150 at [20]
49 *Giles & Weston v Break O'Day Council & Denney* [2001] TASRMPAT 150 at [44] and [52]
50 Forest Products Association. *Review of the biodiversity provisions of the Tasmanian Forest Practices Code: A Report to the Forest Practices Authority*, April 2009. Available at www.fpa.tas.gov.au/__data/assets/pdf_file/0018/58140/Biodiversity_review_report.pdf

management prescriptions. However, it remains the case that FPOs rarely have any qualifications in relation to threatened species management, and are generally engaged by industry. As a result, there is no guarantee that desktop or on-ground assessments will necessarily identify all potentially impacted species, or that management prescriptions will be adequate to protect species in a particular coupe.

Furthermore, while assessment practices and management prescriptions are reflected in non-statutory policy documents and practice only, there is no way to ensure that the standards are met.

Without third party oversight (see 3.8 below), rigorous monitoring or any requirement to routinely consult with DPIPWE to determine if prescriptions are appropriate, it is difficult to be confident that threatened species are being managed in a manner that avoids significant impacts.

Unlike other RFAs, the Tasmanian RFA does include an enforceable provision regarding threatened species.[51] However, following amendments after the Weilangta case, the provision is limited to an agreement that management prescriptions "will provide for" maintenance of relevant species, rather than be adequate to maintain those species.

Even where the Commonwealth Government is satisfied that management prescriptions under the Tasmanian forest practices regime do not provide sufficient protection, the only recourse is the government's power to institute lengthy dispute resolution proceedings.

Threatened native vegetation communities

Pursuant to the commitment at clause 48 of the Supplementary RFA, Tasmania is required to implement statutory mechanisms to "prevent clearing and conversion of rare, vulnerable and endangered non-forest native vegetation communities."

These communities are identified in Schedule 3A of the *Nature Conservation 2002.* Section 19(1AA) of the *Forest Practices Act 1985* prevents certification of a forest practices plan to clear or convert listed vegetation communities unless the forest practices officer or FPA is satisfied that:

(a) the clearance and conversion is justified by exceptional circumstances;

(b) the activities authorised by the forest practices plan are likely to have an overall environmental benefit;

(c) the clearance and conversion is unlikely to detract substantially from the conservation of the threatened native vegetation community;

(d) the clearance and conversion is unlikely to detract substantially from the conservation values in the vicinity of the threatened native vegetation community.

Environmental offset guidelines provide some indications as to what is required to demonstrate "overall environmental benefit" and when clearing will "detract substantially" from conversation values. However, in the absence of clearer statutory guidance, it is not possible to assess whether this section satisfies the requirements of clause 48 of the Supplementary RFA.

A recent situation also highlights a potential regulatory gap in respect of protection for threatened species and vegetation communities.

The Full Court noted... the RFA could not guarantee that the environment, including threatened species, would be protected

IMAGE: Giant Freshwater Crayfish | Mark Pearce

51 *Tasmanian Regional Forests Agreement 1997*, clause 96

CASE STUDY:

Protecting threatened vegetation when compensation refused

In 2009, a landowner's application to clear and convert approximately 1,800 hectares of forest in eastern Tasmania was refused by the Forest Practices Authority on the basis that the proposed clearing did not adequately protect threatened species and natural values. The landowner appealed to the Forest Practices Tribunal, however the Tribunal upheld the decision to refuse the application.[52]

Pursuant to s.41 of the *Nature Conservation Act 2002*, the landowner applied for compensation for the refusal to certify the forest practices plan. No compensation was awarded.

The landowner subsequently re-applied for a forest practice plan over the same area of land. The Forest Practices Authority approved the application, considering that s.44(8) of the Nature Conservation Act 2002 prevented it from refusing to certify the plan regardless of any concerns regarding threatened species impacts.

In this instance, the proposed clearing is for agricultural purposes, rather than commercial forestry. As a result, the RFA exemption does not apply and the Department of Environment may assess the proposed clearing under the EPBC Act.

An interpretation of s.44(8) which removes the FPA's authority to impose restrictions to protect against significant risks to threatened species and communities where compensation has been refused is concerning. This is particularly so if s.44(8) operates even where compensation is refused on grounds unrelated to an assessment of impacts on natural or cultural values, such as lack of government resources or failure to agree on the terms of a conservation covenant.

The situation also highlights the importance of Federal government involvement. If the proposed clearing had been for commercial harvesting, the Federal Minister would have had no power to assess the proposal to clear and convert a significant threatened vegetation community. Instead, the fact that the RFA exemption does not apply allows for the possibility of a referral requirement, public involvement and assessment against the EPBC Act criteria to minimise impacts on threatened communities.

52 *Tucker v Forest Practices Authority* [2009] TASFPT 8

World heritage values

Under the *Forestry (Rebuilding the Forest Industry) Act 2014* a number of areas within the Tasmanian Wilderness World Heritage Area (***TWWHA***) are FPPF land in the Regional Reserve or Conservation Area class. These lots may be subject to:

- special species timber harvesting (where the land is within the FPPF land, such harvesting cannot occur before 2017 and must be consistent with a Special Species Management Plan)
- after 2020, conversion to, or exchange for, permanent timber production land, on which harvesting may occur.

The FPPF land within the TWWHA is also not covered by the TWWHA management plan, despite being part of the TWWHA property.

As outlined above, forest practices in World Heritage Areas remain subject to the EPBC Act. Therefore, proposed harvesting is likely to be referred to the Federal Minister and assessed against our obligations under the World Heritage Convention.

Given repeated comments from the World Heritage Committee regarding the threat forestry operations pose to world heritage values, the 2013 extension of the boundaries of the TWWHA in recognition of those values and the 2014 refusal to modify the boundaries to exclude land for forestry activities, it is likely that allowing harvesting to occur would be inconsistent with our international obligations.

The exemption from the operation of s.38 only applies to forestry operations that occur <u>on</u> World Heritage areas. Forestry operations adjacent to World Heritage areas are subject to s.38 and would <u>not</u> require approval under the EPBC Act, even where harvesting would threaten world heritage values through, for example, fragmentation of vegetation communities, loss of habitat for priority species or compromising visual amenity or cultural landscapes. The Federal Court has previously held that activities taking place outside a World Heritage area that affect threatened

species whose habitat range includes the World Heritage area may be characterised as having a significant impact on world heritage values.[53]

The *Forest Practices Act 1985* does not explicitly provide for any assessment of impacts on world heritage values. In 2013, the Tasmanian and Commonwealth governments entered into a conservation agreement under s.305 of the EPBC Act in respect of State forest land separating the TWWHA from wood production zones.[54] That agreement requires the identified State forest to be managed as if it were an informal reserve under the RFA, with the objective of:

- protecting and conserving the biodiversity values; and
- supporting efficient and effective forestry operations on adjacent land.

The fact that such a Conservation Agreement was considered necessary indicates that the world heritage values within the TWWHA may not have been protected had the standard forest practices system been relied upon in assessing an application for harvesting on the land adjacent to the TWWHA.

Vegetation clearance for non-forestry activities
Delegation of responsibility for assessing the impacts of vegetation clearance associated with building and development to local councils has some advantages. In particular, clearing that is subject to the planning system may be subject to public participation and third party rights, and will be part of strategic and regional resource management considerations.

Depending on its scale, such clearing may also be subject to the EPBC Act.

However, most planning authorities in Tasmania lack both the regulatory power within their planning schemes (though this is being improved with the introduction of interim planning schemes), and the resources and expertise to effectively prevent clearing of threatened native vegetation.

53 *Booth v Bosworth* [2000] FCA 1878
54 Commonwealth of Australia and State of Tasmania. August 2013. *Conservation Agreement for the protection and conservation of areas of State Forest separating the Tasmanian Wilderness World Heritage Area from adjoining wood production coupes*

3.4 Permanent Native Forest Estate

Commonwealth
Clause 60 of the RFA required the Tasmanian government to adopt a broad policy framework to "maintain an extensive and permanent Native Forest Estate". In 2005, as part of commitments made in the Tasmanian Community Forest Agreement, the government introduced a *Policy for Maintaining a Permanent Native Forest Estate* (***Native Forest Estate Policy***) that provided for the retention of 95% of the 1996 level of native forest through:

- phasing out broadscale clearing on public land by 2010
- phasing out broadscale clearing on private land by 1 January 2015, or when the 95% threshold is reached — whichever is earlier.

This was recognised in the policy as one mechanism by which to achieve ecologically sustainable forest management. As discussed below, this policy is under review and the phase out of broadscale clearing on private land has been adjourned until 2016.

Forest practices system
The *Native Forest Estate Policy* is implemented through the forest practices system, with a restriction on the issuing of forest practices plans for broadscale clearing. In particular, plans would not be certified covering more than 40ha on a single property over a 12 month period. From 1 January 2015, this was to be further limited to 20ha over a five year period.

However, in December 2014 the Tasmanian government announced that these new restrictions would not take effect until 1 January 2016 and a review of the broadscale clearing limits would occur as part of the RFA review process. A revised *Native Forest Estate Policy* (December 2014) maintains that:

> *2.1. A minimum of 95 per cent of the 1996 CRA native forest area is to be maintained on a statewide basis.*

However, the revised policy also provides:

> *If on 1 January 2016 the level of retention of native forests exceeds 95 per cent, then small scale clearing and conversion of native forest on private land may continue until the 95 per cent level is reached.*

This is a weakening of the protection previously provided by the *Native Forest Estate Policy*. In particular, the previous version recognised the 95% retention rate as the minimum level of protection

and imposed the broadscale clearing ban from 1 January 2015 even if that threshold had not yet been achieved. In contrast, the new provision will allow broadscale clearing to occur until the threshold is completely exhausted.

Two further concerns exist regarding the application of the Policy:

- The assessment of the policy at a Statewide level ignores the impact on regional vegetation communities. For some of these bioregions, including Ben Lomond, the 95% threshold has already been exceeded and no further broadscale harvesting of native forest should be permitted.

- The revised Policy provides that the clearing thresholds will not apply to clearing that the Minister considers "demonstrates substantial public benefits". This further compromises the achievement of harvesting limits, particularly in the absence of clear guidance as to what is required to demonstrate "public benefit".

The quarterly monitoring of the native forest estate by the Forest Practices Authority in January 2015[55] indicates that approximately 5,500ha is available before the 95% threshold is reached.

However, it is important to note that the delegation of responsibility for clearing associated with building and development to local authorities has fragmented the reporting and monitoring of regional clearance levels. The quarterly monitoring is based on volumes recorded in forest practices plans – it does not account for unlawful clearing that is not reported, clearing for exempt activities (such as infrastructure corridors or fire hazard management) or clearing regulated by local governments.

This fragmentation compromises the capacity to monitor native vegetation loss and ensure that the 95% threshold is not exceeded. The lack of certainty provides a further reason why 95% should remain as a minimum goal, rather than planning to clear right up until the threshold is reached.

55 www.fpa.tas.gov.au/__data/assets/pdf_file/0011/103403/Monitoring_of_the_permanent_native_forest_estate_1_Jan_2015.pdf

3.5 Practical, effective enforcement options

Commonwealth

Effective enforcement mechanisms are essential to ensure that approvals are obtained and conditions designed to protect threatened species and other natural values are complied with.

The Commonwealth Department of Environment currently plays a significant enforcement role to ensure MNES under the EPBC Act are protected. In the three years to 2012, the Department conducted around 980 investigations, commenced 40 prosecutions and successfully secured fines and enforceable undertakings to the value of almost $4 million.[56] Despite this record, a 2014 Australian National Audit Office Report still recommended further improvements in compliance monitoring and enforcement procedures by the Commonwealth Department of Environment.[57]

The Department of Environment has a broad suite of enforcement tools available to address breaches. These include:

- environmental audits
- infringement notices
- remediation determinations
- enforceable undertakings
- strict civil and criminal penalties[58]
- publicising contraventions
- injunctions
- prosecutions

The variety of options available allows enforcement actions to be tailored to address the particular breach. It also allows for an escalation in enforcement activity where breaches are ongoing.

56 ANEDO (2014) House of Representatives inquiry into streamlining environmental regulation, 'green tape' and 'one stop shops' for environmental assessments and approvals: http://www.edo.org.au/policy/140603-Green-Tape-Inquiry-ANEDO-Submission.pdf

57 2014 Australian National Audit Office Report : http://www.anao.gov.au/Publications/Audit-Reports/2013-2014/Managing-Compliance-with-EPBC-Act-1999-Conditions-of-Approval

58 Civil penalty of up to $550,000 for an individual and $5.5 million for a body corporate, or for a criminal penalty of seven years imprisonment and/or a penalty of $46,200

Forest practices system

The Forest Practice Authority describes Tasmania's forest practices system in this way:

> *The system is based on a co-regulatory approach, combining self-management by the industry and independent monitoring and enforcement by the FPA. Forest Practices Officers (FPOs) are employed within the industry and trained and authorised by the FPA to plan, supervise, monitor and report on forest practices.*[59]

This co-regulatory approach can be criticised for its potential for conflict of interest and encouraging co-operative, rather than punitive, approaches even in circumstances where deterrent action may be required.

FPOs have a range of enforcement options available, including warnings, rectification notices, fines and prosecutions.

It is an offence to carry out forest practices otherwise than in accordance with a forest practices plan. Offences are punishable by a fine of up to $130,000 which is considerably lower than fines available under the EPBC Act. The Forest Practices Authority may also allow a person who has unlawfully cleared vegetation to salvage the timber and retain the profits for any use of the wood.[60] Depending on the value of the wood, this can compromise any deterrent effect that a punishment may have.

The Forest Practices Authority may also revoke a forest practices plan, or vary the conditions to provide for rehabilitation or to impose additional restrictions. However, the FPO Manual 2015 advises that this is a rare occurrence:

> *Sometimes the recommendations for threatened species may change during the course of operations under a FPP. Generally, once an FPP is certified the FPA will not require changes to be made other than in exceptional circumstances, for example where new information indicates that the impact on a threatened species may be substantially greater than previously known.*[61]

The principal hurdle for enforcement is lack of monitoring. The council in *Gunns Ltd v Kingborough Council*[62] expressed concern that the fact that only 10% of FPPs are audited made the system "wide open for non-observance" and unable to guarantee that natural values would be protected.

On-ground compliance and lack of enforcement remains a fundamental weakness of the Tasmanian forest practices system. Without more rigorous oversight by government agencies and effective deterrence, the system will not deliver ecologically sustainable outcomes and protection of natural values.

As observed in the Hawke Review:

> *The problem has been that the [RFA licence] has continued to operate irrespective of the extent to which the commitments contained within the agreements have been implemented, particularly in relation to environmental outcomes. The absence of transparent mechanisms to test noncompliance with RFAs and assess governments' performance on RFA obligations causes community concern and mistrust. The lack of transparency also limits the ability of parties to verify whether core environmental commitments or 'license conditions' of the RFAs are being met. In the absence of such verification, the credibility and sustainability of RFAs is at risk.*[63]

On-ground compliance and lack of enforcement remains a fundamental weakness of the Tasmanian forest practices system. Without more rigorous oversight by government agencies and effective deterrence, the system will not deliver ecologically sustainable outcomes and protection of natural values.

More fundamentally, the Commonwealth government does not have monitoring, compliance and enforcement mechanisms in place to determine if the RFAs are achieving their desired outcomes or powers to take action where the outcomes are not being met.

59 Forest Practices Authority Annual Report 2013-2014. Available at www.fpa.tas.gov.au

60 Section 47D, *Forest Practices Act 1985*

61 Forest Practices Officers Manual (Revised January 2015), p59. Available at http://www.fpa.tas.gov.au/__data/assets/pdf_file/0008/103787/FPO_Manual_v_29_Jan_2015.PDF

62 [2005] TASRMPAT 150

63 Hawke Review, s.10.12.

As Wayne Gumley has noted:

> *[T]he exemption for Regional Forest Agreements … makes the systematic destruction of many of our largest and most bio-diverse natural ecosystems valid for several decades without scrutiny or accountability to the public*[64]

Since signing the RFA, the Commonwealth Government is largely powerless to take compliance and enforcement action in relation to breaches of the RFAs. Their powers to respond to breaches or lack of action by Tasmania are limited to 'behind the scenes' negotiations and processes. While the Commonwealth may ultimately cancel the RFA, unless the State government consents to the termination, the cancellation cannot take effect until protracted dispute resolution procedures have been undertaken. This is the case even if the actions (or failures to act) by the State causes significant decline in matters of national environmental significance.

3.6 Access to information

Commonwealth
Access to information is critical for transparency, and to facilitate meaningful public participation in resource management decisions. The EPBC Act requires the following information to be published on the Department of Environment website (excluding any confidential material):

- Referral documents, including with any supporting reports, maps or other material[65]
- All assessment documentation submitted by the proponent
- The Minister's decisions regarding the assessment type and whether to approve a proposed action
- If the proposal is approved, the approval and any conditions imposed.

Generally, all published material remains available on the website indefinitely as a record of decisions.

Forest practices system
There is currently no statutory requirement to make forest practices plans available to immediate neighbours or to the broader public.

The second review of the RFA recommended that forest practices plans be provided on request to neighbours, and information regarding the values to be protected in a FPP be provided to any interested person.

Forestry Tasmania has adopted a policy of making FPPs in relation to State forest available to adjoining neighbours, subject to a briefing with an FPO. The FPA supports the release of FPPs, but generally refers requests to the FPO or landowner in the first instance.

In practice, neighbours receive notice of proposed forestry operations within 30 days of the proposed harvesting commencing. This is rarely sufficient time for concerned neighbours to obtain a copy of the forest practices plan, consult with the Forest Practices Officer, obtain technical advice and, if necessary, seek to change the plan to impose stronger protections for natural or cultural values. It can also be confronting for a neighbour to have to contact the landowner or FPO directly to obtain a copy of the plan.

Parties other than neighbours find it difficult to access information and often have to rely on Right to Information requests to obtain details of forest practices, as outlined in the Swift Parrot Report case study (see 2.3 above). As a result, details can take several months to obtain and may be incomplete.

The Hawke Review also noted that monitoring and reporting remains a weakness of the RFA system:

> *Reporting on the biodiversity outcomes of RFAs, particularly the onground performance of RFAs and adaptive management capacity of forest management practices, has been patchy and has not been delivered according to agreed RFA timeframes. Failure to complete timely reviews and inadequate processes for public complaints has fuelled public mistrust in the management of RFA forests and does not engender the level of confidence needed to continue the current treatment of RFA forestry operations under the Act.*[66]

The third review of the Tasmanian RFA was due to be completed in 2012, but only commenced in 2015.

64 Wayne Gumley, 'An Update on the EPBC Act Reviews' (2009) 32(3) *National Environmental Law Review* 40.
65 Section 74(3) EPBC Act
66 Hawke Review, 10.18

IMAGE: Tarkine production forest | Ted Mead

3.7 Public participation

Commonwealth
Providing practical, informed and timely opportunities for members of the public to comment on proposed developments is critical to transparent and equitable decision making.

Under the EPBC Act, any person may make a written comment (submission) to the Minister at the following stages of the assessment process:

- Referral — comments regarding whether the proposal should be assessed as a controlled action, and what assessment documentation should be required, can be made within **10 business days**[67] of the notice being published; and

- Assessment — comments regarding whether a proposal should be refused, approved or approved subject to conditions can be made within **20 business days** of the assessment material (such as the Environmental Impact Statement) being published.[68]

Forest practices system
There is no statutory opportunity for public comment on an application for a forest practices plan. However, the Forest Practices Code provides for notice of proposed forestry operations to be given to landholders within 100m of the boundary of the operation at least 30 days before the clearing commences.

In practice, landholders are given an opportunity to consult the responsible Forest Practices Officer regarding the clearing. However, in the absence of a statutory requirement for this to occur, the timing of advice, availability of detailed information and willingness to engage varies between Forest Practice Officers and individual situations.

One of the key aims of the RFA process was to reduce conflict between the forestry industry and conservationists. However, without clear opportunities for interested parties (which frequently extends beyond immediate neighbours) to participate in decision making around forest practices, concerned community members may resort to protest action.

The recently enacted *Workplaces (Protection from Protesters) Act 2014* seeks to deter protest activity at forestry sites by restricting lawful activities and imposing significant penalties on protestors.

67 "Business days" are determined on the basis of business days in Canberra
68 Section 103 EPBC Act

3.8 Third parties appeals

Commonwealth
The capacity for interested third parties to challenge environmental decisions is a key pillar of access to justice, as articulated in the *Aarhus Convention*[69].

The EPBC Act does not provide for merits review of decisions made by the Minister. However, any "interested person" can commence judicial review proceedings against the Minister's decision[70] or seek an injunction to prevent breaches of the Act.[71]

The EPBC Act expressly broadens the definition of "interested person" to include:

- individuals or organisations whose interests have been or will be affected by the proposed action;
- individuals, or organisations whose objects include protection or conservation of the environment, who have engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the previous 2 years.

This broad definition has allowed a range of conservation groups to commence legal proceedings to prevent breaches or review decisions.

Forest practices system
The opportunity to appeal against decisions to certify (or refuse to certify) forest practices plans is restricted to the applicant — neighbours or other third parties have no right to appeal.

As forestry operations are generally not subject to the planning system, there are limited opportunities to appeal to the Resource Management and Planning Appeal Tribunal against approvals for clearing. However, in the few cases where an appeal has been available, the Tribunal has been satisfied that additional protections were warranted, raising concern that the protections imposed by the forest practices system alone are not sufficient to protect biodiversity.

A "person aggrieved" may apply to the Supreme Court for judicial review of decisions made by the Forest Practices Authority (or a forest practices officer). However, such actions are made difficult by the costs involved, the need to establish standing and the difficulty in establishing judicial review grounds where the Code provisions are relatively vague.

In the absence of civil enforcement options under the Tasmanian forest practices system, concerned third parties are limited to actions in the Federal Court seeking to demonstrate that the forestry operations are not carried out in accordance with the RFA and therefore do did not enjoy the protection of section 38 of the EPBC Act. The amendments to the RFA since the Wielangta case have made any application for injunctive relief extremely unlikely to succeed.

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69 Australia is not a signatory to the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice, but has expressed support for access to justice principles in the past. Principle 10 of the Rio Declaration on Environment and Development also provides that effective access to judicial proceedings should be provided to the community.

70 *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694

71 Division 14 EPBC Act

IMAGE: Tarkine rainforest walk | Jen Evans and Jenny Archer (shutterbirds)

PART 4: Recommendations

The discussion in the previous sections makes clear that the RFA is not currently achieving the goals of protecting native forests and ensuring forest practices are sustainably managed. This Part outlines a range of recommendations to address identified deficiencies in the current regime.

One principal difficulty with the RFA regime occurs when the State defines its interest in securing a productive forest industry as conflicting with the national interest in protecting matters of national environmental significance. Where the State implements prescriptions that are less rigorous than the measures required to protect these matters, the RFA regime does not provide adequate mechanisms to effectively promote the national interest (for example, by allowing the Commonwealth government to intervene in some other way).

The most effective way to address that conflict is to ensure the Commonwealth government has authority to regulate forestry activities that are likely to have a significant impact on matters of national environmental significance. For this reason, the principal recommendation of this report is to remove the RFA exemption.

For practical reasons, the report also makes a number of secondary, complementary recommendations to improve the interaction of the EPBC Act and the RFA in the event that the RFA exemption is retained. However, it remains our view that ecologically sustainable forest management and the protection of MNES is best achieved by the removal of the exemption.

4.1 Amendments to the EPBC Act

1. Delete Part 4, Division 4 – Forestry Operations on Certain Land in its entirety (that is, remove the 'RFA exemption').

The following recommendations should be implemented only if recommendation 1 is not adopted

2. Include a provision similar to s.59 of the EPBC Act in Part 4, Division 4, allowing the Federal Minister to suspend or cancel the operation of the 'RFA exemption' for forestry operations in Tasmania where she or he is satisfied that:

    a. Reporting requirements have not been met; or

    b. Environmental outcomes are not being achieved (that is, where appropriate monitoring reveals that forestry operations are resulting in significant impacts on MNES).

    This is consistent with recommendations made by the Hawke Review, noting that the 'RFA exemption' was "*akin to an approval issued on certain terms… If the terms of that approval are not complied with… then the approval should be terminated.*"[72] As outlined in the Hawke Review[73], suspension or termination of the RFA exemption would have significant consequences, and a transparent process must be followed in which the Tasmanian government is given an opportunity to respond to any proposal to take such action.

    This amendment would be complemented by 'escalation' provisions which provide for the Commonwealth Minister to take increasing steps towards regaining power over a particular action.

72 Hawke Review, 10.14
73 Hawke Review, 10-37-10.39

This approach has been proposed in the draft approval bilateral agreements in recognition of the need for the Commonwealth to ensure that EPBC standards are being met by any accredited approval process.[74] Where they are not, the Commonwealth may step in.

3. Require the Federal Minister to consider at each 5 yearly review whether the 'RFA exemption' should be suspended or cancelled (that is, to consider whether the powers in the provision proposed in Recommendation 2 should be exercised).

   Formally requiring consideration and determination of this question could allow third parties to review the Minister's decision not to exercise those powers.

4. Amend s.42 to extend the restriction on the RFA exemption to any forest activities likely to impact on the world heritage values of a World Heritage place. This would allow the Federal Minister to review logging activities proposed on the boundaries of the TWWHA to determine if the logging will impact on the natural values of the protected area.

5. As an alternative to the current RFA exemption (and recommendations 2-4 above), provide for an RFA to be subject to a strategic assessment akin to those conducted for Commonwealth-managed fisheries. The RFA would be an endorsed plan, with provision for expiry after 5 years, allowing activities conducted in accordance with its terms to avoid the need for separate approvals under Chapter 9.

   Any strategic assessment RFA should not apply to any class of actions likely to have a significant impact on World Heritage values or Ramsar wetlands.

   Strategic assessment RFAs should be subject to a provision similar to s.152 allowing the responsible Ministers to require amendments to the RFA where there is evidence that the impact of activities conducted in accordance with the endorsed RFA is greater than initially predicted (see also, RFA Recommendation 1).

6. Amend the EPBC Act to allow the Federal Minister to direct that compliance audits and investigations be undertaken where she or he is concerned that matters of national environmental significance are being unduly impacted by forestry activities.

4.2 Amendments to Tasmania legislation

1. Delete s.44(8) – (10) of the *Nature Conservation Act 2002*, to remove provisions that would prevent the Forest Practices Authority from refusing to certify a forest practices plan that will adversely impact on threatened species.

2. Remove the "duty of care" thresholds in the *Forest Practices Code* (and guiding policy documents). The policy of not allowing these thresholds to be exceeded comprises the achievement of conservation outcomes where larger areas must be retained in order to protect threatened species or vegetation communities.

   Removal of the thresholds should be supported by increased resources available to compensate private landowners who are restricted from clearing their property due to threatened species protection measures.

3. Amend the *Forest Practices Act 1985* to require regard to be had to information listed in the *Forest Practices Regulations 2007* when determining whether to certify a forest practices plan under s.19. The *Forest Practices Regulations 2007* should be updated to reflect the suite of policies and management tools currently used by the Forest Practices Authority — the description of the document should be sufficiently broad to include any update to the document.

   If the Guiding Policy is formally inserted into the *Forest Practices Code*, it should include an explicit list of planning tools which are to be applied in the implementation of the Code.

4. Amend the *Forest Practices Act 1985* to explicitly require decisions made under the Act to apply the precautionary principle.

5. Undertake a comprehensive review of the *Forest Practices Code* to implement clear, measurable objectives. The review must involve public consultation and the opportunity to comment on a draft Code.

74 See, for example, clause 16 of the Draft Tasmanian Approval Bilateral Agreement

The 2015 review of the draft Code is limited in scope, and does not invite comment on the suite of planning and management tools developed by the Forest Practices Authority. There is merit in the flexibility achieved through the use of non-statutory tools. However, given the importance of these tools to the assessment, approval and regulation of forestry activities, it is important that they are given statutory effect through explicit reference in an enforceable regulatory document.

6. Amend the *Forest Practices Act 1985* and the *Land Use Planning and Approvals Act 1993* to remove the provisions relating to Private Timber Reserves. All forestry activities should be subject to the relevant planning scheme to allow for better strategic planning and more effective monitoring and enforcement of conditions.

7. Amend the *Forest Practices Act 1985* and *Threatened Species Protection Act 1995* to require applications for forest practices plans that will impact on threatened species to be referred to the Threatened Species section of DPIPWE for comment. The Threatened Species unit may:

    a. Decline to comment, in which case standard agreed management prescriptions must be adopted

    b. Recommend amended or additional management prescriptions to protect threatened species (this may include amending the forest practices plan itself to avoid high risk areas). The FPA must implement the recommended prescriptions.

    c. Recommend refusal of the application, on the basis of unacceptable impacts on threatened species. The FPA must refuse an application that has been recommended for refusal.

        In situations where refusal is recommended, the Threatened Species Unit is to liaise with the Minister regarding the possibility of compensation for the applicant.

    This approach would ensure that a qualified ecologist considers all proposals that may impact on threatened species, and remains aware of clearing proposals across the State / region. The default management prescriptions ensure minimum protections are in place.

8. Convert the underlying tenure of all FPPF land within the TWWHA to national park or state reserve. This would avoid the possibility of special species timber harvesting occurring within the TWWHA. At the very least, the underlying tenure should be converted to a reserve type that can be included in a management plan under the *National Parks and Reserves Management Act 2002*, to allow for consistent management of World Heritage values across the TWWHA.

    FPPF land within the TWWHA should be excluded from the exchange and conversion provisions of the *Forestry (Rebuilding the Forest Industry) Act 2014.*

9. Ensure that adequate resources are available to allow:

    a. Parks and Wildlife Services to manage CAR reserve areas

    b. Forest Practices Authority to monitor compliance effectively and take appropriate enforcement action

    c. Threatened Species Unit to assess proposed forest practices plans and to audit forestry operations

10. Introduce a new *Vegetation Management Act* for the assessment of all vegetation clearance for purposes other than commercial forestry. The Act would have the following features:

    a. Applications would be made to the local planning authority in the first instance, and referred a Vegetation Management Authority, comprised of representatives of the Forest Practices Authority and DPIPWE, for comment. The local council would be required to implement any conditions proposed by the Forest Practices Authority, but would retain the power to refuse an application even where the Forest Practices Authority had recommended approval.

        This is consistent with the approach taken in respect of Level 2 activities, developments on heritage properties and developments affecting water infrastructure.

        Any clearing of threatened native vegetation would be assessed as a discretionary use, and be subject to public comment and third party rights of appeal.

b. Adopt the list of native vegetation communities currently in Schedule 3A of the *Nature Conservation Act 2002.*

c. Prohibit clearing of specified, endangered vegetation types

d. Restrict the clearing of regrowth vegetation

e. Provide limited offset arrangements, ensuring that the avoid, minimise, mitigate, offset hierarchy is effectively implemented.

f. Require any decisions made in relation to Projects of State Significance or Projects of Regional Significance that will impact on threatened native vegetation communities to be consistent with any assessment criteria under the *Vegetation Management Act*

g. Provide technical and financial incentives for adoption of land management plans to restore vegetation communities on private land

h. Enable a range of enforcement options to be exercised by the Vegetation Management Authority or local council, including:

    i. Stop work notices (including injunctions to prevent work commencing)

    ii. Prosecution, with significant fines

    iii. Restoration and remediation notices

i. Require data regarding vegetation clearing to be recorded in a central, publicly accessible database

The Vegetation Management Act could be accredited under the Assessment Bilateral Agreement, to reduce duplication of assessment under the EPBC Act.

11. Publish clear guidelines for determining when clearing and conversion will achieve an "overall environmental benefit" and when clearing will "detract substantially" from the ecological community

12. Amend the *Native Forest Estate Policy* to

    a. commence the provisions intended to be commenced on 1 January 2015, restricting clearing to 20ha over five years;

    b. remove the clause allowing clearing beyond 1 January 2016 if the 95% threshold has yet to be reached;

    c. remove the "substantial public benefit" exemption.

If a "public benefit" exemption is considered necessary, it should be included in the *Forest Practices Act 1985*, subject to clear guidance as to the circumstances in which substantial public benefit will be demonstrated. This approach would allow judicial review of a decision by the Minister that the exemption should apply to a particular project.

13. Amend the *Forest Practices Act 1985* to require a public register of Forest Practices Plans to be maintained.

14. Amend the *Forest Practices Act 1985* to require notification to be given to all neighbours, posted on the site and published in the local paper. The notice should indicate where a copy of the Forest Practices Plan can be viewed, who to contact to discuss the proposal, and provide at least two weeks for comments to be made.

15. Amend the *Forest Practices Act 1985* to provide for appeals to be made to the Resource Management and Planning Appeal Tribunal. Appeals by any person who can demonstrate a "proper interest" in the proposed clearing.

16. Introduce provisions into the *Forest Practices Act 1985* (and any new Vegetation Management Act) to provide for third party civil enforcement in relation to unlawful vegetation clearance.

4.3 Amendments to the RFA

1. Provide for any future RFAs to be declared as an endorsed plan under the strategic assessment provisions of the EPBC Act. Rather than 5 year "reviews", the RFA would be subject to re-assessment every 5 years to determine whether the plan maintains its status as a strategic assessment allowing activities conducted in accordance with the plan to avoid the need for approval under Chapter 9 of the EPBC Act.

2. Amend clause 91 (Sustainability Indicators) to require monitoring and reporting to address any decline in protection of MNES within the RFA region.

3. Ensure that all reserves added to the reserve estate since 2005, including the FPPF land, are included in the CAR reserve system, in reserve classes in which logging is prohibited.

4. Require the tenure of the FPPF land within the TWWHA to be amended so that the land can be covered by the TWWHA management plan. Ideally, the tenure of land would be national park or State reserve.

5. Require the Tasmanian government to advise the Commonwealth Minister of any forest practices that are likely to impact on matters of national environmental significance and invite comment. For example, this could include forestry operations adjoining the TWWHA.

6. Introduce 'escalation' provisions that allow the Commonwealth Minister to suspend the operation of the RFA exemption if the Minister considers that intervention is required to protect a matter of national environmental significance.

7. Allow the RFA to be terminated or suspended by the Commonwealth for "significant non-compliance", without the need for dispute resolution procedures. Significant non-compliance can include repeated failures to comply (for example, repeated failure to report) or any breach that threatens protection of a matter of national significance.

8. Ensure that all Commonwealth and Tasmanian listed species and vegetation communities are described in the schedules

9. Set rolling benchmarks for completion of recovery plans for threatened species.

10. Require the parties to develop and have regard to conservation advice for any listed species.

11. Set objectives for protection of species, rather than just reservation designed to protect species. For example, thresholds could indicate that species decline is kept to 1% across the board, or set specific species targets. Where any thresholds are exceeded, the biodiversity provisions of the forest practices system must be reviewed.

12. Provide for 5 yearly reviews to consider new issues, rather than simply reviewing performance against existing requirements. In particular, the RFA review should explicitly consider the impact of climate change on MNES and wood supply, as well as the potential impact that forestry activities conducted under the RFA will have on climate change mitigation.

13. Require the Tasmanian government to develop and implement a policy on carbon storage in the forest estate, based on the scenarios set out in the Forest Carbon Study. The policy should identify areas where avoided deforestation may be eligible for carbon credits.


THE
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