

# Submission on the Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020

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Committee Secretary

Senate Standing Committees on Environment and Communication

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## The NSW Young Lawyers Environment and Planning Committee (**Committee**) make the following submission in response to the Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020 ('Bill')

### **NSW Young Lawyers**

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining 'carbon budget'.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO<sub>2</sub> (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The NSW Young Lawyers Environment and Planning Committee comprises of a group of approximately 250 members interested in our natural and built environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

1. The Committees welcome the opportunity to comment on the *Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020*.

## Summary of Recommendations

2. The Committee makes the following recommendations in respect of the Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020 (“**Bill**”):
  - 1) That the Bill should not be passed in its present form. Despite the intention of the Bill being to “remove the legal uncertainty surrounding Australia’s native forestry industry”, we submit that the effect of the amending Bill is to weaken the level of environmental protection of Australian forests and wildlife.
  - 2) That the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (“**EPBC Act**”) instead be amended to implement recommendation 15 of the 2020 Independent Review of the EPBC Act.

## The Bill

3. Subsection 38(1) of the EPBC Act and subsection 6(4) of the *Regional Forest Agreements Act 2002 (Cth)* (“**RFA Act**”) exempts a forestry operation that is “undertaken in accordance with” a Regional Forest Agreement (“**RFA**”) from Part 3 of the EPBC Act. Part 3 of the EPBC Act sets out requirements for environmental approvals to be obtained where actions may have a significant impact on matters of national environmental significance, such as actions with a significant impact on threatened or endangered species.
4. The Bill seeks to amend these sections of the EPBC Act and the RFA Act, to omit the words “that is undertaken in accordance with an RFA”. This is purportedly in response to the decision of *Friends of Leadbeater’s Possum Inc v VicForests (No 4)* [2020] FCA 704 (the **Leadbeater’s Possum case**), discussed below. In that case, VicForests breached the relevant RFA, meaning its forestry operations were not conducted “in accordance with” the RFA. On this basis, the Court found that the section 38 exemption did not apply. While the supplementary materials to the Bill state that it would be impractical to have forestry operations cease to be covered by the section 38 exemption because of ‘minor breaches’<sup>1</sup>, the *Leadbeater’s Possum case* dealt with breaches which we consider to be serious.

## Leadbeater’s Possum case

5. On 27 May 2020, the Federal Court of Australia found that VicForests did not comply with requirements under the Victorian Central Highlands Regional Forest Agreement. VicForests had failed to comply with the Victorian Code of Practice for Timber Production (as required by the RFA) as its operations did not implement the precautionary principle, meaning that the logging did not avoid serious or irreversible damage to the environment where it was practical to do so.

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<sup>1</sup> Explanatory Memorandum, Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020 (Cth) 3.

6. The Court found that several breaches of the RFA concerned habitats of the endangered Greater Glider and the critically endangered Leadbeater's Possum. The Court also found that VicForests was unlikely in future to comply with State and Federal laws designed to protect threatened species, and granted declaratory and injunctive relief to protect 66 areas of forest where unlawful logging was occurring<sup>2</sup>. The Court concluded that because VicForests had breached the requirements of the relevant RFA, its operations could not be said to have been carried out "in accordance with" an RFA. Accordingly, the section 38 exemption did not apply to the forestry operations in question, the provisions in Part 3 of the EPBC Act did apply and so environment approvals should have been obtained.

## Comments on the Bill

7. The Committee considers that the outcome of the Leadbeater's Possum case does not provide a justification for the proposed amendments. Contrary to the stated intention of the Bill, the amendments would not "remove the legal uncertainty surrounding Australia's native forestry industry"<sup>3</sup>. Under the existing law, forestry operators can continue to benefit from the section 38 exemption so long as their activities are undertaken "in accordance with" the relevant RFA. As it stands, the Leadbeater's Possum decision may prompt forestry operators to review their compliance to ensure that they are meeting their obligations and do not 'lose' their exemption.
8. In its current form, the Bill would only serve to weaken the level of environmental protection of Australian forests and wildlife, as it would exempt forestry operations from federal environmental controls, irrespective of whether they are being undertaken in accordance with the applicable RFA or not.
9. If the policy intention is to clarify the interaction between the EPBC Act and RFA Act (without creating a lacuna in the operation of environmental protection laws), then legislators could consider introducing provisions to :
- a. explicitly state that the exemption in s 38 will cease to apply where a forestry operation is not compliant with the applicable RFA
  - b. implement appropriate regulatory and enforcement mechanisms to ensure compliance with RFAs and protection of the environment.

**Recommendation 1:** That the Bill should not be passed in its present form. Despite the intention of the Bill being to "remove the legal uncertainty surrounding Australia's native forestry industry", we submit that the effect of the amending Bill is to weaken the level of environmental protection of Australian forests and wildlife.

10. The Committee also notes that the Independent Review of the EPBC Act is now complete and the Final Report has been published. With particular reference to RFAs, the Independent Review observed that "*Commonwealth oversight of environmental protections under RFAs is insufficient and immediate reform*

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<sup>2</sup> See orders made on 21 August 2020, *Friends of Leadbeater's Possum Inc v VicForests (No 6)* [2020] FCA 1199.

<sup>3</sup> Explanatory Memorandum, Environment Protection and Biodiversity Conservation Amendment (Regional Forest Agreements) Bill 2020 (Cth) 2.

is needed".<sup>4</sup> Further, the Independent Review resulted in a finding of 'low confidence' that the environmental considerations required by the RFA Act were as robust as those required under the EPBC Act.<sup>5</sup>

11. Weakening environmental protections under the EPBC Act would be contrary to a number of the Act's objects, including providing for the protection of the environment, promoting ecologically sustainable development and promoting the conservation of biodiversity.<sup>6</sup>
12. The Final Report highlights that reforms to connect proposed National Environmental Standards with project-level compliance at the state level may require years of regulatory refinement. Therefore, instruments such as RFAs that ensure the compliance of state-level projects with federal environmental laws remain essential. By removing this legislative nexus, the status of endangered species' habitats will be at risk until further reforms are implemented following the Final Report.
13. The Committee recommends that the EPBC Act be amended to align with recommendation 15 of the Independent Review which relevantly provided that:
  - (a) "The Commonwealth should immediately require, as a condition of any accredited arrangement, States to ensure that RFAs are consistent with the National Environmental Standards.
  - (b) In the second tranche of reform, the EPBC Act should be amended to replace the RFA 'exemption' with a requirement for accreditation against the National Environmental Standards, with the mandatory oversight of the Environment Assurance Commissioner."<sup>7</sup>
14. This would ensure the environmental considerations under RFAs align with the controlling provisions for matters of national environmental significance under the EPBC Act. Should the current Bill be introduced in isolation, it would create significant uncertainty during the EPBC reform process, particularly regarding the ongoing operation of RFAs between the State and Federal Government.

**Recommendation 2:** That the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ("EPBC Act") instead be amended to implement recommendation 15 of the 2020 Independent Review of the EPBC Act.

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<sup>4</sup> Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) 1.

<sup>5</sup> Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) 16.

<sup>6</sup> *Environment Protection Biodiversity Conservation Act 1999 (Cth)* s 3.

<sup>7</sup> Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) 30.

## Concluding Comments

NSW Young Lawyers and the Committees thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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