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Independent Inquiry into the Environment Protection Authority
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Lawyers for Forests is an association of legal professionals working towards the protection and conservation of Australia's remaining native forests. We welcome the opportunity to make a submission to the Victorian Government's independent inquiry into the Environment Protection Authority. Lawyers for Forests wishes to address only discreet aspects of the inquiry's terms of reference, namely the adequacy of the EPA's statutory powers, the EPA's appropriate role in protecting the environment, and current governance structures and funding arrangements. LFF strongly urges the Victorian Government to transfer forest regulation, compliance and enforcement to the EPA, to give EPA access to expert scientists within other independent or quasi-independent agencies, namely Arthur Rylah Institute (ARI) and the Victorian Environment Assessment Council (VEAC), and to expand the EPA's funding base and resources to enable it to properly carry out these additional functions.

VicForests, a government business enterprise established under the State Owned Enterprises Act 1992, carries out logging in Victoria's public forests. Forest regulation and compliance in Victoria involves enforcement of the complex regulatory framework governing logging in our public forests under the following Acts and legislative instruments:

- Sustainable Forests (Timber) Act 2004 (**SFT Act**);
- Conservation Forests and Land Act 1987 (**CFL Act**);
- Forests Act 1958;
- Forest Managements Plans, being *working plans* made under Section 22 of the Forests Act;
- Code of Practice for Timber Production 2014, Management Standards and Procedures for Timber Harvesting in Victoria's State Forests 2014, Planning Standards for Timber Harvesting in Victoria's State Forests 2014, made under Sections 31 and 36 of the CFL Act;
- Action Statements made under the Flora and Fauna Guarantee Act 1988;
- Allocation Orders, made under the SFT Act.

Presently, the EPA has no powers to investigate or enforce compliance with environment protections in the above regulatory framework. Instead, the regulation of VicForests and enforcement of the above Acts and legislative instruments is split between both the Department of Environment, Land, Water and Planning and the Department of Economic Development, Jobs, Transport and Resources¹. The demarcation of responsibility between Departments for the various aspects of the regulatory framework is extremely complex. For example, each individual section within the SFT Act and CFL Act is designated as the responsibility of either one or both Departments and their respective Ministers. Some Sections within those Acts have subsections that are the responsibility of one Department and other subsections that are the responsibility of the other Department. Such a convoluted and, what appears to be, arbitrary demarcation of responsibility has lead to confusion as to which Department is empowered to enforce the regulatory framework. As a result, a regulatory vacuum appears to be developing. Some

¹ Administrative Arrangements Order (No. 219) 2014, Government Gazette 24 Dec 2014.

concerns from the public relating to compliance with environment protection rules have been met with a response from the “Timber Harvesting Compliance Unit” within DELWP that it is not empowered to direct VicForests to behave in particular ways that would manage or resolve concerns. This includes that the THCU considers it is not empowered to halt logging while it investigates compliance in active logging coupes following complaints². Such a situation is untenable and must be addressed.

Forest protection has been an issue of high public concern in Victoria for decades. Irrespective of the complex demarcation of responsibility between Departments (that occurred in 2014 following election of the new Victorian Labor Government), forest compliance has long failed to meet community expectations and been marred with secrecy and a lack of public confidence. In LFF's view, the best way to address this long-standing issue is for responsibility to be transferred out of both Departments and placed with an independent regulator properly empowered to investigate and enforce the regulatory framework. The EPA is best-suited to this role, with assistance from expert scientists in ARI and VEAC as needed.

3 key factors have led to the current failure of public confidence in enforcement of the regulatory framework governing logging in Victoria:

1. A consistent failure to prosecute breaches reported by the public or found by third-party investigations, and a refusal to disclose information to the public following investigative processes³;
2. Investigations carried out by personnel within the Department that lack the requisite expertise⁴ and a failure to adopt recommendations and regulatory tools developed by the Department's own expert scientists and leading scientific experts⁵;
3. Changes made to detail within the regulatory framework by the Department following disputes between VicForests and the community in order to permit logging in areas of dispute and weaken environment protections⁶.

LFF believes that transfer of investigative and enforcement responsibilities to EPA would go some way to addressing the above concerns by bringing independence and expertise to the regulation of forests in Victoria. An independent regulator would also represent a step toward best-practice regulation in the forest sector. The full suite of investigative and regulatory tools already at EPA's disposal in carrying out its present statutory functions should be made available to EPA in forest regulation and compliance. However, care should be taken to specifically ensure that the above problems are addressed and not replicated in any new regulatory environment. Additionally, expertise in forest ecology within ARI in particular should be made available to the EPA to enable it to best carry out any new functions. For example, proper application of environmental prescriptions relating to protection of specific ecological vegetation classes requires a high level of expertise in identification of particular floristic communities.

Investigation and enforcement should be placed with EPA and separated, at least to a degree, from the development of environment protection prescriptions. The latter should be placed with independent

2 Personal communication with Flora and Fauna Research Collective Inc following complaints made to DELWP regarding breaches in active logging coupes, 2015

3 For eg, community groups have sought information for some 3 years to no avail regarding the Murrungower rainforest logging case, a rare instance of the Department initiating a prosecution against VicForests, but which settled on unknown terms

4 For eg, DELWP's initial 2015 investigation into alleged rainforest and mixed forest logging at Hensleigh Creek, East Gippsland, that required follow up by an external expert appointed by the Department.

5 For eg, refusal to mandate the use of “*A field guide to rainforest identification in Victoria: differential species keys for the delineation of rainforest boundaries*”, Cameron D., DSE 2011; and development of the new Leadbeater's Possum Action Statement in 2014 failing to incorporate Professor Lindenmeyer's recommendations.

6 See, for eg, the highly restrictive definitions of “Hollow-bearing tree” and “Mature tree” inserted into the new *Management Standards* 2014 that significantly reduced protection for hollow-bearing trees and Leadbeater's Possum habitat in State forests.

expert scientists and involvement of industry should be prevented. Forest-related environment protection prescriptions (including in the Code of Practice and its incorporated documents, Forest Management Plans and Action Statements) should be developed and regularly reviewed by independent expert ecologists via VEAC-led processes. This will ensure both independence and a regulatory framework based on evidence and science.

EPA was tasked with undertaking a Special Forest Audit between 2003 and 2007, involving an environmental audit of timber production on public land. EPA audited numerous logging coupes during this period and found a significant number of breaches of the regulatory framework, including logging of protected areas (National Park, Special Protection Zones and threatened species habitat), logging greater than allocated coupe areas and logging occurring outside coupe boundaries⁷. Regrettably, the EPA's lack of statutory power meant that it could not prosecute any of the breaches found. Independent breach findings such as this followed by a lack of enforcement action or penalty have led to a community perception of impunity for the forest industry. Key findings in the reports included inadequate coupe planning and oversight, and lower levels of compliance relating to rainforest protection⁸.

LFF considers that a fundamental gap in the current Victorian framework is a lack of involvement of the regulator *prior to* the commencement of logging. Compliance has shifted toward self-regulation over a number of years. VicForests now make their own Timber Release Plans and coupe plans, as well as conduct their own pre-logging surveys and in-field coupe boundary marking. All these functions are carried out with no routine independent oversight. In jurisdictions such as California, the forest regulator visits every logging coupe pre-harvest to check boundaries and compliance before logging takes place, as well as after logging has occurred. This does not presently occur in Victoria. Enforcement of the regulatory framework should not only be shifted to EPA, but EPA should also be empowered to conduct pre-logging surveys for protected values as well as coupe boundary marking and post harvest audits of every coupe to ensure compliance. Such expanded powers should fit within a shift more broadly that empowers EPA to take preventative action, rather than being limited to post-harm compliance functions only.

Plainly, if EPA is empowered as LFF submits above it will require significant expansion to its funding and resourcing. Part of this expansion can involve a transfer of resources presently flowing to DELWP and DEDJTR. By clearly and unequivocally nominating a single independent regulator, resource savings could likely be made in relation to functions presently duplicated or poorly demarcated between DELWP and DEDJTR.

In sum, LFF urges the inquiry to recommend that EPA be empowered to investigate and enforce the forest regulatory framework in Victoria through both preventative and post-harm compliance functions, and be properly resourced to carry out these new functions.

Sincerely

Lawyers for Forests Inc
4 November 2015

7 See for eg, 2005 Special Forest Audit, EPA Victoria 2006, available at www.epa.vic.gov.au/~media/Publications/1030.pdf and Environment Audit: Timber Production on Public Land 2007 Finding and Recommendations, EPA Victoria 2008, available at www.epa.vic.gov.au/~media/Publications/1217.pdf

8 As above.