# FORESTRY EXEMPTIONS

## A paper presented to the 2002 conference of the Environmental Defenders Office (Tas) Inc by Roland Browne

Since the early-mid 1990s in Tasmania, the forestry industry – like the banking, mining, telecommunications, insurance and superannuation industries - has become increasingly self-regulated. With very few exceptions, government has virtually no role in overseeing the forestry industry, leaving oversight in the hands of the Forest Practices Board and the Board of Directors of the Forestry Corporation, known as Forestry Tasmania. Not only has government handed regulation of the forest industry to Forestry Tasmania and to the Forest Practices Board, Parliament has also almost entirely removed community input from decision making processes surrounding forest industry activities. Those activities are exempt from the matrix of regulation that covers many other major activities in our society.

Public participation in environmental decision making is a recognised cornerstone of good decision making, and is embraced as part of a large range of development assessment processes. At another level, and despite the incessant incantations that the involvement of individuals and community groups will open the floodgates, community and individual involvement has been responsible for significant environmental protection in Australia and overseas. Examples are Corkhill v. Forestry Commission of NSW (1991) 73 LGRA 126 and Booth v. Bosworth [2001] FCA 1453, the latter being a case relating to flying foxes in Queensland where a biology student was successful in halting the use of an electricity grid as it was likely to adversely impact upon the World Heritage values of the Wet Tropics World Heritage area.

### Public participation in resource industry decisions

It is useful to consider some prominent resource activities to look at the role given to members of the public.

Major state projects[1] in Tasmania are assessed by the Resource Planning and Development Commission which is required to publicly exhibit the proposal and to accept and consider representations by the public, including holding hearings[2]. The

[1] Called a project of state significance in the State Policies and Projects Act, 1993

[2] See Part 3 of the *State Policies and Projects Act* 1993 and the *Resource Planning and Development Commission Act*.

Southwood project, planned for the Huon area, is an example of a major forestry development which is required to embrace public involvement. Paradoxically, while the industrial development part of the project requires an assessment that includes public representations considered at a public hearing, decisions surrounding the source of wood for the project are determined administratively by Forestry Tasmania.

Planning schemes regulate (with some exceptions) development across much of Tasmania. Any amendment to a planning scheme involves hearings under Part 3 division 2 of the *Land Use Planning and Approvals Act* 1993 by the Resource Planning and Development Commission. Again, public participation is a feature of any such hearing. Proposed amendments to schemes – until the legislative ascendancy of the private timber reserve – included proposals to alter schemes so as to permit the use of land for forestry purposes.

For the establishment of a wood chip mill, which is a Level 2 activity under the *Environment Management and Pollution Control Act*, *1994* public consultation in respect to such a project is guaranteed by s. 74 of the *Environment Management and Pollution Control Act*.

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The forestry decision making system is an entirely separate system to the Resource Management and Planning System set up in the early 1990's. The latter system includes the *State Polices and Projects Act,* the *Environment Management and Pollution Control Act*, the *Land Use Planning and Approvals Act*, the *Resource Planning and Development Commission Act*, the *Threatened Species Protection Act*, *the Resource Management and Planning Appeal Tribunal Act, 1993*, *the Living Marine Resources Management Act* and the *Historic Cultural Heritage Act*. It is a comprehensive system.

Yet forestry has an entirely separate system. It is best described in a typical Forestry Tasmania forest management plan, where the Corporation says:

> *While recognising the primacy of the Forest Practices system, Forestry Tasmania also supports the principles of the RMPS[3].*

We can only speculate as to why Forestry Tasmania would do other than support the principles of the RMPS, as Forestry activities are exempt from the system!

If we look at the system for management of decisions on private and state land, we can identify how different the systems are.

The *Forest Practices Act* allows for the creation of a private timber reserve, and in doing so the planning provisions of the *Land Use Planning and Approvals Act* have no application[4]. For the establishment of a private timber reserve, the *Forest Practices Act* confines those persons who can have a public input into the decision to declare the reserve (and thus permit land to be cleared for forestry purposes) to those people living within 100 metres of the subject land. Even then, those people are confined to a narrow range of areas of objection. On the other hand, people or businesses who live or work more than 100 metres away, and who are likely to be adversely affected by the aesthetic impact of forestry activities, are excluded from the process.

Forestry activities on State Forest are exempt from the *Land Use Planning and Approvals Act*[5] - and potentially from <u>any other</u> legislation by the *Forestry Act*, s. 22C (3) - provided a forest management plan is in place. Section 22C (3) reads:

> "Subject to this part, a forest management plan may prohibit or restrict the exercise of the statutory power in respect of the land to which it applies".

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3 Huon Forest District Forest Management Plan March 2000 Forestry Tasmania

4 *Land Use Planning and Approvals Act, s. 20(7)(a).*

5 by virtue of the definition of "works" in the *Land Use Planning and Approvals Act*

Hence, a forest management plan that makes some provision for threatened species, environment protection and other consequences of those activities overrides any statute that may require a greater level of environment protection than is afforded by the forest management plan. In other words, by providing for a particular issue, the forest management plan is able to lower the bar below statutory requirements for threatened species, conservation or environment protection.

Under s. 51 (3) of the *Threatened Species Act*, a person acting in accordance with a certified forest practices plan (issued under the *Forest Practices Act*) is effectively immune from the requirements of the *Threatened Species Act*.

Public Involvement

Much has been written on the topic of standing to sue and the access to courts and tribunals by members of the public. Interested members of the public are generally described as busybodies or meddlers if they are seen as a threat to the decision making process. There is apparently a multitude of people held back by the floodgates. What benefit is there from public involvement?

This question can be answered by reference to cases where land owners have chosen to seek planning approval for forestry (and thus seek a permit under the *Land Use Planning and Approvals Act*) rather than seek the declaration of a private timber reserve under the *Forest Practices Act*. In the latter instance the decision is appealable to the Resource Management and Planning Appeal Tribunal, with attendant 3rd party appeal rights. In the former, appeal rights and public involvement are almost non-existent. I offer two examples of forestry cases that have been determined by the Tribunal. In each cases the forest practices plan was found wanting, and the application for the permit was refused.

1. *F Giles and J Weston v. Break O'Day Council & T Denney (RMPAT) J115/2001*

After the forest management plan was prepared, but due to public concern, the plan was re-assessed before the case got to the Tribunal, leading to reservation of stands of rare eucalyptus

trees (*E. brookeriana*) and abandonment of the clear felling of an area inhabited by the Giant Velvet Worm (and selectively harvested instead).

The Tribunal found that even the protective measures in the Forest Practices Plan were insufficient in that:-

(a) threatened species protection was inadequate viz the Velvet Worm and Wedge Tailed eagle.
(b) the proposed 10m or 20m watercourse protection was inadequate viz not a great enough distance; it should have been 30 metres

The permit relating to these areas were refused.

*2. P Robin McDonald v Meander Valley Council [2000] TASRMPAT 124 (21 July 2000)*

In this case the Tribunal found a Forest Practices Plan to be inadequate in its assessment of aesthetics and in its assessment of infrastructure provision. The Tribunal also found the proposal contravened the relevant planning scheme and the RMPS objectives, which include a sustainable development objective. Further, the Tribunal was unable to be satisfied that steps set out in the Forest Practices Plan would adequately deal with sedimentation, chemical run off and protection of Threatened Species.
These 2 cases provide good examples of the failings of the Forest Practices system, in that when the plans are subject to external scrutiny, and when independent expert evidence is introduced, the outcome is very different. In short, the RMPS allows all values to be properly considered, and it allows the community to introduce evidence about relevant values. On the other hand, when the decision is entirely confined to the Forest Practices system the assessment of many environmental and other values is seen through the prism of a foresty operation.

Public involvement in forestry decisions is greatly emasculated in Tasmania.

Yet in various parts of Australia States have opened up environmental protection legislation to permit public participation and enforcement. A prominent example is s. 123 of the NSW Environment Planning and Assessment Act which reads:

> "(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."

There is no evidence this provision has proved deleterious. Further, in this age of self-regulation, and where the self-regulators are lacking in resources and motivation, public accountability ought be encouraged, not feared.

But as Justice Kirby recently observed in the course of argument in the High Court[6] (adopting the words of Sir William Deane, a former Justice of the High Court),

> "When the land below is parched, it is not a bad thing to open the floodgates".

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6 See Brodie v. Singleton Shire Council S44/1999 31st August, 2000 where Kirby J was most likely referring to the comments of Deane J in Phelps v. Western Mining Corp (1978) 33 FLR 327 at 334.