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Jan McDonald

Bond University

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Regional Forest (Dis)Agreements: The RFA Process and Sustainable Forest Management

Abstract

The Regional Forest Agreement process was initiated by the Federal Government in the early 1990s in an attempt to defuse the political sensitivity of forest management decisions. It created a mechanism by which State and Federal governments could agree on the long-term management and use of forests, providing secure industry access while protecting environmental and cultural values. It is the largest inter-governmental natural resource planning process undertaken in Australia to date and as such serves as a useful case study for natural resource managers in Australia and elsewhere.

This article assesses the extent to which the Regional Forest Agreement process has achieved these goals.

Keywords

Regional Forest Agreement, forest management, sustainable development

Cover Page Footnote

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*By Jan McDonald**

Introduction

The management of forest resources has been a controversial and politically divisive issue in Australia for over a century.¹ Some of Australia's most bitter natural resource conflicts have concerned harvesting of publicly-owned native forests.² Since the end of World War II, there have been over 75 major inquiries into the environmental impacts of the Australian timber industry, none of which have found a

* Associate Professor, School of Law, Bond University. This article is based upon a paper presented to the National Environmental Law Association 1999 Annual Conference. The author gratefully acknowledges the assistance of a Forests and Wood Products Research and Development Corporation Postgraduate Research Fellowship.

1 State of the Environment Advisory Council (SEAC), *State of the Environment Report 1996* (1996) Melbourne, CSIRO, at 6-18; Dargavel J, *Fashioning Australia's Forests* (1995) Melbourne, Oxford University Press, at 25; Mercer D, *A Question of Balance* (3rd Edition, 2000) Sydney, Federation Press, at 124-127.

2 Dargavel J, 'Politics, Policy and Process in the Forests' (1998) 5 *Australian Journal of Environmental Management* 25. Three quarters of Australia's forested land is in public ownership. The public forest estate is divided in roughly equal parts between National Park, State Forest and forested Crown Land. Ferguson posits that the public ownership of forests dramatically increases the level of controversy their exploitation generates because the comparatively limited level of human intervention on public forest lands makes them more suitable for conservation and recreation, and because their public nature makes them more susceptible to competing demands. Ferguson I, *Sustainable Forest Management* (1996) Melbourne, Oxford University Press, at 2-3.

solution to the intense debate.³ The issue of native forest logging continues to provoke polarised public reaction.⁴

The primary cause of conflict is disagreement over what balance should be struck between conservation and exploitation. Since European settlement, 40-50% of pre-settlement forest cover in Australia has been removed for agriculture, pasture and commercial forestry. By far the primary cause of forest decline is conversion to grazing and agriculture, but there is evidence that commercial harvesting and the extensive clear-felling of Australian native forests for woodchip exports from the 1970s radically altered the remaining forest landscape.⁵ Logging practices in some areas continue to produce environmental impacts such as serious algal blooms, sedimentation problems, reduced water supplies, flooding in local waterways, reduced numbers of tree species resulting in fewer fruits and flowers, reductions in animal populations, and exposure of the forest to fire and invasion from exotics.⁶

3 Mercer above n1, at 143-144. Mercer describes these processes as little more than a 'participatory ritual' in which the views of citizens and environmental groups have been sought, but ignored in the final conclusions.

4 The most comprehensive survey of public attitudes towards forest issues was undertaken for the Resource Assessment Commission in 1991. Three quarters of those interviewed considered forest protection to be important. 67% thought so even if it meant timber workers would lose their jobs and 53% accepted that it might cost more to do so. Dargavel 1995, above n1, at 157. In 1995, 63% of respondents to an AGB McNair Age poll expressed opposition to logging in undisturbed native forests, compared with 24% in support of logging. 43% of respondents also opposed logging in previously logged forests, compared with 45% who supported the continued logging of such areas. AGB McNair Age poll, *The Age*, 15 February 1995, referred to in Pyers G, *Chipping Away: Woodchipping and Logging in Native Forests* (1996) Port Melbourne, Reid Library-Cardigan Street, at 3.

5 Clear-felling produced a uniform stand of young trees, which was more like a plantation than a complex forest ecosystem. The impacts were the same for both domestic and export chip mills, but the scale of exports meant that their impact was far greater. Ironically, the decision in the late 1960s to commence woodchip export operations was uncontroversial. The Commonwealth's Forestry and Timber Bureau even assured the Australian Conservation Foundation that 'the forest activities are confidently expected by foresters to result in an improvement in the health of the forest and an increase in fauna.' Forestry and Timber Bureau, quoted in Dargavel 1995, above n1, at 87.

6 Mercer, above n1, at 123 and 146-147.

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Harvesting levels in most Australian public forests are close to the maximum sustained yield projections.⁷ But even with a dramatic increase in the volume of timber harvested since the early 1970s,⁸ employment in the forest products sector has declined steadily.⁹ This decline has

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- 7 McCormack R, 'A Review of Forest Practices Codes in Australia' in Dykstra D & Heinrich R, *Forest Codes of Practice: Contributing to Environmentally Sound Forest Operations* (1996) Rome, FAO, at 105.
- 8 National Forest Inventory (NFI), *Australia's State of the Forests Report* (1998) Canberra, Bureau of Rural Sciences, at 84-85. The NFI's data is based on statistics from 1984-1996. The total volume of timber harvested from the Australian forest estate rose by about 35% from 1970-97. During that time, hardwood harvesting remained fairly constant, while softwood production more than doubled. Hardwood saw-log production fell from 8 million cubic metres to 4.7 million cubic metres in the same period, but there was a fourfold increase in hardwood pulp log harvest. Ibid, at 81-82. Despite increases in production, the Australian industry's heavy dependence on woodchip/pulp exports means that it performs poorly in areas of value-adding. The *1998 State of Australia's Forests Report* collated ABS data about value-adding in the Australian wood-based forest products industry. It showed that while the CPI rose by over 50% from 1984-1996, prices for wood products remained unchanged and paper prices rose by a small fraction. Ibid, at 125. Exports of woodchips accounted for \$564 million in export earnings in 1994-95, which represents about 5% of the total value of the timber industry.
- 9 Ibid, at 85, and 124-126. Industry 'productivity', measured in thousands of cubic metres of logs delivered to the mill door annually per employee, increased by 47% from 1985 to 1994. Productivity in the manufacturing sector increased by only 8% in the same period, while paper production experienced a 100% increase in productivity attributable to new technology, better waste management practices and job-shedding. Ibid, at 138. Dargavel estimates that 36% of the forest sector workforce jobs were lost in the 1970s and 1980s, in spite of the establishment of the woodchip export industry and a 37% increase in the quantity of wood cut from native forest and plantations. Dargavel 1995, above n1, at 111. He notes, however, that detailed conclusions are difficult to draw because of definitional differences regarding what forms the 'forest sector'. Some estimates include furniture makers and other industries which have the effect of doubling the apparent workforce. For example, in 1987, the Forestry and Forest Products Industry Council (FAFPIC) claimed that the industry employed 106 700 people, but the 1992 Resource Assessment Commission definition showed that less than a half that number were employed in the sector. The preferable definition limits workers to those in the primary and secondary sectors, namely

resulted from structural changes in the industry, technological innovation and reduced log availability caused by historical over-cutting.¹⁰ Harvesting levels have been reviewed since forest management agencies have recognised the need to manage public forests for the full range of forest uses. These changes have had impacts on long-term cutting plans and short-term levels in some regions. They have little overall impact on industry performance, however: the forest products industry workforce is predicted to drop further over the next thirty years, whether a high yield or high conservation strategy is postulated.¹¹

Despite strong evidence to the contrary, conservationists are portrayed as the cause of Australian timber workers' troubles, in an 'environment versus jobs' contest.¹² Conflicts within the community, between levels of government, and between forestry and conservation agencies within government have escalated since the 1970s, as it became clear that the traditional methods of resource management were failing the forests.¹³ The Regional Forest Agreement process was initiated by the Federal Government in the early 1990s in an attempt to defuse the political sensitivity of forest management decisions. It created a

logging, sawmilling, and woodchip and pulp processing. By contrast with the general trend, employment in the plantation timber industry was predicted to increase by as much as 50% from 1995 to 2000. Clark J, *Australia's Plantations*, Environment Victoria: Melbourne 1995.

10 Mercer above n1, at 123. See Dargavel 1995, above n 1 at 120-121, for a discussion of the impacts of mechanisation; at 122-125 for a discussion of the effects of concentration and centralisation; and 125-126, and 203, for a discussion of productivity gains resulting from industry restructure and vertical integration.

11 Resource Assessment Commission, *Forest and Timber Inquiry Final Report* (1993) Canberra, AGPS, Volume 2a, at L92; Dargavel 1995, above n1, at 120. McCormack, above n7, at 108.

12 Dargavel 1995, above n1, at 112. This point is echoed by many in the conservation movement, who regret the way in which the individual forestry workers have been pitted against conservationists, resulting in a 'raw deal' for conservation *and* jobs. Otway Range forest protester, Radio Interview, *Earthbeat*, ABC Radio National, 25 March 2000. The problems of the limited way in which forestry and other environmental issues are treated in the Australian media has been analysed by Collins R 'Ecopolitics and the media' in Star C (ed) *Green Politics in Grey Times*, proceedings of the Ecopolitics XI Conference (1999) Melbourne, 76-87.

13 Dargavel 1998, above n 2, at 25.

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mechanism by which State and Federal governments could agree on the long-term management and use of forests, providing secure industry access while protecting environmental and cultural values.¹⁴ It is the largest inter-governmental natural resource planning process undertaken in Australia to date¹⁵ and as such serves as a useful case study for managers natural resource managers in Australia and elsewhere.

This article assesses the extent to which the Regional Forest Agreement process has achieved these goals. Part One locates the RFA process on the continuum of resource planning and management strategies attempted by successive Australian governments over the past two decades. It sets out the legal and policy context of the process, including international and national commitments to ecologically sustainable development (ESD) generally, and ecologically sustainable forest management (ESFM) in particular. Part Two examines the key elements to the RFA process, including the comprehensive regional assessment, the establishment of reserves, and the provision of resource security. It also analyses the enforceability of what appear at first glance to be fundamentally political documents. Part Three assesses the success of the RFA process against its stated goals and against the broader principles of ESD. The article concludes in Part Four with some thoughts on the implications of the RFA outcomes for the sustainable management of Australian forests and the forest products industry. It suggests that the RFAs that have been completed may provide additional conservation and forest management benefits but that it is too soon to judge whether they have extinguished Australian forest policy fires or merely fanned their flames.

Ecologically Sustainable Development And Australian Forest Policy

The Principles of ESD and ESFM in International Law

Ecologically sustainable development is ‘ development that meets the needs of present generations without compromising the ability of future

14 Commonwealth of Australia, *Regional Forest Agreements: the Commonwealth Position* (1995) Commonwealth of Australia, Canberra, <www.rfa.gov.au/rfa/national/rfa/rfa/html>, 28 June 2000.

15 Dargavel 1998, above n 2, at 25.

generations to meet their own needs’.¹⁶ The overriding goal of sustainable development is underpinned by a series of principles, some of which further define the concept, and others of which indicate how to achieve the substantive goals. The key substantive principles of ESD are generally considered to be:

- intergenerational equity – obliging today’s law makers to ‘ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.’¹⁷
- intra-generational equity – obliging law-makers to address issues of social injustice that can be both a cause and consequence of environmental degradation;¹⁸ and
- conservation of biological diversity – requiring conservation of species and genetic diversity in order to safeguard the ecological services performed by the global environment.¹⁹

The mechanisms by which the goals of ESD are to be implemented are:

- application of the Polluter Pays Principle, full-cost pricing of environmental resources, and the internalisation of externalised environmental and social costs;²⁰
- integration of sustainability principles into economic policy formulation;²¹

16 World Commission on Environment and Development, *Our Common Future* (1987) Oxford, Oxford University Press, at 1, 46.

17 *Rio Declaration on Environment and Development*, adopted June 14 1992, *Report of the United Nations Conference on Environment and Development* 3, Rio de Janeiro, June 3-14, 1992, UN Doc. A/Conf. 151/51 Rev 1, Vol I, United Nations Publication Sales No.E.93.I.8, New York (1993) reprinted in (1992) 31 I.L.M. 874, at 878, (the *Rio Declaration*), Principle 3. See Bates G, *Environmental Law in Australia*, (3rd Edition 1995) Sydney, Butterworths, at 24.

18 *Rio Declaration* Principle 3; Commonwealth of Australia, *Inter-Governmental Agreement on the Environment*(1992), Canberra (reproduced in *National Environment Protection Council Act 1994* (Cth) Schedule 1 (IGAE), s3.5.2.

19 *Ibid* s3.5.3.

20 *Rio Declaration*, Principle 16; IGAE, above n 18, at s3.5.4.

21 *Rio Declaration*, Principle 4; IGAE, above n 18, at s3 generally

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- application of the precautionary principle to decisions on activities that pose a risk of serious or irreversible environmental harm. The principle stipulates that ‘ where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.’ ;²² and
- public participation in environmental, resource and land-use decision making.²³

The principles of ESD were embraced by the international community, including Australia, in the documents of the 1992 United Nations Conference on Environment and Development (UNCED).²⁴ They were applied specifically to forest management issues in the Non-Binding Statement of Forest Principles (the Forest Principles) – the outcome of unsuccessful attempts to develop an international forests convention at UNCED.²⁵ Domestically, they were agreed to by the Commonwealth,

22 Rio Declaration Principle 15, The *Inter-Governmental Agreement on the Environment* elucidates this definition, explaining that it requires careful evaluation to avoid irreversible harm and an assessment of the risk-weighted consequences of various options. *IGAE* s3.5.1.

23 *Rio Declaration*, Principle 10.

24 The *Rio Declaration* set out 27 general non-binding principles that would guide nations in structuring their policies and activities in order to achieve ecologically sustainable development. The *Convention on Biological Diversity* (CBD), the *United Nations Framework Convention on Climate Change* (UNFCCC) and the *Convention on Desertification* all contain obligations that encompass and contemplate forest conservation. *Convention on Biological Diversity*, June 5, 1992, reprinted in 31 ILM 822 (1992); *Framework Convention on Climate Change*, May 9, 1992, reprinted in 31 ILM 851 (1992).

25 *Agenda 21, Report of the United Nations Conference on Environment and Development* 9, Rio de Janeiro, June 3-14, 1992, UN Doc A/Conf.151/26/Rev.1, Volume I, United Nations Publication Sales No.E.93.I.8, New York (1993). The Forest Principles underlined the need to reconcile the productive and economic functions of forests with their protective, environmental and social roles. *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, Report of the United Nations Conference on Environment and

State and territory governments and the Local Government Association in the *Inter-governmental Agreement on Environment 1992*.²⁶

Post-UNCED processes have attempted to build upon the Forest Principles by formulating and harmonising criteria and indicators (C&I) for assessing ESFM.²⁷ Sets of C&I have now been formulated, through inter-governmental processes, for each major forest type: temperate,²⁸ boreal,²⁹ humid tropical,³⁰ sub-Saharan dry-zone³¹ and the Near East dry

Development, Rio de Janeiro, 3-14 June 1992, Vol I, United Nations publication, Sales No E.93.I.8 and corrigendum), resolution 1, annex III.13 June 1992, UN Doc A/CONF 152/6/Rev.1, 31 ILM 881 (1992). The Forest Principles were the subject of intense North-South negotiation, despite their voluntary nature. Paragraph (d) of the Statement's Preamble provides that the Principles 'reflect a first global consensus on forests...[c]ountries also decide to keep [the principles] under assessment for their adequacy with regard to further international cooperation in forest issues.' The Principles seek to draw connections between the forests issue and the wider issues of environment and development. Forest Principles, Preamble ¶(a) and (c).

26 *Intergovernmental Agreement on the Environment*, above n 18.

27 Commission on Sustainable Development (CSD), *Item 4: Scientific Research, Forest Assessment and Development of Criteria and Indicators for Sustainable Forest Management - Report of the Secretary-General*, CSD Ad Hoc Intergovernmental Panel on Forests, Second Session 11-22 March 1996, E/CN.17/IPF/1996/10, 20 February 1996.

28 The Pan-European (Helsinki) Process. See *European List of Criteria and Most Suitable Quantitative Indicators*, adopted by the first Expert Level Follow-Up Meeting of the Helsinki Conference, Geneva, 24 June 1994.

29 The non-European Working Group on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests (the Montreal Process'). See *Statement on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests - the 'Santiago Declaration'*, Santiago, Chile, 3 February 1995.

30 The Tarapoto Process and the International Tropical Timber Organisation. See *Proposal of Criteria and Indicators for Sustainability of the Amazonian Forests, Final Document*, Tarapoto, 25 February 1995. ITTO, *Criteria for the Measurement of Sustainable Tropical Forest Management, ITTO Policy Development Series 3* (1992) Yokohama, Japan; ITTO, *Guidelines for the Sustainable Management of Natural Tropical Forests* (1992) ITTO Policy Development Series 1, Yokohama Japan; ITTO, *Guidelines for the Establishments and Sustainable Management of Planted Tropical Forests*, (1993) ITTO Policy Development Series 4, Yokohama Japan; ITTO, *Guidelines on the Conservation of Biological Diversity in Tropical*

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zone.³² They are intended to provide a common understanding of what constitutes ESFM and a common framework for describing, assessing and evaluating a country's progress towards sustainable management.³³ While the overall purpose of the criteria is to improve forest management, it must be emphasised that the criteria refer only to the method of *assessing* ESFM; they impose no measurable targets for what constitutes good management.

Australia is a party to the Montreal Process, the members³⁴ of which endorsed the 1995 Santiago Declaration as a comprehensive framework of seven criteria and supporting indicators of ESFM for boreal and temperate forests.³⁵ The 1998 *Framework of Regional (Sub-National) Level Criteria and Indicators of Sustainable Forest Management in Australia*³⁶ represents Australia's position on how it plans to implement

Production Forests (1993) ITTO Policy Development Series 5, Yokohama Japan; ITTO 1995.

- 31 UNEP/FAO Expert Meeting on Criteria and Indicators for Sustainable Forest Management in Dry-Zone Africa, Nairobi, 21-24 November 1995, FAO/African Forestry and Wildlife Commission, 10th Session, Sanbonani, 27 November-1 December 1995.
- 32 FAO/UNEP Expert Meeting on Criteria and Indicators for Sustainable Forest Management for the Near East, Cairo, 15-17 October 1996, FAO/Near East Forestry Commission, 12th Session, Cairo, 21-24 October 1996.
- 33 Criteria characterize or define the essential elements of forest management against which the sustainability of forestry practices should be assessed. Each criterion relates to a key element of sustainable forestry. Criteria are amplified by quantitative or qualitative indicators. They are not intended to assess sustainability directly at the forest management unit level. CSD, *Background document 1: Promoting and Facilitating the Implementation of IPP's Proposals for Action - Working Draft*, CSD Ad Hoc Intergovernmental Forum on Forests Secretariat, E/CN.17/IFF/1998/2, 19 June 1998, at ¶75.
- 34 The Montreal Process Working Group consists of Argentina, Australia, Canada, Chile, China, Japan, Mexico, New Zealand, Korea, Russian Federation, the United States and Uruguay, and represents 90% of the world's temperate and boreal forests.
- 35 The Santiago Declaration is reproduced in (1995) 93:4 *Journal of Forestry* 18-21.
- 36 Commonwealth of Australia, *Framework of Regional (Sub-National) Level Criteria and Indicators of Sustainable Forest Management in Australia* (1998) Canberra, Commonwealth of Australia. The framework takes 30 of Montreal's 67 national indicators for use at the regional level. Ten indicators

the Montreal criteria at the regional level. The Regional Framework recognises that implementation of all C&I will be neither possible nor cost-effective in all regions in the short term.³⁷ The framework is voluntary, and the extent of its implementation will depend upon individual jurisdictions, although the Regional Forest Agreements make reference to Montreal C&I being used to report on progress under each Agreement.³⁸

are considered to be irrelevant for regional measurement, 25 indicators have been re-worked to give them a stronger regional focus and twelve new or interim measures have been added.

37 The tranche of indicators that will be implemented first are not necessarily the most important, but the ones on which information is already available. *Ibid*, at Introduction, ix. The 'category A' data that could largely be provided now deal with: scientific and spatial information about the size of the forest estate by type and tenure, and by growth, species lists; areas available for wood production and under plantation; area harvested annually and so on. The category B data, which would require some development of data-collection capacities, include economic information about the timber industry, fragmentation of forest types, carbon sequestration, and areas under formal protective management. The third category will require longer term research and development before the indicators can be properly implemented. They include details about species populations, including genetic variations, evaluations of the quality of ecosystem health in forested areas; valuations of non-timber forest industries; and the viability and adaptability of forest dependent communities.

38 *Regional Forest Agreement for South West Western Australia between the Commonwealth of Australia and the State of Western Australia* May 2000 (Western Victoria RFA) cl 46, 51;

Tasmanian Regional Forest Agreement between the Commonwealth of Australia and the State of Tasmania November 1997 (Tasmanian RFA) cl 91;

Regional Forest Agreement for East Gippsland between the Commonwealth of Australia and the State of Victoria, February 1997 (East Gippsland (Vic) RFA), cll23, 34;

The Central Highlands Regional Forest Agreement between the Commonwealth of Australia and the State of Victoria February 1997 (Central Highlands (Vic) RFA) cl 48;

North East Victoria Regional Forest Agreement between the Commonwealth of Australia and the State of Victoria August 1999 (Northeast Victoria RFA) cl 48;

West Victoria Regional Forest Agreement between the Commonwealth of Australia and the State of Victoria March 2000 (West Victoria (Vic) RFA) cl 49;

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ESFM in Australian Forests Policy

Management of natural resources, including forests, rests primarily with the Australian States and Territories. The Commonwealth assumed limited oversight of forestry decisions in the mid-1970s, when it became apparent that the desire of individual states to obtain export income from woodchips was producing a sell-off of woodchips at too low a price. The Federal Government imposed permit requirements on woodchip exports relating to the minimum price at which chips should be sold, and obliging companies to investigate the establishment of processing plants in Australia.³⁹ The basis of this early intervention was the Commonwealth's Constitutional power over trade and commerce and over Commonwealth instrumentalities, but increasingly broad interpretations of the Constitution have given the Commonwealth a broad platform of powers upon which to intervene in resource management issues.⁴⁰ Measures that give effect to Australia's international obligations will generally be upheld as valid under the external affairs power, even if they require the Commonwealth to legislate for environmental protection – a subject not mentioned explicitly in s51 of the Constitution.⁴¹

Gippsland Regional Forest Agreement between the Commonwealth of Australia and the State of Victoria March 2000 (Gippsland (Vic) RFA) cll 49; *Regional Forest Agreement for Eden between the Commonwealth of Australia and the State of New South Wales* August 1999 (Eden (NSW) RFA) cl47, 52;

Regional Forest Agreement for North East New South Wales (Upper North East and Lower North East Regions) between the Commonwealth of Australia and the State of New South Wales March 2000 (Northeast (NSW) RFA) cl 49, 53.

39 Dargavel 1995, above n1, at 90, 93. Export permit conditions required that chips be sold for prices at or above the ruling world market price, taking into account differences in quality and transport costs and that prices be adjusted for inflation periodically.

40 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, *Commonwealth v Tasmania* (1983) 46 ALR 625. Lane M, 'Regional Forest Agreements: Resolving Resource Conflicts or Managing Resource Politics?' (1999) 37 *Australian Geographical Studies* 142, at 145.

41 *Commonwealth v Tasmania*, above n40; *Queensland v Commonwealth* (1988) 62 ALJR 143.

Under public pressure to intervene in forest management issues, the Commonwealth used the *Export Control Act* 1982 (Cth), the *Australian Heritage Commission Act* 1975 (Cth), the *Environment Protection (Impact of Proposals) Act* 1974 (Cth) and the *World Heritage Properties Conservation Act* 1983 (Cth) throughout the 1980s.⁴² By the end of that decade, however, the government had realised that involvement in natural resource decision-making could have adverse political implications. Consequently, it began to circumscribe its powers of intervention in environmental affairs and search for more cooperative approaches to Commonwealth-State relations over the environment.

In 1992, the Federal Government released three major policy statements regarding natural resource management: the *National Strategy for Ecologically Sustainable Development* (NSES),⁴³ the *National Forest Policy Statement* (NFPS)⁴⁴ and the *Intergovernmental Agreement on Environment* (IGAE).⁴⁵ The NSES identified the following objectives for forest management and use:

- the ecologically sustainable management and utilisation of Australia's forest estate for all forest values
- the maintenance of ecological processes and biodiversity and the optimisation of benefits to the community from all uses, within ecological constraints

42 See generally Davis B, 'Federal-State Tensions in Australian Environmental Management: The World Heritage Issue' in Walker J (ed) *Australian Environmental Policy - Ten Case Studies* (1992) Sydney, UNSW Press, 215; Toyne P, *The Reluctant Nation* (1994) Sydney, ABC Books.

43 Commonwealth of Australia. *National Strategy for Ecologically Sustainable Development* (1992) Canberra, AGPS.

44 Commonwealth of Australia, *National Forest Policy Statement: a New Focus for Australia's Forests* (1992) Canberra, AGPS. All States and Territories except Tasmania signed the NFPS in 1992. Tasmania signed in 1995. <www.rfa.gov.au/rfa/national/nfps/obj>, 28 June 2000.

45 IGAE, above n18. Ferguson I, 'Changes and Challenges in Trade and Investment: An Australian Perspective', in Bachelard E & Brown A (eds) *Preparing for the 21st Century - Proceedings of the 4th Joint Conference of the Institute of Foresters of Australia and the New Zealand Institute of Forestry*, 21-24 April 1997, Canberra, Institute of Foresters of Australia, at 23.

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- enhancement of the quality of life for successive generations by protecting and enhancing all values from forests and developing an ecologically sustainable and internationally competitive forest products industry.⁴⁶

The forestry provisions of the NSESD were derived from the conclusions of the Ecologically Sustainable Development Forestry Working Group⁴⁷ and the Forest and Timber Inquiry of the Resource Assessment Commission.⁴⁸ The ESD Forestry Working Group recommended *inter alia*:

- joint assessments by State and Commonwealth governments of old-growth forests;
- cooperative arrangements with the Australian Heritage Commission (AHC) to assess the wilderness and estate values of public forests; and
- the development of intergovernmental agreements providing for joint integrated assessment of forest land-use options.⁴⁹

46 NSESD 1992, above n 43.

47 The ESD Working Group Process involved a series of roundtable discussions covering a two year period involving 'stakeholders' from a series of industry sectors. The Forest Use working group was the only group in which environmental groups refused to participate. They perceived that it was too biased towards continued high-levels of native forest logging.

48 The Resource Assessment Commission was established in 1989 to conduct inquiries into contentious resource issues and to provide expert analysis of how best to deal with them. The inquiry into options for the use of Australia's forest and timber resources was the RAC's first. The inquiry received over 500 submissions, as well as thirty consultants' reports, detailed analyses by commission members and thousands of pages of transcript from oral hearings. The Commission advocated a market-based approach to forest management and decision-making. RAC, above n 11.

49 Ecologically Sustainable Development Working Groups, *Final Report – Forest Use* (1991) Canberra, AGPS, recommendations 8, 16, 30 and 34. Fowler R, 'The Implications of Resource Security for Environmental Law' in *The Challenge of Resource Security*, ed by Gardner A, Sydney: Federation Press 1993, 51, at 74.

The RAC Inquiry also supported integrated regional forest assessment.⁵⁰ In particular, it endorsed the model of regional assessment undertaken by the AHC and the Western Australian Department of Conservation and Land Management (CALM) in 1990, in respect of the national estate values in the Southern forests of Western Australia.⁵¹ The commitment to regional assessment and accreditation of state processes was fleshed out in the sector-specific NFPS, the overriding objectives of which were the same as those identified in the NSESD.⁵²

The NFPS set out principles of ESFM, and identified 11 broad qualitative goals for management of the forest estate.⁵³ It explicitly recognised that

50 The RAC also made numerous recommendations relating to the establishment of adequate representative reserves, and the protection of wilderness and old growth.

51 The assessment results and the resulting MOU were signed in 1992. For an excellent analysis of this model, as well as a thorough examination of the first attempt at resource security legislation, see Fowler, above n 49.

52 NFPS, above n 44.

53 'National Forest Policy Statement National Goals', NFPS above n 44, <www.rfa.gov.au/nfa/national/nfps/goals>, 28 June 2000.

Conservation - maintaining extensive, permanent native forest estate, managed in an ecologically sustainable manner to conserve full range of forest values for present and future generations;

Wood production and industry development - development of an internationally competitive and ecologically sustainable wood products industry based on value-adding opportunities and efficient use of resources;

Integrated and coordinated decision-making and management - reducing duplication and fragmentation between and within levels of government;

Private native forests - ensuring that private forests are managed according to ESFM principles to complement crown timber reserves;

Plantations - expanding plantations for economic development and replanting degraded agricultural land for environment, water catchment and aesthetic benefits;

Water supply and catchment management - ensuring water quality by protecting water catchments

Tourism and other economic and social opportunities - managing forests for multiple uses, including tourism, recreation and non-wood forest products;

Employment, workforce, education and training - expanding the employment opportunities and skills base of forest industry employees;

Public awareness, education and involvement - promote awareness of ESFM and provide opportunities for public participation

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commercial uses of forests based on ecologically sustainable practices were appropriate and desirable activities, that there should be a sound scientific basis for sustainable forest management and efficient resource use; and that complementary multiple-use management of forests was needed.⁵⁴ It acknowledged that forest conservation should realize the economic, scientific, cultural and social benefits derived from the retention of intact forest systems; satisfy the duty of intergenerational equity in natural capital; and recognize the intrinsic values of forests and their biodiversity.⁵⁵ The NFPS established the framework for comprehensive regional assessment (CRA) of Australian forests – a joint planning exercise involving Federal, State, and stakeholder representatives. The NFPS foreshadowed that each CRA would result in the formulation of a Regional Forest Agreement (RFA). The RFA was to specify the use and management of each forest area for the next 20 years and formalise the Commonwealth's accreditation of State management processes and practices.⁵⁶

The IGAE was a broad statement of the future balancing of Commonwealth-State powers and responsibility over environmental matters. It identified the 'interests' and 'responsibilities' of each level of government, carefully limiting the Commonwealth's involvement in environmental and natural resource management to those issues that involve international commitments, national estate values and trans-border problems. Taken together, the IGAE and the NFPS make clear that despite Constitutional interpretations that gave the Commonwealth wide powers to intervene, primary responsibility for ESFM still rests with each state. The regional forest agreement process was to provide the chief mechanism by which the Commonwealth was to 'extract' itself from oversight of forest management.

Research and development – coordinating research to expand and integrate knowledge about native forests, plantations, forest management, conservation and forest product development

International responsibilities – ensuring that Australia fulfils its international obligations.

The NFPS contains no quantitative goals.

54 Ibid, at Part 4 Specific Objectives and Policies.

55 Ibid, at 74.

56 Ibid, 'Intergovernmental Arrangements'; See also IGAE, above n 18, Second Schedule, cl 4 and 8; Fowler, above n 49, at 80–83.

While these major policy initiatives were all in place by the end of 1992, implementation of the NFPS did not begin in earnest until 1995.⁵⁷ Over the past five years, however, the major timber production areas have undergone comprehensive regional assessment, and eight regional forest agreements have been concluded. The key aspects of these processes and their outcomes are examined in the next section.

57 The RFA process was roused from its policy slumber after what is now regarded as a 'defining moment' in national forest policy. Action was triggered by the Federal Government's 1994 approval of increases in woodchip exports, against the advice of its own Environment Minister. The decision was challenged and the Federal Court held that the Minister failed to observe Commonwealth environmental impact assessment requirements in reaching his decision. Lane above n 40, at 147. The Federal Court decision, and the obvious division within Federal Cabinet over the announcement of temporary reservations in key areas provoked a timber worker blockade of Parliament House and national protests by environmentalists. The intensity of public outcry on both sides and the electoral liability it represented made clear to the Federal Government that a de-politicised mechanism for resolving such forest management decisions was urgently required. *Tasmanian Conservation Trust v Minister for Resources*; See also McDonald J & Munchenberg S, 'Public Interest Environmental Litigation - Chipping Away at Procedural Obstacles' (1995) 12 *Environmental and Planning Law Journal* 140.

The Regional Forest Agreement Process

Comprehensive Regional Assessment

The focus on regional assessment of forest management that underpinned the National Forest Policy Statement recognised the differing ecological, social and economic needs of forested areas within Australia. The task of selecting and delineating appropriate regions for assessment was complicated by the range of biogeographical difference within some areas, such as Tasmania; the political boundaries between discrete biogeographical regions, such as East Gippsland in Victoria and South-East NSW; and the overlap of several regions arising from high pulpwood demand from large mills.⁵⁸ Eleven regions were eventually identified: Tasmania, South-West Western Australia, South East Queensland, five regions in Victoria (East Gippsland, Gippsland, the Central Highlands, West Victoria and Northeast Victoria) and three regions in New South Wales (North East New South Wales, Eden, and South East New South Wales).

The first phase of the RFA involved the preparation of a scoping agreement between the relevant state government and the Federal Government, recording the parameters of the assessment process, including the geographical scope and potential range of management issues to be considered. A comprehensive regional assessment (CRA) was then undertaken, led by the relevant state government. The CRA identified the economic, social, environmental, and heritage values of the forests.⁵⁹ The data requirements for the social and economic assessment included information on current forest resources and resource utilisation; the potential for plantation development; the structure, productivity and markets for the existing wood products industry; the potential value of alternative forest uses, including tourism, mining, alternative wood products and water catchment; current and past trends in economic and social conditions in each region; and the contribution of forest use to

58 Dargavel 1998, above n 2, at 27.

59 *The Commonwealth Position on Regional Forest Agreement*, above n 14; Australian Heritage Commission, 'Regional Forest Agreements: Update', in (1997) 17:1 *Heritage News*, 13.

State and national economic and social conditions (including GDP, trade and community attitudes).⁶⁰

The availability and quality of data for these criteria as well as the environmental, cultural and heritage values was highly variable among the regions, but generally poor. The Australian Montreal Implementation Group's first assessment of Australia's reporting capabilities under the Montreal Process criteria, published in 1997, showed that agencies were able to report well on certain indicators, especially those relating to timber production and value.⁶¹ It revealed large gaps, however, in Australia's data collection on forest health and non-timber uses. When analysing the success of RFAs in achieving an appropriate balance between commercial and non-commercial uses of forests, it is particularly noteworthy that virtually no information existed about the valuation of forest uses other than timber extraction. By the time the MIG report was published, the RFAs for East Gippsland and Tasmania had been completed.

Comprehensive regional assessment also involved a review of the forest management systems in each region, distilling guiding principles from the International Organisation for Standardisation's ISO 14000 *Environmental Management System* standard, the NFPS and the Montreal Criteria.⁶² The nature of the CRA assessment process is 'system-' or

60 *The Commonwealth Position on Regional Forest Agreement*, above n 14, at 16.

61 Commonwealth of Australia Montreal Implementation Group, *Montreal Process First Approximation Report - Australia* (1997), Canberra, Commonwealth of Australia. The MIG consists of State and Commonwealth forestry officers, a representative from the Forest and Wood Products Research and Development Corporation and a private forest grower.

62 Press T, 'The RFA process and ecologically sustainable forest management', *Assessing Sustainable Forest Management in Australia*, Conference Proceedings,

www.dpie.gov.au/dpie/conference/asfma/speeches/press.html,

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November 1998. The seven principles are:

- maintain the full suite of forest values for present and future generations
- maintain and enhance long-term multiple socio-economic benefits to meet the needs of society;
- protect and maintain biodiversity
- maintain the productive capacity and sustainability of forest ecosystems;
- maintain forest ecosystem health and vitality;

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‘ process-’ based, rather than ‘ performance-based’ . The system of forest management was assessed, but the ‘ on-ground’ performance forest management practices and their conservation or economic outcomes did not form part of the assessment process.’⁶³ CRAs generated a large volume of reports on each of the issues identified in the scoping agreement. This material has been too wieldy for public consumption, so the key options for each region were collated and set out in a public discussion and options paper. It is this discussion paper that has formed the basis of the final RFA negotiations in each region.

The Comprehensive Adequate and Representative (CAR) Reserve System

A major function of the CRA is the identification of areas to be protected under the Comprehensive, Adequate and Representative (CAR) reserve system,⁶⁴ using criteria developed cooperatively by Federal and State governments, known as the JANIS criteria.⁶⁵ The CAR system recognises that existing reserves are fragmented and small, so the JANIS criteria for designation aim to reserve 15% of the pre-1750 forest ecosystems. This

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- protect soil and water resources;
 - maintain forest contribution to global carbon cycles;
 - maintain natural and cultural heritage values;
 - utilize the precautionary principle for preventing environmental harm.

See also Davey S et al, ‘Assessment of Ecologically Sustainable Forest Management for Regional Forest Agreements’ in Bachelard & Brown, above n 45, at 235. The review of the assessments for East Gippsland and Tasmania found that management planning processes were good, but that there were deficiencies in monitoring, auditing and review processes. Ibid, at 241.

- 63 Hoare J, ‘Ecologically Sustainable Forest Management Assessments being Undertaken in the Regional Forest Agreement (RFA) Process’, *Assessing Sustainable Forest Management in Australia* Conference Proceedings, 1996, <www.dpie.gov.au/dpie/conference/c-s/brs.html>, 12 November 1998.
- 64 The system would be comprehensive in that it applied to all States and all land tenures, adequate to ensure viable protection, and representative of all forest types.
- 65 Report by the Joint Australian and New Zealand Environment and Conservation Council – Ministry of Forestry, Fisheries and Agriculture National Forest Policy Statement Implementation Subcommittee (JANIS), *Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and Representative (CAR) Reserve System for Forests in Australia*, <www.rfa.gov.au/rfa/national/janis/contents.html>, 28 June 2000.

includes reservation of 60% of the extant old-growth forest in each Ecological Vegetation Class, and 100% of the old-growth elements that are rare or depleted. The reserve criteria also aim for reservation of 90% (or more if practicable) of wilderness forest areas outside of northern Australia.⁶⁶ The 15% objective has been lauded by international conservation groups: the World Wide Fund for Nature notes that only 6% of forest resources are currently protected globally and has suggested an international target of 10% of each of the world's forest types. While Australia's objective exceeds the international standards,⁶⁷ however, progress towards its achievement has been criticised.⁶⁸

The Regional Forest Agreement

The RFA sets out the detail of respective Commonwealth and State obligations. Once an RFA is in place, resource security contracts or formal undertakings will be signed with forestry companies, under which removal of the right to extract timber must be compensated.

66 JANIS, *ibid*; NFI, above n 8, at 79-80; Old growth is recognised internationally as the premium reservoir of biological diversity. The NFPS defined old-growth as forest that is ecologically mature and has been subjected to negligible unnatural disturbance such as logging and road building. The JANIS criteria are subtly different – they define old-growth as 'ecologically mature forest where the effects of disturbances are now negligible.' (NFI, above n 8, at 79). In Australia, 'it is the diversity of the dominant structural features of old growth forest, and their relative stability over time compared to highly disturbed and logged forests, that are essential in supporting critical food and shelter resources and habitat for old growth dependent biota ... It is often on the more productive sites that the greatest diversity of species and assemblages occurs, and where the population densities of many species can reach a maximum.' Norton T & Kirkpatrick J, 'Sustainable Forestry – the urgency to make the myth a reality' in Bradstock et al (eds), *Conserving Biodiversity: Threats and Solutions* (1995) Surrey, Beatty & Sons, 240, at 243.

67 In 1992, the Fourth World Congress on National Parks and Protected Areas suggested as a goal that protected areas should cover at least 10% of each biome by 2000. Varangis N, Crossley R & Primo Braga C, *Is there a commercial case for tropical timber certification, Policy Research Working Paper No 1479*, (1995) Washington DC, World Bank, at 14.

68 See generally World Wide Fund for Nature – International, *Forest Protection* (1998) Gland, WWF.

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With the exception of the first agreement – the East Gippsland RFA – all RFAs consist of two parts. The first part sets out the overall context and framework of Commonwealth and State commitments, but expressly provides that it is not intended to create legally binding obligations.⁶⁹ All of the RFAs entered to date contain statements in this section that the Commonwealth has complied with its obligations under the Australian Heritage Commission, World Heritage and Endangered Species Protection legislation. The second section articulates an intention to create legally binding obligations.⁷⁰ It formally obliges the parties to meet certain of the commitments in the main section: state governments are obliged to implement ESFM forest systems,⁷¹ and the Commonwealth undertakes to refrain from exercising its environmental legislative powers for the duration of the Agreement (20 years), having ‘accredited’ the relevant state forestry practices and laws.⁷²

Each RFA also removes export controls on woodchips from RFA regions, limits exports to chips sourced from RFA regions, and establishes a compensation mechanism. Where the right to log is subsequently removed by a Commonwealth government decision, applications for compensation are made to the State government and funded by the

69 *WA cl16, Tasmania cl16, Central Highlands cl16., North East Victoria cl16, West Victoria cl16, Gippsland cl16, Eden cl16l, North East NSW cl16. East Gippsland’s RFA does not contain an equivalent provision/*

70 *WA cl94, Tasmania cl92, Central Highlands cl87, North East Victoria cl85, West Victoria cl93, Gippsland cl93, Eden cl94, North East NSW cl107. East Gippsland’s RFA does not contain an equivalent provision/*

71 *WA cl94, 96, Tasmania cl93, Central Highlands cl89, North East Victoria cl87, West Victoria cl95, Gippsland cl95, Eden cl96, North East NSW cl109. East Gippsland’s RFA does not contain an equivalent provision.*

72 *WA cl48, Tasmania cl65, East Gippsland cl32–33, Central Highlands cl 47, North East Victoria cl47, West Victoria cl 48, Gippsland cl 48, Eden cl50, North East NSW cl52.*

Rather than stating that ESFM is currently practised in NSW, then adding a clause that identifies an opportunity for continual improvement of management practices, as has been done in the Victorian RFAs, the New South Wales Agreements accredit NSW practices *as providing for continual improvement*. For a discussion of the East Gippsland RFA process, see Forsyth J., ‘Anarchy in the Forests: a Plethora of Rules, an Absence of Enforceability’ (1998) 15 *Environmental and Planning Law Journal* 338, at 340.

Commonwealth.⁷³ State environmental laws remain applicable, although both parties agree to avoid the enactment of legislation that would undermine the operation of the Agreement.⁷⁴ Conclusion of the RFA process also involves significant financial assistance through the forest industry structural adjustment package, jointly funded by the State and Commonwealth governments.⁷⁵ The obligation to fund these schemes is also set out in the part of each RFA intended to create legally binding obligations.

Thus, the provision of resource security involves a positive role by state governments in providing long-term access, and a negative role by the Commonwealth in refraining from exercising its environmental powers.⁷⁶ The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBCA), which is expected to commence in July 2000, specifically excludes from Commonwealth environmental impact assessment and endangered species laws, areas that are subject to regional forest agreements or RFA negotiations.⁷⁷ The new legislation

73 WA c197, Tasmania c195, Central Highlands c190, North East Victoria c188, West Victoria c196, Gippsland c196, Eden c197, North East NSW c1110. East Gippsland's RFA does not contain an equivalent provision.

74 WA c119, East Gippsland c17, Central Highlands c119, North East Victoria c119, West Victoria c119, Gippsland c119, Eden c119, North East NSW c119. The Tasmanian RFA contains no equivalent provision.

75 Details of the industry packages are set out on the RFA web-site: <www.rfa.gov.au> See also Mercer 2000, at 112 and 169. Under the East Gippsland RFA, \$140 million has been committed for job creation. The Gippsland RFA included a \$42.6 million fund from the Commonwealth-State Hardwood Timber Industry Development and Restructuring Program and \$20 million from the State government for silviculture and plantation initiatives, improved inventorying and tourism development. In Tasmania \$13 million was provided for industry development and \$10 million for infrastructure development projects. A package totalling \$110 million was offered to fund the development of exports and value-adding industries; in Western Australia a \$50 million development package is being offered, with a further 17.5 million for tourism; the Eden RFA involves \$65 million in assistance for the native hardwood industry, including funding for a new recovery sawmill, while the North East NSW RFA came with a \$265 million fund.

76 Fisher D, 'Resource Security - Overview' (1992) 2 *Australian Environmental Law News* 48, at 50.

77 EPBCA ss39-40. The exclusion of RFA activities from the purview of Commonwealth EIA oversight was heavily criticised in the minority reports of the Senate Environment Committee's Inquiry into the *Environmental Protection and Biodiversity Conservation Bill*. See Allison L, 'Minority

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complements the terms of the *Regional Forest Agreement Bill* 1999, which is before Federal Senate at the time of writing. That Bill expressly provides that timber from RFA areas is not subject to export controls (thereby replacing the Export Control (Hardwood Wood Chips) Regulations 1996 (Cth) and the Export Control (Regional Forest Agreements) Regulations 1997 (Cth)), and that RFA forestry operations are not subject to the *Australian Heritage Commission Act* 1975 or the *World Heritage Properties Conservation Act* 1983.

There is limited scope for agreements to be amended. As the discussion in Part 3 will show, several CRAs have been criticised because they were based upon inadequate data and the resulting RFAs were negotiated in haste. When a once-off regional assessment forms the basis of 20-year resource security agreements, an application of the precautionary principle militates in favour of some provision for variation of the CAR reserve where new information becomes available. Individual RFAs are subject to five-yearly review, but administrative arrangements make it fairly clear that agreements themselves are unlikely to be altered. The following issues are 'exceptional and unforeseen circumstances' that could be handled through amendments to management plans and practices or other initiatives, short of revising the entire RFA:⁷⁸ the discovery that forest use activities would cause a species to become threatened, or more threatened; major decline in species populations or disruption of ecological process; major impacts on the natural

Report by the Australian Democrats', *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998 - Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee*, Canberra: AGPS, 1999.

78 *The Commonwealth Position on Regional Forest Agreements*, above n 14, at 10. Bartlett argues that the failure to permit reviews of new scientific information to ensure that conservation objectives are being met, and the failure to mandate the public availability of review results, are two of the major flaws in the proposed legislation. Bartlett T, 'Regional Forest Agreements - a Policy, Legislative and Planning Framework to Achieve Sustainable Forest Management in Australia (1999) 16 *EPLJ* 328, at 329. This approach would be consistent with the adaptive management principles outlined in Dovers S, 'The rise and fall of the NSESD, or not?', paper presented at the *18th National Environmental Law Association Conference*, Sydney 8-10 September 1999.

environment or heritage estate that was not considered when the agreement was developed, and new information that shows that significant impacts on World Heritage, National Estate or indigenous values were not assessed. The entire RFA should only be reviewed where the Commonwealth proposes to exercise a power that was not previously considered, such as defence; where there has been a material breach of the agreement or a condition thereof; or where it is found that an aspect of an agreement would result in unintended extinguishment or impairment of native title.⁷⁹

The extent to which amendments to management plans and practices can accommodate significant additions to the scientific knowledge base remains to be seen. This approach deviates from that contemplated under the earlier unsuccessful resource security proposal, the *Forest Conservation and Development Bill 1991 (Cth)*. That Bill permitted the Commonwealth to intervene to regulate activities under resource security if information came to light that demonstrated a threat to an endangered species, or world heritage or national estate values.⁸⁰ The narrower provisions of the RFAs could significantly limit the chances of revisiting poorly designed RFAs that were negotiated with insufficient data.⁸¹

Given these limitations on the ability to amend agreements in the future, the legal enforceability of the regional forest agreements as contractual undertakings is important. Their status is somewhat uncertain. Where a government enters into an agreement that appears on its face to be an

79 *The Commonwealth Position on Regional Forest Agreements*, above n 14, at 10. It is worth noting that all agreements specifically provide that they have no impact on any existing or future native title claim.

80 *Forest Conservation and Development Bill 1991 (Cth)* Clause 17, discussed in Fowler, above n 49, at 65–66.

81 Fowler above n 49, at 70–71; Wright P & Triola C, 'East Gippsland Final Countdown' (1996) 24 *Habitat*, 29; Graham A & Knight R, 'Regional Forest Agreements – Lessons from Tasmania' (1998) 150 *Wilderness News*, 6, at 7. Graham and Knight suggest that the results and recommendations of over 50 reports and studies commissioned as part of the Tasmanian RFA decision-making process were not used because of the pressure to complete the RFA speedily. As a result, the RFA reportedly fails to secure critical habitat for threatened species. The Victorian Minister for Conservation and Land Management described the RFAs in that State as 'set in stone'. Forsyth above n 72, at 348)

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essentially political document, demonstration of an intention to create legally binding obligations is the key determinant of whether a legally enforceable contract has been agreed to. This intention is less readily inferred when the Crown is a party to the agreement,⁸² and more unlikely still when the agreement is between two Crown parties, as is the case here.⁸³ All RFAs but the first East Gippsland Agreement attempt to overcome this position by including clear statements about their intent in respect of various aspects of the documents. The undertaking contained in all agreements that parties will not use their legislative powers to enact inconsistent legislation in the future is, however, unenforceable. This is because the executive government has no power to fetter the rights of future Parliaments to enact overriding or repealing legislation.⁸⁴ Moreover, the provision is contained in the first part of the RFA documents, which is prefaced by a clear statement that it is not intended to create legally binding obligations. The structure of the RFA arrangement does, however, oblige the Commonwealth to pay compensation should it apply its laws so as to curtail future access to, and exploitation of, forest resources. This unquantifiable obligation is likely to be enforceable, and will serve as a powerful disincentive to future Parliaments considering the adoption of tighter forest conservation measures.

Evaluation Of The RFA Process

At the time of writing, RFAs had been concluded for nine of the 11 nominated regions. The CRA for Southern New South Wales is still in progress.⁸⁵ The Queensland Government announced its RFA proposal in September 1999, but it has not yet been endorsed by the Federal Government, and funding and other undertakings remain uncertain.⁸⁶ The

82 *Australian Woollen Mills Pty Ltd v Commonwealth*(1954) 92 CLR 424; *Administration of the Territory of Papua New Guinea v Leahy* (1961) 105 CLR 6.

83 *South Australia v Commonwealth* (1962) 108 CLR 130.

84 *Ansett Transport Industries(Operations) Pty Ltd v Commonwealth* (1977) xxx CLR.

85 The Options Paper for the Southern Forests RFA was released for public comment in January 2000.

86 The Agreement will phase out old growth logging on public forest estate and in wilderness forests and will immediately double the conservation estate in

Queensland proposal has received support from both the timber industry and conservation stakeholders following a lengthy negotiation process involving relevant groups.⁸⁷ It stands in stark contrast to the chilly reception with which all other agreements have received. This may be attributable to the less-polarised negotiation process behind the Queensland agreement, but it may equally be because the South-East Queensland forests have little remaining old growth and do not support a controversial export woodchipping industry.⁸⁸

The Commonwealth's stated objectives for the RFA process were to reduce uncertainty and duplication of governmental requirements; to provide secure access to resources for forest-based industries; to balance competing sectoral objectives; and to maintain regional environmental, heritage and social values.⁸⁹ In political terms, it aimed to

South East Queensland. The Queensland industry will be entirely plantation-based by 2025. The Federal Minister for Forestry, Wilson Tuckey, states that the Federal Government's refusal to endorse the Queensland RFA is based upon the Agreement's failure to meet the terms of the 1992 National Forest Policy Statement, which contemplates a continuation of logging in native forests. Tuckey, W., Radio Interview, *Earthbeat*, Radio National, 25 March 2000. His position has been criticised by those in the conservation movement who welcome the Queensland approach as a model for the rest of the country. Young V, Radio Interview, *Earthbeat*, Radio National, 25 March 2000.

87 The Wilderness Society described the Queensland RFA as 'an enormous achievement. It is a victory of common sense and an affirmation that our society is beginning to understand the importance of caring for country'. Schneiders L, *Wilder News* October 1999, 1. Young, above n 87, identifies several unique attributes of the Queensland agreement: it is the first time that a state logging industry has agreed to end all native logging on crown land, old growth and wilderness; the first resource security guaranteed an industry based on the shift to plantations; and the first timber industry expansion project that is based wholly on plantations. She reports that the agreement was reached in spite of opposition from the Queensland Liberal-National coalition, the Australian Workers Union and affiliates within the Labour party, NAFI, and elements of the bureaucracy and the media.

88 Young V, 'SEQ Forests Campaign' *Wilder News*, October 1999, 3, at 4. Queensland initially exported 300 000 tonnes of sawmill chips from Brisbane, but this volume was subsequently reduced to 180 000 tonnes per year. Dargavel 1995, above n 1, at 105.

89 *The Commonwealth Position on Regional Forest Agreements*, above n 14, at 4; Lane, above n 40, at 143; Dargavel 1998, above n 2, at 25.

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defuse the electoral importance of disputes over forest use.⁹⁰ It is beyond the scope of this work to make a thorough assessment of the RFA process by reference to all stated goals, but some preliminary observations are made below, paying particular attention to Australia's international ESD obligations and the contribution that the RFA process will contribute to ESD in the future. This section suggests that, judged by their stated goals, the Agreements reached to date have enjoyed mixed success.

Resolving Political Conflict

At a political level, the objective of the RFA process was to 'resolv[e] the forest issue once and for all.'⁹¹ In strict legal terms, the conclusion of the Agreements may have accomplished this objective, but it seems unlikely that forestry issues will depart the national policy stage. In Victoria, conservation groups are pushing for expansion of CAR reserves, while industry lobbyists point to the weak resource security they have received.⁹² Clashes appear to have intensified in some areas, with violent confrontations at conservation camps in East Gippsland and Western Victoria.⁹³ In addition to traditional blockade techniques, groups of professionals, such as 'Doctors for the Forest', 'Liberals for Forests' and 'Business Lobby for Old-Growth Forests' have engaged

90 Lane, above n 40, at 146.

91 *The Commonwealth Position on Regional Forest Agreements*, above n14, at 8; Wright & Triola, above n 81, at 29; Forsyth, above n 72, at 339.

92 Corkill D (Northeast Forest Alliance) interview on ABC Local Radio (NSW North Coast) 3 April 2000.

93 de Blas A, *Earthbeat*, ABC Radio National, 25 March 2000. Environmental protests in Western Australia prompted the Minister for Environment to declare a 'temporary control area' over one forest block. The declaration was purportedly designed to ensure the safety of protesters and workers. Minister for Environment, *Ministerial Media Statement*, 16 January 1998. The violence in East Gippsland is escalating and protestors are now channeling their energies into international advocacy against Harris Daishowa for failing to take action. Randal Helten <randalhelten@sprint.ca>, 'sign-on against violence in forests', mailing list <forest-pacrim@igc.topica.com>, 18 March 2000.

in sophisticated campaigns aimed at urban populations in Victoria and Western Australia.⁹⁴

In Western Australia, public outcry over the omission of key areas of the Southwest's karri and jarrah forests forced the State Premier to revise the Agreement, after it was signed by the Prime Minister, and in the face of strident criticism from the Commonwealth Minister for Forests.⁹⁵ The Premier agreed to expand the conservation reserves and agreed to end harvesting of old-growth tingle and karri by 2004, the new date for completion of an acceptable agreement.⁹⁶ The Federal government has not yet agreed to any change to the WA Agreement, but the Premier's revision suggests that the hoped-for certainty is a flexible concept at best.

Resource security and international competitiveness

Timber industry analysts have for years pointed to long-term resource security as an essential incentive for future investment.⁹⁷ Costly processing plants cannot be contemplated unless supply of raw material is guaranteed for at least a decade. The provision of resource

94 Doctors for the Forest has published advertisements in the Melbourne *Age* newspaper, in cinemas, and on an electronic billboard in Melbourne's CBD.

95 Mercer suggests that forest management is the most divisive political issue in that State. Mercer, above n 1, at 112. In 1999, the traditionally pro-timber National Party suggested that the Western Australian public was not getting good value from the forestry industry, arguing that there remained significant scope to move away from reliance on low-value woodchip exports towards greater value-adding industries. National Party (WA Branch) 1999, *Position Paper: The Forest Conservation and Management Policy of the National Party in Western Australia*, at 6, discussed in Mercer, above n 1, at 124. The WA Labor Party also supports the phase-out of logging in old-growth forests.

96 Mercer above n 1, at 170, citing WA Forest Alliance <www.wafa.org.au>. The revisions mean that current logging contracts on old-growth will be permitted to run to expiry (end-2003), which the Wafa claims could result in the removal of 15% of all remaining karri and tingle forest. Harvesting of old-growth jarrah will continue for the life of the RFA. 'Large scale clear-felling is prohibited, but 'small-scale clearfelling', which is not defined, is permitted. Royalty rates will be reviewed before 2003. Mercer above n 1, at 170.

97 *Ibid.*, at 207.

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security for the timber industry is justified if it ensures long-term stewardship of forest resources and promotes investment in wood-processing facilities.⁹⁸ The Final Report of the 1992 RAC Forest Inquiry recommended that resource security be guaranteed, but only if 'industry pa[id] governments for the full value of wood harvesting rights and pa[id] for the costs of wood production in public native forests.'⁹⁹

The precursor to the RFA process was the Commonwealth's abandoned *Forest Conservation and Development Bill 1991*, whose aim was 'to provide resource security for major new wood processing projects.'¹⁰⁰ Under that proposal, resource security would only apply to 'major new wood processing facilities involving major investment commitments', in other words, the establishment of a major processing mill.¹⁰¹ The commitment of resource security was to be preceded by an environmental assessment process which then replaced all other environmental obligations. Like the RFA process, the Commonwealth and State governments were to undertake an integrated assessment of environmental, heritage, cultural, social and economic considerations and

98 Ibid. As early as February 1992, then-Prime Minister Paul Keating outlined the nascent regional forest agreement process, which would be modelled upon the Memorandum of Understanding between the WA Department of Conservation and Land Management (CALM) and the Australian Heritage Commission (AHC) identifying national estate places for the Southern Forest Region of WA. He foreshadowed the used of 'enhanced intergovernmental agreements', contingent upon 'industry commitment to value-adding investment or restructuring.' Keating P, *Economic Statement*, 26 February 1992, quoted in Fowler, above n 49, at 69.

99 RAC above n 11, at 40, quoted in Fowler, above n 49, at 62. On this basis, the RAC did not support the Commonwealth's earlier resource security proposal.

100 Prime Minister of Australia, *Building a Competitive Approach Industry Statement*, Canberra: Department of Prime Minister and Cabinet 1991, at 1.16. The legislation was defeated in the Senate, following criticism by environmentalists, on the basis that it would effectively fast-track pulp mill projects, and by smaller domestic operators on the basis that it offered them no additional security at all.

101 This reflected the domination of industry groups by major pulp and woodchip companies, at the expense of smaller mill owners and workers. Dargavel 1995, above n 1, at 219.

then enter into an agreement, backed up by the implementing resource security legislation.¹⁰²

While the concept of resource security also underpins the RFA process, RFAs have a much broader scope than the earlier bill. The RFA process applies to major timber producing regions around the country, regardless of the level of investment currently contemplated. Woodchip exports are only to be permitted in areas covered by an RFA.¹⁰³ In addition, resource security is 'guaranteed' for the industry as a whole, at the will of the State government, over the next twenty years, rather than for individual projects. There is therefore no mechanism by which to ensure that resource security leads to investment in value-adding plants. Such a requirement should have been included since a form of contractual resource security has been in place in Tasmania, Victoria and New South Wales for several years, and all three States demonstrate that investment in value-adding does not necessarily follow.¹⁰⁴ Indeed, there is no evidence that any investor is ready to establish processing plants

102 Following the failure of the Commonwealth's earlier resource security legislation, some commentators predicted the pursuit of resource security through administrative arrangements, while acknowledging the legal difficulties of doing so. The pitfalls of such an approach, including the validity of attempts to fetter the future exercise of administrative power, obviously proved sufficient to justify persevering with Commonwealth legislation. See Fowler, above n 49, at 83.

103 *WA* cl31, 96, *Tasmania* cl22, 94, *East Gippsland* cl16, 50, *Central Highlands* cl 31, 89, *North East Victoria* cl31, 87, *West Victoria* cl 32, 95, *Gippsland* cl 32, 95, *Eden* cl30, 96, *North East NSW* cl34, 109.

104 Tasmania introduced provisions for the state industry that guaranteed a minimum of 300 000 m³ of saw and veneer logs per year. Dargavel 1995, above n 1, at 238. In Victoria, the issuance of 15 year licences allocated 98% of the estimated timber volume outside reserves, subject to the payment of compensation if conservation imperatives called for the reduction in licence volumes. Krockenberger M (ACF), in *Australian Environmental Law News* 2 (1992) 52, at 53; Lindenmayer D, 'Timber Harvesting Impacts on Wildlife: Implications for Ecologically Sustainable Forest Use' (1994) 1 *Australian Journal of Environmental Management* 56. The New South Wales Government also entered ten-year supply contracts prior to the conclusion of the RFA processes in that State Wright P, 'RFA Process is Failing Australia' (1997) 25 *Habitat* 29.

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anywhere in Australia, in spite of supply now being protected.¹⁰⁵ The only investment contemplated in the short term is that emanating from Commonwealth industry restructuring packages provided as part of the RFA process itself. It is far too early to brand the investment-generation outcomes of the process as failures, but the evidence bodes ill for a revitalisation of the industry using private capital. Similarly, there is no evidence of improved pricing policies for timber concessions in regions where RFAs have been completed.¹⁰⁶ The provision of a statutory guarantee of supply from public lands, tantamount to compensable property rights, must be questioned when it is not matched by reciprocal undertakings about employment generation or the full-cost pricing of timber concessions.

Scientific basis and the precautionary principle

A range of social and political factors will influence the final content of an RFA,¹⁰⁷ but the legitimacy of the RFA outcome hinges upon its scientific basis. The release of the options reports of the comprehensive regional assessments have typically been accompanied by public statements about the comprehensive scientific base that they represent.¹⁰⁸ Yet there are serious flaws in the information underpinning the RFAs undertaken to date and the scientific process by which information has been gathered. These flaws call into question the capacity of the concluded RFAs to observe the precautionary principle. It

105 Wright, above n 104; Mercer, above n 1, at 139. To the contrary, the announcement of the Tasmanian and Western Australian RFAs were followed by plans to close mills in both regions.

106 Indeed, recent reports suggest that under-pricing of timber concessions has continued in the post-RFA period, at least in Victoria.

107 For the need to consider various dimensions of resource use, see Lane, above n 40 at 146, and the references cited therein.

108 Horwitz and Calver quote press releases accompanying the release of the CRA for Western Australia in which the Commonwealth Ministers for Environment and for Primary Industries and Energy, and the State Minister for Environment declared that 'this assessment provides the scientific base for sound decisions on how best to protect all ... environmental and cultural values for future generations'. Horwitz P & Calver M, 'Credible Science? Evaluating the Regional forest Agreement Process in Western Australia'(1998) 5 *Australian Journal of Environmental Management* 213, at 214.

will be recalled from Part Two that this principle obliges governments to avoid using the absence of full scientific certainty as an excuse for not taking precautionary measures in the face of serious environmental risks.

Australia's First Approximation Report to the Montreal Working Group makes clear that Australia currently lacks the capacity to report on a whole range of ESFM indicators, especially those regarding non-timber forest values. At the same time, the RFAs concluded so far have been based largely on the collation of *existing* information.¹⁰⁹ The *Regional Framework of Criteria and Indicators* specifically contemplates that consistent regional measurement will provide a scientifically credible basis for statements on forest management and will aid in the formulation of requirements for the RFA processes.¹¹⁰ Yet by the time the framework was published in 1998, RFAs in Victoria and Tasmania were already completed, and most of the scientific investigation was substantially complete elsewhere. These RFAs do make specific reference to the Montreal C&I as a basis upon which to develop regional measures for monitoring programs, but the fact that no criteria had been formulated before the RFAs were concluded raises questions about the scientific credibility of RFA decisions.

Even where sufficient data was available, that credibility of the *process* of data collection has been questioned. The credibility of the Western Australian CRA has been assessed against four principles of a 'scientifically credible process.'¹¹¹ The researchers identified the 'normal cultural activities under which a scientific process should operate', namely, the use of appropriate and adequately presented methodology; use of appropriate analytical tools; drawing appropriate conclusions based on good theories and sound data; and general criteria, such as the significance, originality, organisation, soundness and clarity of the work.¹¹² Judged against these criteria, the WA RFA process was

109 While the NFPS contemplates an assessment process that takes a new look at forest resources, it also provides that data collection is unnecessary when information already available. Forsyth above n 72, at 342.

110 Commonwealth of Australia, above n 36, at vii-viii.

111 Horwitz & Calver, above n 108.

112 *Ibid*, at 215. The criteria by which they assessed the scientific performance of the RFA process asked whether it had provided a framework for, or facilitated, scientific debates; the involvement and affiliations of scientists; the use of scientific norms of publication, peer review and conferences; and

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found lacking. The authors found that many studies were omitted from the CRA.¹¹³ Of those 38 reports that were undertaken for the CRA, 26 had the involvement of WA's forestry agency, the Department of Conservation and Land Management¹¹⁴ The collation and incorporation of numerous published and unpublished reports made it difficult to assess the quality and consistency of the research methodology employed.¹¹⁵ Methodologies were not specified or were heavily abbreviated.¹¹⁶ While some reports were peer reviewed, this practice was patchy. Moreover, the technique of resolving scientific disagreements through the establishment of a 'Panel of Independent Scientists and Experts', which was expressly contemplated by both governments at the commencement of the process, was only used once.¹¹⁷ Rather than conclude that this demonstrated an absence of scientific disputation, the authors suggest an unwillingness to acknowledge the existence of

the use of explicit methodology from which conclusions can be justified. Ibid, at 216.

113 Ibid, at 217-218.

114 Ibid at 218. The authors make no judgements about the quality of individual authors of reports that had significant agency involvement. Nor do they necessarily conclude that CALM desired to retain control of the scientific inputs to the process. They point out, however, that the fact that the process permits such a conclusion to be drawn at all, weakens the credibility of the process. Ibid, at 220. This concern is strengthened by the history of litigation in which environmental groups have sought to question CALM's forest management practices. See, for example, *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1998) 18 WAR 102; *Bridgetown/Greenbushes Friends of the Forest Inc and Anor v Executive Director of Conservation and Land Management and Ors*; *Executive Director of Conservation and Land Management and Anor v South-West Forest Defence Foundation Inc and Anor* (1998) 18 WAR 126.

115 Horwitz & Calver, above n 108, at 220.

116 Ibid at 221. The authors contrast this with the approach of the RAC. The RAC's 1993 *Final Report* documented the results of a comprehensive literature survey. The methodology was clearly set out and the criteria by which materials were considered or omitted were explicitly stipulated. For a discussion of the contrast between this approach and that of the RFA process, see Horwitz & Calver, *ibid*.

117 Ibid at 217.

scientific disagreement and thereby exclude its resolution from the processes of the CRA.¹¹⁸ The authors conclude:

We believe that the lack of scientific transparency in the Western Australian RFA process makes possible the interpretation that decision-makers may well be using science as a façade in the process.¹¹⁹

Similar criticisms of the data-collection methods, sampling regimes and conceptual models, largely attributable time and cost constraints, have been made of other CRAs.¹²⁰ In New South Wales' Northeast RFA, the estimates of sustainable yield were reportedly rejected by the government's own departments because they lacked scientific credibility.¹²¹ Where new information has been obtained, it has often been substandard because of the short time-frame between approval of research funding and the due date for delivery of research results.¹²² Flaws have also been identified in the scientific method used for

118 Ibid. The authors point to substantial disagreement in the scientific literature, and in particular the journal *Australian Forestry*, on matters of forest ecology, to support their rejection of the first possibility.

119 Ibid, at 223.

120 Bentley J, *Review of proposed biodiversity research methodologies for the Queensland RFA*, Unpublished report, 1997, Melbourne, Deakin University, cited in Lane, above n 40 at 149; Wright above n 105, at 29; Forsyth above n 72, at 347; Mercer, above n 1, at 167. Already, it appears that some of the estimates made in the CRAs are proving to be inaccurate. Since the completion of the East Gippsland and Central Highlands RFAs, the Victorian Department of Natural Resources and Environment has indicated that sustainable sawlog yields may have to be reduced in those areas, which raises questions about the reliability of other predictions made during the CRA. Anderson T, *Attachment to the ACF Submission to the Australian Senate Rural and Regional Affairs and Transport References Committee Legislation Committee Inquiry into the Regional forest Agreement Bill 1998*, 20 January 1999 (on file with author). It has also called into question the economic arrangements of that RFA, since the downward revisions may involve greater job losses. Tuckey W, Radio Interview, *Earthbeat*, ABC Radio National, 25 March 2000.

121 Causley I, MLA (Member for Page), interview on ABC Local Radio (NSW North Coast) 3 April 2000.

122 Kirkpatrick J, 'Nature conservation and the regional forest agreement process' (1998) 5 *Australian Journal of Environmental Management* 31, at 35.

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identifying conservation areas, at least for the East Gippsland and Tasmanian RFA process.¹²³

These criticisms suggest that the original hope that the CRAs would provide a solid scientific platform upon which to base decisions seems to have been misplaced. The disconnect between scientific analysis and policy formulation is by no means unique to forest management,¹²⁴ but seldom is it so well illustrated.

123 *Ibid*, at 36. Techniques are available for selecting minimum areas required for particular conservation goals taking into account non-conservation values. For these regions, conservation areas were selected without reference to such techniques by policy bureaucrats, rather than scientists.

124 Lane M, above n 40 at 149, referring to problems routinely encountered in resource assessment.

Forest conservation

The JANIS criteria were originally to be formulated by experts in both the State and Commonwealth Governments, but protracted disagreement led to the appointment of a committee of independent experts to assist in their development.¹²⁵ The final criteria were not finalised until after the commencement of the East Gippsland and Tasmanian RFAs.¹²⁶ While most of the language of the original criteria remains, the addition of the proviso that targets need only be met 'if practicable and possible' has meant that targets could be varied for socio-economic reasons.¹²⁷ The final criteria also removed references to maintaining the unreserved forest estate in a largely native condition. This management objective was an underlying assumption of the original conservation targets, so that its omission further potentially the adequacy of the modified targets.¹²⁸

While the JANIS criteria may suffer from shortcomings, the RFA process has resulted in additions to conservation reserves in all areas.¹²⁹

125 Kirkpatrick, above n 122, at 33.

126 Ibid. The core components of the criteria – protection of biodiversity, old-growth and wilderness were incorporated into those agreements. Dargavel 1998, above n 2, at 27.

127 Kirkpatrick, above n 122, at 34.

128 Ibid.

129 In East Gippsland, the RFA applies to 1.2 million hectares of public and private land, 90% of which is public land. Half of the public land has been included in the CAR reserve system and the JANIS targets have been satisfied. Timber harvesting is not permitted, but other uses such as mining may be permitted in certain conservation zones, subject the Victorian environmental impact assessment requirements. In Gippsland, 266 500 hectares has been added to the CAR system, bringing 29% of the total area and 54% of public land in the area within the CAR system. In West Victoria, 194000 hectares were added to the reserve system, so that 65% of public land in the region is reserved. In Tasmania, 396 000 of public land has been added to the reserve system. 40% of Tasmania's total land area is now in reserves. 29 new national parks or state reserves will be created. \$30 million has been allocated to ensuring protection of certain high-conservation value private land. In the Central highlands of Victoria, 116 000 hectares of public land has been added to the reserve system and roughly 50% of public land will now be managed for conservation purposes. In Western Australia, 150 000 hectares will be added to the reserve system, with old-growth stands meeting the JANIS target for protection. In Mercer,

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Whether these additions meet the definitions of the JANIS criteria is subject to debate. The Tasmanian RFA outcome has been bitterly criticised by the Wilderness Society, the Tasmanian Conservation Trust and the World Wide Fund for Nature for falling short of the commitment to a comprehensive, adequate and representative reservation of forest areas.¹³⁰ It is claimed that the definition of 'old-growth' was interpreted narrowly, thereby reducing in absolute terms the area requiring reservation under the 60% rule, and that the number of forest types found in Tasmania was underestimated, thereby compromising the representative nature of the reserve areas.¹³¹

A range of similar criticisms have been levelled at the CAR outcomes of other agreements, although all of them purport to establish a CAR reserve system.¹³² For the most part, critics point to the inadequacy of reserves, but in East Gippsland and the Central Highlands RFAs, the Victorian Association of Forest Industries (VAFI) asserts that the JANIS targets for conservation were already met in those areas before the RFA

above n1, at 168. In North East New South Wales, the additions to the CAR estate have brought the total area of public land in reserves to 55% for the Upper North East and 67% for the Lower North East.

130 Kirkpatrick assesses that 27 forest communities have been protected to a greater extent than the indicative targets, 16 communities are close to the feasible target on public land, but that 6 communities fell short of the targets, justified on the basis of the flexibility provisions. Kirkpatrick, above n 122, at 36. See also Law G, 'World-Class Forests vs World-Scale Woodchipping' (1997) 25:3 *Habitat* 26; Graham & Knight, above n 81; Rae M (WWF-Australia) personal communication 1999; Allison, above n 77, at 209.

131 Law, above n 130, at 26; Wright, above n 104, at 29.

132 The reserves established under the RFA for the Northeast Forests of New South Wales have also been criticised for omitting areas that had previously been identified as necessary to satisfy the JANIS criteria. Corkill D (Northeast Forest Alliance), Interview on ABC Local Radio (NSW North Coast) 3 April 2000. The WA RFA has been criticised because the areas identified for reservation are marginal woodlands and contain minimal tall forest. MacKenzie D, 'RFA Ditches Democracy in the Wild West' (1999) 155 *Wilderness News*, 5. 350 000 hectares of newly reserved forest is in fact sand dunes or cleared. Mercer, above n1, at 113 and 126, citing Lekakis G, 'Queensland warned on logging ban' *Australian Financial Review* 22 July 1999.

was developed, so that additional inclusions in the conservation estate constituted unnecessary limits on access to resources.¹³³

Whether these criticisms are well-founded is difficult to assess without detailed scientific scrutiny of each region. Some difficulties are readily apparent, however. For example, the designation of political boundaries has meant that CRAs have ignored biological cohesiveness: the Southern forests region of NSW and the East Gippsland region in Victoria constitute a single biological and economic region, but have been divided for the purposes of identifying and designating areas for inclusion in CAR reserves and for industry restructuring.¹³⁴ In all RFAs concluded so far, mining is permitted within CAR reserves. This right is subject to the overriding operation of application state laws relating, for example, to national parks and environmental impact assessment, but still threatens to undermine conservation values in the absence of Federal Government oversight of management decisions affecting CAR reserves.¹³⁵

In addition to the establishment of CAR reserves, one of the key aims of the RFA process has been to ensure that Commonwealth environmental obligations are satisfied so that the Commonwealth could absent itself from future forest disputes.¹³⁶ The Commonwealth's obligation to identify and protect areas of world heritage or national estate value was largely fulfilled by the application of the JANIS criteria applied for CAR reservation, which was undertaken as part of the comprehensive regional assessments for each region. All agreements provide that the Commonwealth's obligations under the *Australian Heritage Commission Act* have been met.¹³⁷ In some areas, however, the entire forest estate

133 Rowan J (Director of Resources, VAFI), Radio Interview, *Earthbeat*, ABC Radio National, 25 March 2000.

134 Dargavel 1998, above n 2 at 25-27.

135 *WA* cl 85; *Tasmania* cll 78-81; *East Gippsland* cl 56; *Gippsland* cl 84-85; *West Victoria* cl 84-85; *North East Victoria* cl 77-78; *North East NSW* cl 95-98; *Eden* cl 83-85. Some states permit mining in National Parks, in others, mining is prohibited.

136 This view is shared by Dargavel 1998, above n 2, at 29.

137 *WA* cl 20; *Tasmanian* cl 25; *East Gippsland* cl 8; *Central Highlands* cl 20; *Gippsland RFA* cl 20, 22; *Western Victoria* cl 20, 22; *Northeast Victoria* cl 20, 22; *Eden* cl 20, 22; *Northeast NSW RFA* cl 20, 22. Bartlett asserts that *Regional Forest Agreement Bill* fails to provide adequate safeguards for conservation outcomes because while it makes provision for compensation payments in cases of security being lost, there are no equivalent provisions

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fulfilled the national estate criteria for heritage listing based on natural values. These areas only received protection to the extent that they *also* fell within areas identified under the JANIS criteria. In Tasmania, Kirkpatrick suggests that this resulted in the exclusion from reservation of most natural national estate criteria where they did not overlap with JANIS criteria.¹³⁸ If this is the case, it is an ironic outcome, since the draft National Forest Policy Statement referred specifically to Commonwealth examination of national estate values in the CRA process and since the first model of regional assessment – the Memorandum of Understanding between the Australian Heritage commission and the WA Department of Conservation and Land Management for the Southern Forests of Western Australia – entailed a consideration of national estate values only.¹³⁹ The Agreements also stipulate that they represent a fulfilment of the Commonwealth's obligations under the *Environment Protection (Impact of Proposals) Act* 1974 (Cth) and the *Endangered Species Protection Act* 1994 (Cth).¹⁴⁰

The final issue related to the conservation outcomes of the RFA process is the limited scope of application, applying only to timber production forests. This is particularly important in the wider debate about forest degradation because, in Australia, the vast majority of land defined as forested under the UN FAO definition is cleared for agricultural purposes.¹⁴¹ The failure to develop a national strategy for all forms of land clearance, encompassing the highly contentious practice of clearing almost 500 000 hectares of woodland and scrubland per year in Queensland alone,¹⁴² renders the gains made by the RFA process fairly hollow.

guaranteeing ongoing protection of environmental values. Bartlett, above n 78, at 337.

138 MacKenzie, above n 132, at 5.

139 Fowler, above n 49, at 77.

140 *Western Australia* cl 23-25; *Tasmania* cl28-30; *East Gippsland* cl10-11; *Central Highlands* cl23-24; *Gippsland* RFA cl 23-24; *West Victoria* RFA cl 23-24; *North East Victoria* cl 23-24; *Eden* cl23-24; *Northeast NSW* RFA cl 24-25.

141 SEAC, above n 1, at 65-66.

142 The practice of land-clearing for agriculture and pasture has been legislatively controlled in all States except Queensland, but enforcement is extremely poor. Queensland enacted tree clearing legislation in December 1999, but suspended its commencement when it failed to secure funding

Implementing ESFM practices

Ecologically Sustainable Forest Management (ESFM) involves a complex mix of timber yields, conservation, silvicultural practices and social considerations. ESFM examines the volume of timber that can be extracted, the silvicultural techniques employed, including the proportion of the forest area to be logged; the rotation rate for coupes; the spatial configuration of the forests designated for timber production and associated activities; harvesting techniques; and the other human activities undertaken in the same areas.¹⁴³ In these respects, it contrasts with traditional forestry forecasts based on ‘sustained yield’, which concentrated almost exclusively on maintaining a steady wood supply.

Under the settled RFAs, the on-going management of ‘working forests’ has been left with the State governments, but many commentators place blame for public forest degradation firmly at the feet of the state forest agencies. Criticisms range from lack of funding for forest managers, an agency mindset that places a disproportionate focus on the timber production values of forests, to negligent underpricing of public resources in the face of pressure from powerful industry players.¹⁴⁴ For example, in 1998, the Western Australian Environment Protection Authority (EPA) reported on the progress made by the Department of Conservation and Land Management (CALM) in complying with its own Forest Management Plan. The EPA found that CALM had significantly altered silvicultural practices by using a more intrusive style of harvesting, and had substantially increased the area logged, all without the required consultation with EPA.¹⁴⁵ In addition, one environmental

from the Federal Government for compensation claims by affected land holders. See ‘Trees, Water, People, and the Way We Farm’ *Background Briefing*, ABC *RadioNational*, 9 April 2000, transcript available at <www.abc.net.au/rn/talks/bbing/specials/landclr/script.htm>.

143 Norton & Kirkpatrick, above n 66.

144 The historical criticism of forest managers for under-pricing the timber resource is not unique to Australia. See for example Marchak P, *Logging the Globe* (1995) Montreal, McGill-Queen’s University Press, Chapter 7.

145 EPA (WA), *Advice in Relation to the Development of the Regional Forest Agreement in Western Australia: Progress Report on Environmental Performance and mid-term Report on Compliance: Forest Management Plans 1994-2003*, EPA Bulletin 912, 1998: <www.environ.gov.au/pubs/bull/912>, at 4-6.

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condition required CALM to manage karri and karri-marri forest in accordance with a 'precautionary approach.' The condition stipulated that 'where there is a significant risk that a particular forest management measure could lead to an irreversible consequence, appropriate monitoring and subsequent adjustments to management within an acceptable time-frame should be carried out.' EPA concluded that the knowledge base upon which decisions about silvicultural and fire prescriptions were being determined was inadequate to predict ecological outcomes. The EPA specifically recommended a change to the definition of the precautionary approach, replacing it with the definition adopted in the IGAE.¹⁴⁶ The Report was critical of CALM's management practices in a range of other respects.

Australian states have adopted Codes of Forest or Logging Practice, combining descriptions of the environmental impacts, regulations and policies, targets and broadly framed operational procedures. In addition, national guidelines have been developed by the CSIRO and the Standing Committee on Forests.¹⁴⁷ Generally, codes have lacked a legislative basis¹⁴⁸ and sufficient detail.¹⁴⁹ In most jurisdictions, codes do not apply

146 Ibid, at 9-10.

147 Cameron A & Henderson L (eds), *Environmental Guidelines for Forest Harvesting* (1979) Canberra, CSIRO; Standing Committee on Forestry National Forest Policy Statement, *National Principles for Forest Practices Related to Wood Production*, Canberra, AGPS, cited in McCormack, above n 7, at 107.

148 Only Victoria and Tasmania have prescribed a legislative basis for their Forest Codes. See *Forest Practices Act* 1985 (Tas) and the *Forest Practices Amendment Act* 1994 (Tas) and the Timber Harvesting Regulations 1989 to the *Forests Act* 1958 (Vic). In other jurisdictions, logging operations are controlled by a mixture of regulations and conditions contained in timber sale contracts. McCormack, above n 7, at 108.

149 Tasmania, New South Wales, Victoria and Western Australia's codes have the highest levels of specificity. The details of how an area is to be harvested is generally prescribed in a timber harvesting plan, that is typically annexed to the timber sale contract. The approval of this THP must involve environmental agencies in Tasmania and New South Wales, but in other jurisdictions rests with the forest manager. McCormack, above n 7, at 109.

to private land.¹⁵⁰ Enforcement mechanisms also vary considerably and are poor in some jurisdictions.¹⁵¹ The RFAs for Victoria address this by including an undertaking by the State Government to publish details of compliance with relevant Codes.

Some of these concerns may be addressed by a separation of the commercial forestry and other planning functions performed by forest agencies, as is specifically provided for in the Victorian RFAs and a commitment to observe the principles of the National Competition Policy.¹⁵² It is, however, too early to determine the impact of these undertakings. Each RFA also commits the relevant State government to ecologically sustainable management of their forest estate, involving a program of on-going improvement of its forest management systems,¹⁵³ based on Montreal Principles and ISO 14000. It also requires managers to report on progress. The significance of this commitment is unclear. The obligation contains no measurable targets, and the RFAs also acknowledge that applicable state practices *currently provide* for ESFM.¹⁵⁴ Even allowing for local differences, it is difficult to see how every state can be meeting ESFM principles, when there are such large disparities among state forest agencies in the content and enforcement of

150 Ibid at 107; La Fontaine B & Van Diemen Forestry Consultants, 'Forest Certification and ISO 14 001 for the Forest Manager' (1995) 36:6 *IFA Newsletter* 2, at 4.

151 McCormack, above n 7, at 108.

152 *Western Australia* cl 87, 95; *Tasmania* cl 85-87; *East Gippsland* cl 58; *Gippsland* cl 88; *Central Highlands* cl82, 86; *West Victoria* cl 88; *North East Victoria* cl 80, 86; *Eden* cl 86, 95; *North East NSW* cl 99, 108.

153 *Western Australia* cl 33, 40, 42, 94; *Tasmania* cl 93; *East Gippsland* cl 30, 62; *Gippsland* cl 34, 40; *Central Highlands* cl39-40; *West Victoria* cl 34, 40; *North East Victoria* cl 34, 39; *Eden* cl 42, 44; *North East NSW* cl 44, 46-47.

154 *Western Australia* cl 41-42; *Tasmania* cl 64; *East Gippsland* cl 30, 62; *Gippsland* cl 41, 47; *Central Highlands* cl41, 46; *West Victoria* cl 48; *North East Victoria* cl 40; *Eden* cl 43; *North East NSW* cl 45, 46-47. No equivalent provisions were included in the East Gippsland Agreement. The statements in the two NSW Agreements indicate that current management practices represent a sound basis for further progress on ESFM. For an early discussion of Victoria's transition to ESFM, see Manderson A, 'Impact of the Timber Industry Strategy and the code of Forest Practices on Forest Management in Victoria' (Paper presented at the Environment Institute of Australia Second National Conference, *Environmental Practice and Sustainable Development*, Sydney, 9-11 October 1989).

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harvesting codes of practice, and the types of harvesting that are permissible.

The extent to which the RFA process will produce genuine reform of forest management practices will depend on the will of the relevant state governments rather than anything provided in the agreements themselves. Responsibility rests firmly with the States to reform forest agencies and improve their forest management systems to ensure ESFM. Properly done, this should address the inadequacies in forest resource valuation, and result in a shift in resource exploitation patterns where the valuation process shows this to be economically necessary. Substantial progress has already been made, but there remains considerable scope for improvement. The opportunity for real progress may be reduced, however, if State governments are under pressure not to undermine the commitments made in the Agreements. Each State has stipulated the annual yield permissible from each region. These commitments may constrain from modifying forest management practices.

Public participation in the process

The comprehensive regional assessment for each RFA undertaken so far has included a social impact assessment and a series of stakeholder reference groups. The integration of social information is an essential component of any meaningful resource planning process¹⁵⁵ and the RFA documents all assert that the comprehensive regional assessments afforded significant opportunities for public participation.¹⁵⁶ Coakes points to the paucity of social science expertise within the public and private sector organisations involved in the comprehensive regional assessment (CRA) process and the prevailing perception of social data as ‘soft.’¹⁵⁷ She concludes that the social assessment component of the CRA has increased awareness of the RFA process; enhanced

155 Coakes S, ‘Valuing the Social Dimension: Social Assessment in the Regional Forest Agreement Process’ (1998) 5 AJEM 47; Bartlett, above n 44, at 335; McGhee W (McGhee Logging), Radio Interview, *Earthbeat*, Radio National, 25 March 2000, Lane M above n at 150.

156 *Western Australia* cl 47; *Tasmania* cl 72; *East Gippsland* cl 24; *Gippsland* cl 43; *Central Highlands* cl 42; *West Victoria* cl 43; *North East Victoria* cl 42; *Eden* cl 48; *North East NSW* cl 50.

157 Coakes, above n 155, at 52.

understanding of the complexity of forest management issues; improved relations between local communities and forest agencies; and has led to what she described as a ‘ground truthing’ of perceived facts.¹⁵⁸

Despite this, there is anecdotal evidence that many timber communities have felt excluded from the CRA process. In particular, some have suggested that the process became centralised in capital cities and dominated by key ‘peak’ stakeholder groups, who may not necessarily have represented the full range of interests.¹⁵⁹ Social assessments were typically undertaken using a survey, but surveying techniques appear to have been flawed – in one region only about 10% of workers received the survey, there was no central body from whom workers could seek explanations, and only about 25% of those who received the survey actually responded.¹⁶⁰ Broader public participation was left to the standard techniques of written comment on a detailed directions paper published for the purpose. There has also been criticism that indigenous groups have been excluded from RFA consultations¹⁶¹ and that the quality of analysis for indigenous interests was poor.¹⁶² Native title issues were not considered,¹⁶³ but nor are potential claims affected by

158 Ibid, at 53.

159 In the South-East Queensland CRA, the stakeholder panel consisted of timber, agricultural, and mining interests, three conservation groups, three Aboriginal bodies, timber workers, loggers and local government. Despite this broad representation, the author understands from confidential interviews that final negotiations were dominated by large timber companies, union delegates, and one peak conservation group. In some jurisdictions, entrenched interest groups co-opted the CRA process very early on. Gardner A, personal communication, September 1999.

160 McGhee W (McGhee Logging), Radio Interview, *Earthbeat*, ABC Radio National, 25 March 2000. McGhee dismissed the social assessment as a ‘circus’, citing the fact that an entire sawmill, and its workforce, has been omitted from the data collection for that region.

161 Mercer, above n1, at 110; Gilmour D, ‘Forest Conservation in Australia: Changing Policy Landscape’ (1998) 8 *Arborvitae*; Lane M, ‘Social Impact Assessment and Queensland’s Regional Forest Agreement process’ *Report to the Commonwealth Department of Primary Industry and energy*, 1997, Melbourne, RMIT. All RFAs make provision for on-going consultation with indigenous stakeholders. *WA* cl81; *Tasmania* cl83; *East Gippsland* cl 51; *Central Highlands* cl 74; *Northeast* cl73; *West* cl 78; *Gippsland* cl78; *Eden* cl79; *North East NSW* cl92.

162 Dargavel 1998, above n 2, at 27, 29.

163 Ibid at 28–29.

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the final agreement. Conflict with native title rights is expressly identified as one of the grounds upon which agreements may be amended, but the precise operation of this safeguard will not be known until native title rights are determined.

It is extremely difficult to assess the adequacy of the public consultation and participation in the RFA process. The enormity of the information-gathering exercise necessarily constrained those engaged in the Comprehensive Regional Assessments. This always requires a certain consolidation or clustering of interest groups. The success of this aspect of the process may well depend upon the extent to which communities accept RFA decisions in the longer term and the level of commitment made to on-going monitoring and policy-dialogue.

Implications For The Australian Forest Products Industry

This paper has attempted to provide readers with a legal and policy context within which to analyse the regional forest agreement process. Its primary focus has been on whether the process has fulfilled the fundamental principles of ecologically sustainable development, namely the precautionary principle, retention of options for future generations, conservation of biological diversity, full cost pricing of environmental resources and public participation in environmental decision-making.

One of the key criticisms of the RFA process has been the underlying assumption of the National Forest Policy Statement that Australia could and should sustain an ‘internationally competitive native timber industry’.¹⁶⁴ To start from this premise without a detailed economic and ecological analysis of the viability and profitability of this use of the forest resource was to place the policy cart firmly before the deliberative horse. From the outset, alternative forest uses were subject to less detailed analysis, even though much less was known about their economic value. The examination of environmental values and conservation needs has provided an excellent platform upon which to build with additional research. But it hardly represents a level of

164 National Forest Policy Statement, above n 44; See also Forests and Forest Industry Council of Tasmania, *Secure Futures for Forests and People* (1990); CALM, *Timber Production in WA – A Strategy* (1987); and Government of Victoria, *Victorian Timber Industry Strategy* (1986).

scientific certainty high enough to justify a guaranteed right to exploit remaining forests for the next two decades. A proper application of the precautionary principle would have resulted in the inclusion of provisions that allowed for variation of agreements where subsequent research demonstrated an ecological need for more stringent conservation measures.

The addition of large new reserves to the conservation estate in each region is welcome indeed and can only assist in conserving Australia's extraordinary terrestrial biodiversity. Questions remain about whether the JANIS criteria have been adequately implemented, and whether the Commonwealth has omitted from reserves areas meeting national estate or world heritage criteria. In a broader context, deficiencies may also be identified in the limited scope of the RFA process, concerned as it is only with commercial forestry and ignoring the wider issues of native vegetation clearance in other biodiverse ecosystems, such as brigalow and mallee scrub.

The RFA process has done little to promote more commercial pricing of forest resources that assigns a proper economic value to the environmental costs of timber extraction. The agreements require State governments to comply with the principles of the National Competition Policy, but otherwise leave pricing decisions to forest agencies. While there is no imperative to value and compare the non-timber uses of forests, such as tourism, water catchment, honey and wildflower production, a proper economic analysis of forest's true value will remain biased towards timber harvesting. Prices will be determined not by the value of the forest but by world timber prices. Progress towards sustainable forest management will be slow while this distortion remains, yet the difficulty of developing and applying valuation techniques to environmental and social values means that research into these issues is a low priority.

It is too early to assess fully whether the RFA process is moving the Australian forestry industry towards more sustainable practices. Given our generous market access to imported forest products, the competitiveness impacts of an immediate shift to full internalisation of environmental costs would effectively destroy the industry. Yet, in order for Australia to fulfil its international conservation obligations as well as to maximise the full range of economic benefits to be gained from forest

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resources, further rapid progress is required. The RFAs oblige every forest management agency to implement a management system that provides for continual improvement and to report on progress. The heightened public awareness of forestry issues aroused by the RFA process may yet result in improved management of the forest resource. The proposal announced in late-April this year to develop an Australian Forestry Standard may be the first step in articulating a consistent and measurable set of performance indicators for Australian forestry. Only the quality of the final standard and its implementation at the forest level will reveal whether critics are justified in dismissing it as an industry campaign to mislead consumers about the sustainability of Australian forest products.¹⁶⁵

The mechanism of regional assessment held great promise because it focussed on regional forest types and regional social and economic needs. To date, however, conservation groups have unanimously criticised the process because it failed to meet conservation commitments, did not mandate changes to industry or agency practice, and undertook cursory social assessment. In particular cases, these criticisms may be justified. What the chorus of complaint may actually signal, however, is the inappropriateness of the RFA's technocratic approach to resolving a fundamentally ideological conflict.¹⁶⁶ The underlying political rationale of the RFA process was to de-politicise forestry decisions, yet it seems to have obscured what remained essentially political judgements behind a veneer of scientific legitimacy. This undermined claims that outcomes were either scientifically-sound *or* derived from a wide stakeholder consultation. In this respect, the RFA experience provides a salutary lesson for forest managers in other countries who are struggling with similar tensions. It also provides valuable guidance for the managers of other natural resources in Australia, such as minerals, water and fisheries. The fundamental objectives and approach of the process itself are meritorious, but the flaws in its implementation show that substantial modification will be

165 Native forest Network, *Media Release*, 'National Environment Groups Condemn Federal Plans for an 'Australian Forestry Standard'', 8th May 2000.

166 Lane above n 40 at 149-150, citing Syme G 'When and where does participation count?' in Munro-Clarke M (ed) *Citizen Participation in Government*, Sydney, Hale and Iremonger, 78.

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needed before the regional forest agreement process can yield the widespread agreement it strived to achieve.