

# Environmental Defenders Office (Tas.) Inc.

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The Resource Planning and Development Commission  
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Dear Sirs

## ***Inquiry on Progress with Implementation of the Tasmanian Regional Forest Agreement (1997): Comment on Draft Recommendations Report***

### **Introduction**

The Environmental Defenders Office (Tas) Inc. (the 'EDO') is a Commonwealth and State funded community legal service specialising in environmental law. The EDO provides free legal advice and assistance to the Tasmanian community on environmental matters. We also seek to participate in law reform/review processes relevant to the environment.

These submissions will concentrate primarily on the issues raised in chapter 4 of the Draft Recommendations Report (the 'Report') relating to Tasmania's forest management systems..

### **Executive Summary**

At chapter 4.2 of the Report the Commission identifies issues of public disaffection with the Forest Practices System and refers to the need for improvement in the public communication mechanisms, accountability and transparency of Tasmania's forest management systems. We believe that institutionalised barriers to effective public participation that currently exist within the Tasmania's forest management systems are a root cause of community disaffection with the forest industry. We believe this is an issue of paramount importance, as anecdotal evidence suggests the current level of community mistrust and hostility towards the industry is increasing and has reached the point where the ability of regulatory agencies, the industry and the community to cooperate in achieving sustainable forest management is severely compromised.

Through our experience and contact with clients we have concluded that the problems outlined above (and identified in chapter 4.2 of the Report) stem predominately from the dislocation of the Forest Practices System from Tasmania's Resource Management and Planning System (the 'RMPS').

Optimal integration of strategic policy development, strategic planning and operational management of forests at the organisational and institutional level is a key objective of the National Forest Policy Statement and the Tasmanian Regional Forests Agreement. Full integration of Tasmania's Forest Practices System with the RMPS and its planning processes will resolve the fundamental conflicts inherent to the currently dislocated systems.

We thus believe the Commission should in its final recommendations:

- Acknowledge the problems stemming from the dislocation of the Forest Practices System from the RMPS and the consequent institutional barriers to public participation in forest management;
- Acknowledge that this lack of integration and lack of public participation, hinders the implementation of ecologically sustainable forest management as defined in the RFA and the sustainability indicators, and is in conflict with the terms and objectives of the RFA, and;
- Recommend that appropriate legislative measures to rectify the situation be investigated as a matter of priority.

We submit that it is appropriate and squarely within the scope of the RFA review (and the Commission's jurisdiction under the Terms of Reference for conducting the review) to make these recommendations.

### **Ecologically Sustainable Forest Management ('ESFM')**

In Clause 2 (Part 1 RFA) ESFM is defined as, 'forest management and use in accordance with the specific objectives and policies for ecologically sustainable development as detailed in the NFPS' (National Forest Policy Statement).

In Clause 62 of the RFA the Commonwealth and State Governments agreed that

*ESFM is an objective which requires a long term commitment to continuous improvement and that the key elements for achieving it are:*

- *The establishment of the CAR reserve system.*
- *The development of internationally competitive forest products industries which are economically sustainable and provide for social and economic benefit; and*
- *The establishment of **fully integrated** (emphasis added) and strategic forest management systems capable of responding to new information."*

By virtue of Clause 2 (Part 1 RFA) 'Forest Management Systems' are defined to include, inter alia, both the Forest Practices System established under the Forest Practices Act 1985 and the State's Resource Management and Planning System (RMPS).

Clause 63 of the RFA states:

*The State confirms its commitment to the **ongoing development**, implementation and achievement of ESFM on both Public Land and Private Land through the **development** and implementation of its Forest Management Systems.*

Under Clause 64 the State agreed to amend its Forest Management Systems in accord with a number of specific undertakings in Attachment 10 and under Clause 65 the Commonwealth accredited Tasmania's current Forest Management Systems as providing for ESFM.

We do not dispute that the Commonwealth accreditation of the State's Forest Management Systems was appropriate. Nor do we dispute that, by and large, the State has fulfilled its commitment under Clause 64 to make the amendments specified in Attachment 10. The State's obligations did not end there however. By virtue of Clauses 62 and 63 of the RFA, the State has an *ongoing* obligation to continually develop and improve its Forest Management Systems in line with ESFM. We submit that at present, the most important and pressing area in need of development and improvement in Tasmania's forest management systems is the effective integration of those systems.

### **ESFM, Integrated Management and Tasmania's Forest Management Systems**

As specifically provided in Clause 62 of the RFA, a key element for achieving ESFM is the establishment of *fully integrated* and strategic Forest Management Systems. The National Forest Policy Statement contains numerous statements highlighting the objective of ecologically sustainable development through integrated management. By way of example the following are some relevant excerpts from the NFPS Specific Objectives and Policies<sup>1</sup>:

At page 2 of the NFPS:

*The protection of the full range of forest ecosystems and other environmental values is fundamental to ecologically sustainable forest management. It entails the maintenance of the ecological processes that sustain forest ecosystems, the conservation of the biological diversity associated with the forests and (particularly endangered and vulnerable species and communities), and the protection of water quality and associated habitats*

At page 5:

*Ecologically sustainable forest management will be given effect through the continued development of **integrated planning processes**, through codes of practice and environmental prescriptions, and through management plans that, among other things, incorporate sustainable yield harvesting practices.*

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<sup>1</sup> <http://www.rfa.gov.au/rfa/national/nfps/obj.html> (accessed 7 October 2002)

At page 16:

*If the community is to optimise the benefits that can accrue from the many uses of Australia's forests, it is important to integrate policy development, strategic planning and operational management between and within the forest management agencies, at the organisational and regional field levels.*

And at page 17:

*...More generally, each State Government will seek to ensure that links between and within agencies are fully effective and that opportunities are available for local government and the public to participate in the development of strategic plans.*

*At the operational level, the States will ensure that management plans are developed by forest management agencies, consulting with local government, regional organisations and other authorities as appropriate and providing opportunities for public consultation. **Operational management will be integrated to the greatest extent possible, consistent with achieving agency objectives.***

In light of the above, it is worth now looking at the statutory objectives of the Tasmanian RMPS and its land use planning system established under the Land Use Planning and Approvals Act 1993 (LUPAA):

*The objectives of the resource management and planning system of Tasmania are –*

*(a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and*

*(b) to provide for the fair, orderly and sustainable use and development of air, land and water; and*

*(c) to encourage public involvement in resource management and planning; and*

*(d) to facilitate economic development in accordance with the objectives set out in [paragraphs \(a\), \(b\) and \(c\)](#); and*

*(e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.*

**2. In [clause 1\(a\)](#), "sustainable development" means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –**

**(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and**

*(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and*

*(c) avoiding, remedying or mitigating any adverse effects of activities on the environment.<sup>2</sup>*

*The objectives of the planning process established by this Act (LUPAA) are, in support of the objectives set out in [Part 1](#) of this Schedule –*

*(a) to require sound strategic planning and co-ordinated action by State and local government; and*

*(b) to establish a system of planning instruments to be the principal way of setting objectives, policies and controls for the use, development and protection of land; and*

*(c) to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land; and*

*(d) to require land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels; and*

*(e) to provide for the consolidation of approvals for land use or development and related matters, and to co-ordinate planning approvals with related approvals; and*

*(f) to secure a pleasant, efficient and safe working, living and recreational environment for all Tasmanians and visitors to Tasmania; and*

*(g) to conserve those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value; and*

*(h) to protect public infrastructure and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community; and*

*(i) to provide a planning framework which fully considers land capability.<sup>3</sup>*

Now compare the statutory objectives of the Forest Practices System established under the Forest Practices Act 1985:

*The objective of the State's forest practices system is to achieve sustainable management of Crown and private forests with due care for the environment while delivering, in a way that is as far as possible self-funding –*

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<sup>2</sup> Land Use Planning and Approvals Act 1993, Schedule 1, Part 1

<sup>3</sup> LUPAA, Schedule 1, Part 2

- (a) an emphasis on self-regulation; and*
- (b) planning before forest operations; and*
- (c) delegated and decentralized approvals for forest practices plans and other forest practices matters; and*
- (d) a forest practices code which provides practical standards for forest management, timber harvesting and other forest operations; and*
- (e) an emphasis on consultation and education; and*
- (f) provision for the rehabilitation of land in cases where the forest practices code is contravened; and*
- (g) an independent appeal process; and*
- (h) through the declaration of private timber reserves – a means by which private land holders are able to ensure the security of their forest resources.<sup>4</sup>*

There is a world of difference between the two. We submit that the statutory objectives of the RMPS reflect the principles and objectives of Ecologically Sustainable Forest Management as defined in the RFA/NFPS. The objectives of the Forest Practices System, alone, do not. The objectives of the Forest Practices System and their practical application promote industry resource security over ESFM.

The RMPS and the Forest Practices System coexist within the broad suite of laws and policies that form the Forest Management Systems of Tasmania, but the two systems are not integrated. Forestry operations on public land (State Forest) are exempt from the integrated planning processes established under LUPAA by virtue of a definition of ‘works’ in Section 3 of LUPAA that excludes forest practices on State Forest. On private land, forestry operations are subject to local government planning schemes and LUPAA planning process until a landowner decides to apply to the industry based Forest Practices Board for the land to become a Private Timber Reserve (PTR).

We submit the Private Timber Reserve concept is repugnant to the objectives of ESFM. Its sole purpose is to provide forestry with a commercial advantage over alternative forms of land use (including conservation) by shielding forestry developments from the control of local government and perhaps more importantly, the public participation and appeal mechanisms established under LUPAA.

The PTR system does not create an orderly or fair process of resource management. On the contrary, it defeats the proper functioning of the integrated, openly democratic planning processes that apply to other land and resource use within the State under LUPAA and therefore undermines the implementation of ESFM. It creates animosity and resentment amongst regional communities who are confronted by broad scale

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<sup>4</sup> Forest Practices Act, Schedule 7

clearfelling and plantation developments and deprived of appeal and objection rights they would otherwise be entitled to under their local planning scheme.

The PTR process also creates a bureaucratic nightmare for local governments. The only way a local government can guarantee that its planning scheme will apply to forestry developments is to make forestry a prohibited use, an inflexible outcome, which in many areas would not be appropriate. If a local government wants to preserve control of a forestry development in an area where forestry is zoned *discretionary* under its planning scheme it can be forced through potentially 4 separate application and appeal processes i.e.

1. Landowner applies to Forest Practices Board for a PTR, Council objects on public interest grounds
2. Board grants PTR, Council appeals to Forest Practices Tribunal to have declaration revoked.
3. Appeal is successful; Landowner applies for permit, dealt with under S. 57 of LUPAA, council refuses permit or grants permit under conditions.
4. Landowner appeals council decision to RMPAT.

A current example of a planning fiasco stemming from the PTR exemption is the illegal clearfelling by Gunns Ltd at a coupe in Middleton, Southern Tasmania. A portion of the coupe had been declared a PTR but the remainder of the coupe, almost 200 ha, was clearfelled without the required council permits in the mistaken belief that the whole coupe was a PTR.

The coupe fell within the control of both the Huon Valley and Kingborough Councils. Kingborough Council has now resolved to prosecute Gunns Ltd for the illegal landclearing and has granted a permit subject to 29 conditions for a plantation proposal. The Huon Valley Council had a few weeks earlier granted a permit on conditions, which purportedly retrospectively validates the whole proposal, including the illegal landclearing.

The Kingborough Council Planning Committee noted in its final report on the Gunns Ltd proposal:

*From a statutory perspective Council staff have a concern that if this application is any guide, the concept of self regulation within the forestry industry is not performing sufficiently well. No less than 5 amendments to the FPP (forest practices plan) have been made, there have been basic inaccuracies in the FPP relating to which local government area is affected, which properties are within the forest coupe etc. Information sent to residents about the use of 1080 was sent before any such permit was obtained. Information regarding sprays has changed at various times. Many of these matters are acknowledged and advice received suggests many internal procedures at Gunns have been updated and checking improved.*

*Nonetheless the following seems necessary for future applications:*

- *Closer dialogue between Gunns, Forest Practices Board (the Board) and Council on Forest Practices Plans*

- *Regular updates to Council from Gunns and the Board on PTR's existing and sought*
- *Encouragement of Gunns and others to lodge development applications in all cases*
- *Copies of all Forest Practices Plans being provided to Council prior to works commencing.*<sup>5</sup>

Another example was a case we dealt with in the past year where a landowner applied to have land declared a PTR within a planning zone where forestry was a permitted use. Adjoining neighbours were opposed to the forestry development, objected to the PTR application and made it clear to the landowner that if the PTR were approved they would appeal to the Forest Practices Tribunal. The objectors instructed that throughout the process they had great difficulty obtaining information on the proposed development particularly the PTR application and the Forest Practices Plan.

The Forest Practices Board declared the land a PTR but before the objectors were notified of that decision and could appeal to the Forest Practices Tribunal, the landowner commenced forest practices on the subject land (clearing of remnant native vegetation). When objectors complained they were informed that until the Forest Practices Tribunal determined otherwise, the land was a PTR and the landowner could conduct forest practices on it without a council permit or need of further approval. When the neighbours argued that they had been given no notice of the commencement of forest practices, and were entitled under the Forest Practices Code to at least 30 days notice before forest practices commence; the landowner cited a letter sent to neighbours over 12 months beforehand advising that at an unspecified date in the future the landowner intended to commence forest practices!

Under the Forest Practices System the landowner had discharged all legal obligations, but throughout the process demonstrated contempt for due process and the rights of neighbouring community members who in turn felt disenfranchised and embittered.

These cases referred to above are not isolated or even the probably the worst examples of the problems generated by the failure to integrate forestry within RMPS planning processes. We submit they mirror the concerns raised by many representors that were referred to by the Commission in Chapter 4 of the Draft Recommendations Report.

The Report also clearly recognises the shortcomings of the Forest Practices System to involve and engage the community in forest management. We note the Commissions comment at page 34 of the Report:

*The Commission considers that there is room to make the process for obtaining information on the content of Forest Practices Plans more transparent, and to make the industry more accountable to the public for undertaking its responsibilities for public consultation.*

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<sup>5</sup> Report to Kingborough Council Planning Committee, Development Application for Forestry at P. 1212 Risby Street, Middleton for Gunns Ltd Triabunna, 16 October 2002, page 10

And at page 38:

*While measures identified in the RFA on the implementation of ecologically sustainable management are intended to provide improved involvement by, and communications with the community, it is evident that sections of the community remain suspicious, untrusting and disenfranchised by existing consultation and communication mechanisms commonly used within the Forest Practices System.*

Sustainability indicators 7.1.b and 7.1.c. (which are derived from the Montreal Protocol) highlight the importance of coordinated forest related planning and opportunities for public participation in decision making related to forests. We recognise in recent years there has been improvements in policy coordination and opportunities for public participation at the broad strategic and policy levels. However at the operational level, the level often of most immediate relevance to the community, coordination of forestry with community stakeholders and local government is often poor (see examples above) and opportunities for public participation in forest related decision-making are limited, to non-existent.

The Forest Practices Code contains a number of statements and exhortations on the importance of forestry proponents 'consulting' with local government and relevant community stakeholders. Similar requirements are found in such instruments as *The Good Neighbour Charter for Commercial Tree Farming in Tasmania* and the *Community Forest Agreement* between Tasmanian Beekeepers Association Inc and Forestry Tasmania. In all of these instruments however, provisions for community and stakeholder consultation amount to little more than statements of intent on the part of forestry proponents. They do not confer any enforceable legal rights upon community stakeholders or any legally sanctioned obligations on forestry proponents.

The Forest Practices Act gives no right of appeal against a Forest Practices Plan to anyone other than forestry proponents. There are no civil enforcement provisions allowing affected third parties to appeal breaches of the Forest Practices Code or a Forest Practices Plan<sup>6</sup>

In practice, the provisions about community consultation within the Forest Practices System at the operational level can be described as '*mere puffery*' i.e. 'representations, statements or conduct that clearly over – exaggerates the attributes or characteristics of some product or service and is not intended to be an offer to be relied upon.'<sup>7</sup>

Full integration of the Forest Practices System with the strategic and operational RMPS planning processes will rectify these problems. Forestry proponents will be accountable to the community through Local Government, through RMPAT and the Commission. The recent Southwood development approval process demonstrates

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<sup>6</sup> Contrast this with Section 64 of LUPAA and Section 48 of the Environmental Management and Pollution Control Act 1994.

<sup>7</sup> Butterworths Australian Legal Dictionary, Butterworths, 1997, page 960

how, within the RMPS, the community can effectively participate in the operational planning approval process for a forestry development.<sup>8</sup>

We have heard very few credible arguments in justification for the forestry industry remaining quarantined, at the operational level, from RMPS planning and civil enforcement processes. One such argument is that because forestry operations must be subject to a forest practices plan, approved by the Forest Practices Board, it would be placing forestry proponents in double jeopardy if they were also subject to local government approval, and exposed to the possibility of appeal to RMPAT.

This is thin argument, particularly since 1 January 2002 amendments to the Forest Practices Act and regulations introduced land-clearing controls across the board. Under these amendments *any* developer wishing to clear land must go through the double-barrelled approval process. For example, under current legislative arrangements, a landowner wanting to clear land in order to establish an organically certified vineyard or olive grove will need to obtain both local council approval under LUPAA and obtain a certified Forest Practices Plan from the Forest Practices Board. Of course, if the same person wanted to clear his land to establish an E. Nitens or Radiata Pine plantation (involving associated 1080 and herbicide/pesticide use), he could opt out of LUPAA requirements by applying to the Board alone to have his/her land declared a Private Timber Reserve.

## **Conclusion**

In these submissions we argue that problems associated with the current functioning of the Forest Practices System, identified in Chapter 4 of the Draft Recommendations Report, could be addressed by full integration of the Forest Practices System with the Resource Management and Planning System.

We seek that the Commission acknowledge in its recommendations the problems associated with the dislocation of the Forest Practices System from the RMPS (through Private Timber Reserves and the exemption of forestry works on State Forest from LUPAA) and recommend that steps be taken to integrate the two systems by removing forestry exemptions. It would be far simpler and more effective to integrate the already well-developed public participation mechanisms of the RMPS into forest management than to attempt to try and introduce new, unintegrated public participation mechanisms into the Forest Practices System.

We note that the Commission has already addressed this issue squarely in paragraph 8.2.3 (page 107) of the Report, by finding that the RFA contains no commitments that change the relationship between the RMPS and the Forest Practices System. Whilst we acknowledge that the RFA contains no specific commitments in this regard, the National Forest Policy Statement and the RFA both emphasise the value of *integrated* forest management systems as being an important requirement for the implementation of Environmentally Sustainable Forest Management. Clauses 62 and 63 contain clear commitments on the part of the State to continually develop and improve its Forest Management Systems of which the RMPS and the Forest Practices System form key

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<sup>8</sup> An example of a forestry operation that was tested in RMPAT under LUPAA is F. Giles, J. Weston and T. Dudley v Break O Day Council & T. Denney TASRMPAT No. J115/2001

components. Part of the scope of the review is to monitor the States progress in fulfilling its commitments under the RFA and make recommendations on how progress in meeting these commitments can be better achieved.

In light of the above, we submit that the recommendations we seek are appropriate and within the scope of this review.

Yours Faithfully

**Environmental Defenders Office (Tas) Inc.**

Per

Stephen Hall  
Principal Lawyer