



No longer tenable

Bushfires and Regional Forest Agreements

Authors

Margaret Blakers OAM

Brendan Sydes, CEO/Lawyer, Environmental Justice Australia

About Environmental Justice Australia

Environmental Justice Australia is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

Donate at: www.envirojustice.org.au/donate

For further information on this report, please contact:

Brendan Sydes, CEO/Lawyer, Environmental Justice Australia

T: 03 8341 3100

E: admin@envirojustice.org.au

Produced & published by Environmental Justice Australia

ABN 74 052 124 375

Telephone: 03 8341 3100 (Melbourne metropolitan area)
1300 336 842 (Outside Melbourne metropolitan area)

Facsimile: 03 8341 3111

Email: admin@envirojustice.org.au

Website: www.envirojustice.org.au

Post: PO Box 12123, A'Beckett Street VIC 8006

Address: Level 3, the 60L Green Building, 60 Leicester Street, Carlton

Publication date: 27 March 2020

Images: Rob Blakers (cover, pages 3, 4, 10, 14); Frances Pike (page 12); Donovan Wilson (page 15); Environmental Justice Australia (pages 7, 8).

Contents

1 Summary.....	4
2 An unprecedented ecological catastrophe 2019–20.....	5
3 Regional Forest Agreements – no longer tenable	6
4 The current situation.....	8
5 Policy and legal implications.....	13
6 Bushfires – implications for the RFA system.....	14



1 Summary

1. Regional Forest Agreements (RFAs) are intergovernmental agreements between the Commonwealth and States that attempt to resolve competing demands on native forests for resource extraction and industry certainty on one hand and conservation on the other.
2. Conservation provisions of RFAs are underpinned by regional systems of what were claimed to be Comprehensive, Adequate and Representative (CAR) reserves. They comprise formal and informal reserves and prescriptions to protect the environment in forests where logging is permitted. Even before the fires RFAs were failing to protect species threatened by logging and to secure environmental values more broadly.
3. This summer's bushfires are of unprecedented scale, intensity and severity. Their impacts on forests and wildlife have been catastrophic. The CAR reserves have been severely affected with over three million hectares of dedicated parks and reserves burned and impacts on policies, prescriptions and other protections in forests available for logging.
4. The fires, particularly through their impacts on the CAR reserves, have destroyed the policy foundations of the RFA system, rendering it untenable. Governments have so far failed to respond to the changed circumstances, continuing instead to operate on a 'business as usual' basis.
5. The consequences of the fires and the impact on CAR reserves also raise legal issues in relation to whether the agreements continue to be binding, whether RFAs are legally valid, and whether exemptions to the *Environment Protection and Biodiversity Act 1999* founded on RFAs continue to apply.
6. RFAs today are legally uncertain and failing in practice. Their problems cannot be fixed within the RFA framework because the agreements are predicated on gradual change not catastrophic events. They contain no mechanism for comprehensively altering the terms of the agreement to reset the balance between conservation and production, made necessary by the fires.
7. This summer's fires mark the start of a new more threatening, more complex and uncertain era for forests and wildlife. To have a chance of avoiding extinctions and ecosystem collapse RFAs and native forest logging must end.



2 An unprecedented ecological catastrophe 2019–20

This summer's Australian bushfires are an ecological catastrophe. Between September 2019 and January 2020 over 12.6 million hectares burned across the continent.¹ In NSW and Victoria alone over 20% of the country's temperate broadleaf and mixed forest biome burned, a globally extraordinary extent.²

An estimated billion birds, mammals and reptiles have been killed or affected by the fires, together with many more billions of invertebrates, plants and other organisms.³ The impacts extend well beyond the areas actually burnt, for example through runoff contaminating downstream aquatic systems and wide-ranging species losing critical resources.⁴ Impacts may also be compounded by other threats and extend over time.

Of the area burnt in south-eastern and south-western Australia up to 7 January 2020, 99% contains potential habitat for at least one nationally listed threatened species.⁵ Preliminary analysis identified 327 species, listed as threatened under the federal *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), with more than 10% of their likely and known distribution within fire-affected areas.⁶ Other species and communities not currently listed as threatened will also have been impacted by the fires and will now meet the criteria for listing. Many invertebrates and other lesser-known organisms are likely to be extinct.

The Commonwealth government published a provisional list of 113 animals requiring urgent management intervention on 11 February 2020.⁷ These include species that occur in forests under Regional Forest Agreements (RFAs) and for which logging and other forestry operations are an acknowledged threat, for example the Regent Honeyeater, Greater Glider, Spot-tailed Quoll, Koala and Giant Burrowing Frog. An equivalent list for plants is not yet available.

The Commonwealth government had no established plan for a systematic conservation response to fires of such magnitude; recovery plans and processes under the EPBC Act

are inadequate to respond to the scale of the disaster and too slow. The Threatened Species Recovery Hub has partially filled the gap by providing initial recommendations for short-, medium- and long-term responses.⁸ The Threatened Species Scientific Committee expects it will take one to two years just to revise existing recovery plans in response to the crisis.⁹

The catastrophic and unprecedented impact of the fires on our forests – both the timber resource and native forest ecosystems – calls into question current laws, policies and practices:

post the fires, neither the wood production nor the conservation assumptions that underpin the RFAs make any sense, as the timber is simply gone while the forests have been critically damaged and forest-dependent wildlife is now on extended life support¹⁰

In Victoria, according to Premier Daniel Andrews, initial estimates are that almost half of the area planned for timber harvesting in East Gippsland has been burned in the fires.¹¹ State-owned logging agency VicForests has taken the extraordinary step of issuing 'force majeure' notices to contractors in East Gippsland after 40% of the area planned for logging was burned.¹²

In NSW around 60% of the areas zoned for timber production were affected by fires in 2019–20,¹³ but logging has resumed with only minor changes to conditions. The NSW Forestry Corporation has also declared force majeure on wood supply agreements on the north coast and elsewhere.¹⁴

Scientists have warned for decades about the consequences of global heating.¹⁵ In eastern Australia the 2019–20 fire season has made them manifest with bushfires of unprecedented scale, intensity and severity. They are globally significant and they change everything.

- 1 See: <https://www.abc.net.au/news/science/2020-03-05/bushfire-crisis-five-big-numbers/12007716>
- 2 Boer, M.M., Resco de Dios, V. & Bradstock, R.A. Unprecedented burn area of Australian mega forest fires. *Nat. Clim. Chang.* 10, 171–172 (2020). <https://doi.org/10.1038/s41558-020-0716-1>
- 3 See: <https://sydney.edu.au/news-opinion/news/2020/01/08/australian-bushfires-more-than-one-billion-animals-impacted.html>
- 4 Chris Dickman, Don Driscoll, Stephen Garnett, David Keith, Sarah Legge, David Lindenmayer, Martine Maron, April Reside, Euan Ritchie, James Watson, Brendan Wintle, John Woinarski (2020) After the catastrophe: a blueprint for a conservation response to large-scale ecological disaster, Threatened Species Recovery Hub, January 2020. <http://www.nespthreatenedspecies.edu.au/news/a-conservation-response-to-the-2019-20-wildfires>
- 5 See: <https://theconversation.com/six-million-hectares-of-threatened-species-habitat-up-in-smoke-129438>
- 6 See: <https://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources>
- 7 See: <http://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources#a2>

- 8 Chris Dickman, Don Driscoll, Stephen Garnett, David Keith, Sarah Legge, David Lindenmayer, Martine Maron, April Reside, Euan Ritchie, James Watson, Brendan Wintle, John Woinarski (2020) After the catastrophe: a blueprint for a conservation response to large-scale ecological disaster, Threatened Species Recovery Hub, January 2020. <http://www.nespthreatenedspecies.edu.au/news/a-conservation-response-to-the-2019-20-wildfires>
- 9 Senate Environment and Communications Legislation Committee, Senate Estimates 2 March 2020. https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/ec/2019-20_Additional_estimates
- 10 See: <https://www.theaustralian.com.au/inquirer/in-this-new-normal-for-bushfires-business-as-usual-will-no-longer-cut-it/news-story/b243904cc6fcc652c93b5648e8e5185>
- 11 See: <https://www.theage.com.au/politics/victoria/big-impacts-almost-half-of-areas-in-east-gippsland-approved-for-logging-burnt-20200120-p53sx1.html>
- 12 See: <https://www.abc.net.au/news/2020-02-06/logger-contracts-cancelled-by-vic-forests-due-to-gippsland-fires/11937932>
- 13 See: <https://www.forestrycorporation.com.au/operations/about-our-harvesting-operations/fire-affected-native-forests> Note that this probably includes both native forests and plantations.
- 14 Nick Roberts, CEO, FCNSW in evidence to the NSW Legislative Council Industry Committee. Uncorrected transcript, 17 March 2020, p.24
- 15 Climate Council (2019) This is not normal: climate change and escalating bushfire risk. Briefing paper. <https://www.climatecouncil.org.au/resources/bushfire-briefing-paper/>

3 Regional Forest Agreements – no longer tenable

3.1 RFAs – history and objectives

Australia has some of the most beautiful and interesting forests in the world, uniquely dominated by eucalypts and inhabited by wildlife found nowhere else. From the 1960s competing demands of conservation and industry, especially clearing for pine plantations and export woodchipping, made native forests a political battleground. The Commonwealth was involved through its support for plantations and, as conflict grew, the increasing use of export controls to leverage forest conservation and protect the national estate.¹⁶

In 1992 governments attempted to resolve the conflict through a nationally agreed policy framework – the National Forest Policy Statement – signed eventually by all States and Territories and the Commonwealth.¹⁷ Governments agreed to set aside dedicated conservation reserves and other special areas for nature protection and to manage forests available for wood production in a complementary way. In 1994 as controversy over export woodchipping continued to grow, the Commonwealth moved to extricate itself by handing responsibility for native forests to the states under RFAs. Ten RFAs covering more than six million hectares were eventually negotiated by the Commonwealth and the governments of Tasmania, Victoria, WA and NSW between 1997 and 2001.

RFAs are supposed to balance economic, social and environmental demands on forests. They have been in force for 20 years. In practice they have acted as a bulwark normalising logging in native forests even as the vast majority of the industry has moved to plantations. They have not defused conflict but rather deflected it to the states who bear the brunt of ongoing protests, court cases and political pressure.

3.2 National Forest Policy Statement

RFAs have their origins in the 1992 National Forest Policy Statement. Its 11 goals, including for conservation and wood production, were to be pursued within a ‘regionally based planning framework that integrates environmental and commercial objectives so that, as far as possible, provision is made for all forest values’¹⁸ Importantly ‘forest’ is defined to include both native forests and plantations meaning that while nature conservation relies almost exclusively on native forests, industry goals can be achieved from the wider forest estate, notably plantations.

Under the National Forest Policy Statement governments agreed to set aside parts of the native forest estate in dedicated nature conservation reserve systems with complementary management of forests outside reserves

and available for wood production. The National Forest Policy Statement introduced and defined the principles of comprehensiveness, adequacy and representativeness (CAR) as the hallmarks of the system:

- **comprehensiveness** – includes the full range of forest communities recognised by an agreed national scientific classification at appropriate hierarchical levels;
- **adequacy** – the maintenance of the ecological viability and integrity of populations, species and communities;
- **representativeness** – those sample areas of the forest that are selected for inclusion in reserves should reasonably reflect the biotic diversity of the communities.

A technical working group was appointed to elaborate on the principles and determine criteria for applying them to the protection of forest biodiversity, old-growth forests and wilderness.¹⁹ Their report ‘Comprehensive, adequate and representative reserve system for forests in Australia’ consolidated the concept of a CAR reserve system. See further at 3.4.

3.3 What is an RFA in legal terms?

RFAs are intergovernmental agreements between the Commonwealth and State governments. In common with other intergovernmental agreements, they have the appearance and use the language of a private contract, but are actually an exercise of executive power by governments. RFAs are given legislative effect in a messy and complicated way by the *Regional Forest Agreements Act 2002* (the RFA Act) and the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).

The definition of RFA is in the RFA Act is:

RFA or Regional Forest Agreement means an agreement that is in force between the Commonwealth and a State in respect of a region or regions, being an agreement that satisfies all the following conditions:

- (a) the agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions:
 - (i) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;
 - (ii) indigenous heritage values;
 - (iii) economic values of forested areas and forest industries;
 - (iv) social values (including community needs);
 - (v) principles of ecologically sustainable management;
- (b) the agreement provides for a comprehensive, adequate and representative reserve system;

¹⁶ Ajani, Judith (2007) *The Forest Wars*. MUP, Melbourne

¹⁷ Commonwealth of Australia (1992) National Forest Policy Statement. A new focus for Australia’s forests <https://www.agriculture.gov.au/forestry/policies/forest-policy-statement>

¹⁸ National Forest Policy Statement p.4

¹⁹ The JANIS Report also describes the ‘components’ of the CAR Reserve System (formal and informal reserves, values protected by prescription) and ‘criteria’ for the conservation of forest biodiversity, old growth forests and wilderness <https://www.agriculture.gov.au/forestry/policies/rfa/about/protecting-environment>



- (c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions;
- (d) the agreement is expressed to be for the purpose of providing long-term stability of forests and forest industries;
- (e) the agreement is expressed to be a Regional Forest Agreement.

In high-level terms, RFAs represent a settlement between States and the Commonwealth to resolve competing demands for resource extraction and industry certainty on the one hand and conservation on the other. According to the Commonwealth: ‘RFAs sought a reasonable balance between conserving Australia’s forest estate and its enduring use for economic production and recreation’.²⁰ 20 years on, governments claim that they provide ‘an efficient and effective, long-term solution to access and use’ of forests.²¹

On their introduction, RFAs reserved additional native forests to create what were claimed to be CAR reserve systems and lifted controls on export woodchipping. The Commonwealth accredited State laws and processes covering logging and other forestry operations, and made them exempt from the federal EPBC Act if undertaken in accordance with the accredited State schemes. The Commonwealth also agreed to compensate the States if it took any further action to restrict logging.

3.4 CAR reserves – critical underpinnings of the RFA system

From a conservation perspective, the CAR reserve system is the critical set of assumptions, claims and commitments that underpin the RFA system. The CAR reserves comprise both areas of forest reserved from logging plus prescriptions intended to protect environmental values in forests where logging is permitted.

The definition of CAR reserve is found in the RFA itself:

‘Comprehensive, Adequate and Representative Reserve System’ or ‘CAR Reserve System’ means areas under any of the following categories of land tenure -- as described in the JANIS report -- Dedicated Reserves, Informal Reserves and other areas on Public Land protected by prescriptions This reserve system is based on the principles of comprehensiveness, adequacy and representativeness.²²

CAR reserves are assessed and defined regionally. Victoria has five regions, NSW three, and Tasmania and WA are each a single region.

CAR reserves were established upon entry into the RFAs following a Comprehensive Regional Assessment process in each region, including assessments of environmental, indigenous heritage, economic and social values and the principles of ecologically sustainable management. Whether the resulting CAR reserves were in fact adequate is highly contested.²³

²⁰ See: <https://www.agriculture.gov.au/forestry/policies/rfa/about/why>

²¹ See for example: Commonwealth of Australia (2017) *Further assessment of matters under the Regional Forest Agreements Act 2002 (Cth) relating to the 2017 variation of the Tasmanian Regional Forest Agreement*. Commonwealth of Australia, Canberra. <https://www.agriculture.gov.au/forestry/policies/rfa/regions/tasmania>

²² The definition is the same in all RFAs except East Gippsland which contains similar wording and WA which omits reference to areas on public land protected by prescriptions

²³ Whether the reserve systems were in fact comprehensive, adequate and representative was strongly contested from the outset, e.g. Flint, C., D. Pugh, and D. Beaver. 2004. *The good, the bad and the ugly: science, process and politics in forestry reform and the implications for conservation of forest fauna in north-east New South Wales*. Pages 222-255 in D. Lunney, editor. *Conservation of Australia’s Forest Fauna*. Royal Zoological Society of New South Wales, Mosman.

4 The current situation

4.1 Current status of RFAs

As RFAs approached the end of their 20 year terms in NSW, Tasmania, and Western Australia, they were extended for a further 20 years. The agreements in each of these States have also been amended to provide for an automatic extension for a further five years following five yearly reviews, effectively making them perpetual.²⁴

Victorian RFAs expire on 31 March 2020 and extensions are currently under negotiation.²⁵

4.1.1 Tasmania, WA and NSW

The 20-year RFA extensions in Tasmania, WA and NSW were negotiated without re-doing the comprehensive regional assessments on which they rely. Instead an ‘assessment of matters’ (assessment report) was prepared for each state to ‘provide an update on the matters listed in para (a) of the

definition of the RFA in order to support the decision by the parties to enter into the proposed renewal of the RFA’²⁶

The assessment reports collate information from a range of sources, sometimes including case studies. They do not amount to a comprehensive assessment and in particular do not evaluate whether the CAR reserves are in fact protecting biodiversity. The assessment reports for the three states make similar claims, sometimes identically expressed, casting doubt on whether their conclusions are in fact supported by evidence, for example:

This report shows that the Australian and [state] governments have, through a comprehensive and diverse range of processes, had ongoing regard to the listed matters in para (a) of the definition of ‘RFA’ in the RFA Act relevant to the region. (*Tasmania, NSW, WA*)

This report has demonstrated that the Australian and [state] governments have, through a comprehensive and diverse range of processes, formally had ongoing regard to the matters listed in para (a) of the definition of ‘RFA’ ...Given the commitments of both governments to continue implementing the ongoing obligations and

²⁴ See clause 5, 6A and 6B of the New South Wales – Eden, New South Wales – Southern, and New South Wales – North East, and Western Australia Agreements, clause 8 of Tasmanian Regional Forest Agreement.

²⁵ Memorandum of Understanding. Modernising Victoria’s Regional Forest Agreement Framework between the Commonwealth of Australia and the State of Victoria, executed 5 May 2018. <https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/rfa/regions/vic-gippisland/rfa/mou-extension-vic-rfas.pdf>

²⁶ NSW Dept of Primary Industries (2018) *NSW Regional Forest Agreements: Assessment of matters pertaining to renewal of Regional Forest Agreements*. Sydney. The equivalent reports for Tasmania and WA are similar. <https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/forestry/rfa/nsw-rfa-assessment-matters-renewal-rfas.pdf>



commitments of the ... RFA, while allowing for the framework and implementation mechanisms to be responsive to new information consistent with adaptive management and continual improvement principles, it could be expected that the ... management of [state] forests would continue within this framework. (*Tasmania, NSW, WA*)

The application of sustainable yield and the conservation and sustainable use of forest resources for current and future generations has ensured that the health, diversity and productivity of the environment has been maintained for the benefit of future generations. (*Tasmania, NSW*)

In 2017, departmental briefings provided to NSW ministers Paul Toole and Niall Blair, ahead of federal-state meetings about RFA extensions, noted that the Commonwealth had previously raised 'legal uncertainty as to whether the now quite old comprehensive regional assessments (CRAs) that underpin the existing RFAs remain valid for proposed extensions'.²⁷ They report that 'It is in both parties' interests to avoid the need to revisit the costly CRA process.' The estimated \$100 million cost of the original comprehensive regional assessments explains their reluctance to re-do the exercise.²⁸

4.1.2 Victoria

Victoria's five RFAs expire on 31 March 2020. The State and Commonwealth governments are negotiating extensions.²⁹ In November 2019 the Victorian Government's RFA Scientific Advisory Panel, on request, gave advice about the adequacy of the CAR reserve system now and in the future. The Scientific Advisory Panel agreed unanimously that:

the CAR reserve system has not adequately protected biodiversity, and under current management arrangements, will not provide adequate protection in the future³⁰

Their conclusion pre-dates the 2019–20 bushfires which have severely impacted Victoria's forests, especially high biodiversity value areas.³¹ It is difficult to see how extended RFAs can claim to provide for a CAR reserve system in the absence of new comprehensive post-fire reserves.

4.2 A failing system even before the bushfires

The effectiveness of RFAs and the CAR reserves in protecting biodiversity and other forest conservation values was already highly contested prior to the 2019–20 fires. Nationally listed threatened species dwelling in or dependent on

native forests and for which native forest logging is an acknowledged threat have continued to decline.³² No threatened forest vertebrate has moved to a lower threat category since RFAs began. Twelve forest-dependent vertebrates impacted by logging have had their threat status increased to 'Endangered' or 'Critically Endangered' under the EPBC Act since the RFAs came into force, for example the Regent Honeyeater, Western Ringtail Possum, Swift Parrot and Koala (NSW and Queensland populations).

A wide-ranging legal review of the RFA regime in 2013 concluded that 'protection of forests' biodiversity and threatened species would be of a higher standard if regulated by the EPBC Act rather than under the RFA regime'.³³ The reasons include:

- inadequacy of State threatened species protections accredited by RFAs;
- insufficient provision for adaptive management;
- inadequate reviews;
- deficient monitoring, compliance and enforcement; and
- limited third-party participation rights.

The review ultimately concluded:

RFAs have never delivered the benefits claimed for them, for a mix of political, economic, cultural and legal reasons.

From a legal perspective, the main reason the RFAs have failed is that the States do not take the regulatory and legal actions required to adequately protect matters of national significance. This failing cannot be addressed by differently wording the RFA and strengthening States' obligations: rather, the failure is fundamental to the concept of the RFAs and of devolving control of matters of national environmental significance from the Commonwealth to the States.³⁴

Notably, governments have failed to properly assess RFAs' effectiveness and incorporate new information through the life of the agreement.³⁵ This is particularly the case in relation to the adequacy of management prescriptions intended to protect threatened species in forests open to logging outside the reserve system.³⁶

27 Borschmann, G (2018) Exclusive: legal concerns over plan to roll over forestry agreements without reviews. Wide Brown Land. Guardian, 21 March 2018. <https://www.theguardian.com/environment/2018/mar/21/exclusive-legal-concerns-over-plan-to-roll-over-forestry-agreements-without-reviews>

28 Dept Agriculture and Water Resources. Media talking points – Ministerial. Tasmanian Regional Forest Agreement, 15 August 2017. Obtained under FOI

29 See: <https://www.forestsandreserves.vic.gov.au/forest-management/regional-forest-agreements>

30 See: <https://www2.delwp.vic.gov.au/futureforests/forest-values-assessment/scientific-advisory-panel>

31 See: https://www.wildlife.vic.gov.au/home/biodiversity-bushfire-response-and-recovery?fbclid=IwAR2lS1jDz4mSoBCDGamwEpFETlZauS2eRF-EdoVo1_xwmoDLWK_VM8nGd5U

32 The Wilderness Society (2019) *Abandoned: Australia's forest wildlife in crisis*.

<http://www.wilderness.org.au/images/resources/Abandoned.pdf>

33 Feehely, J., Hammond-Deakin, N. and Millner, F. (2013) One Stop Chop: How Regional Forest Agreements streamline environmental destruction. Lawyers for Forests, Melbourne, Australia. https://www.envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/One_Stop_Chop.pdf

34 Ibid at page 5

35 Jacobs, D *Regional Forest Agreements: limitations and current opportunities* (2017) 32(4) Australian Environment Review 94; Lindenmayer David B., Blair David, McBurney Lachlan, Banks Sam C. (2015) The need for a comprehensive reassessment of the Regional Forest Agreements in Australia. *Pacific Conservation Biology* 21, 266-270. <https://doi.org/10.1071/PC15042>

36 Jacobs, D *Regional Forest Agreements: limitations and current opportunities* (2017) 32(4) Australian Environment Review 94.

4.3 Impact of the 2019–20 fires on CAR reserve system

CAR reserves are the core conservation provision in native forests subject to RFAs. In NSW and Victoria, the 2019–20 fires burned through over three million hectares of the national parks and reserves that form the backbone of the CAR reserve system (Table 1).

Table 1. Fire extent (ha), NSW^{37,38} and Victoria³⁹

	VICTORIA BURNED AREA	VICTORIA PROJECTED BURN AREA*	NSW BURNED AREA
Date	11 Jan 2020	11 Jan 2020	28 Jan 2020
Total	1,300,000		5,300,000
National parks and nature reserves	369,932	494,674	2,700,000
Permanent protection on private land	194	3,139	
Immediate protection areas	38,112	10,126	
Special protection zone areas	177,333	157,972	
Prescriptions – species	162,774	149,075	
Prescriptions – modelled old growth	18,932	15,559	
State forest (excluding plantations)			813,000

*Area projected to be impacted by fire and fire suppression activities based on forecast weather and fire modelling

37 NSW Department of Planning, Industry and Environment (2020) Wildlife and Conservation Bushfire Recovery. Immediate Response January 2020. <https://www.environment.nsw.gov.au/research-and-publications/publications-search/wildlife-and-conservation-bushfire-recovery-immediate-response>

38 See: <https://www.theland.com.au/story/6628729/salvaging-the-forestry-industry-after-fires/?cs=4951&fbclid=IwAR01CyUY1usONCSH28hvnN3t2qGdGpTrceqLP8YB6ITN7-toYqskNaRk6jo>

39 Victorian Department of Environment, Land, Water and Planning (2020) Victoria's bushfire emergency: Biodiversity response and recovery. Preliminary report – Version 1. <https://www.wildlife.vic.gov.au/home/biodiversity-bushfire-response-and-recovery>



Before and after the bushfires in the Kuark forest, Victoria

In Victoria, the Department of Environment, Land, Water and Planning has analysed the impacts of the fires on areas within the CAR reserves.⁴⁰ It reports that the bushfires have impacted on a large part of the CAR reserve system in eastern Victoria, both dedicated reserves and areas protected by prescription:

- 42 national parks and conservation reserves have 90–100% of their land within the fire extent at the time of assessment;
- large national parks have been severely affected; for example, Snowy River NP (74% in current fire extent), Errinundra NP (50%), Croajingolong NP (69%);
- 647,000 ha of special protection zones and forests protected by prescription are within the current fire extent or projected impact area.

The impacts of fires on the NSW CAR reserves do not appear to have been analysed but are likely to be equivalent to, if not greater than, in Victoria.

As the Victorian assessment makes clear, the impact of the bushfires on the CAR reserve system is not restricted to fire damage to forests in parks and nature reserves. Other forms of protection covered by the CAR reserves such as protections under policy commitments, special protection zones in areas otherwise available for logging and other prescriptions have also been significantly impacted by the fires.

It can also be expected that the foundations of the prescription-based reservation incorporated in the CAR reserves will have been disrupted by the fires. For example, new species will qualify for listing as threatened under State laws and the EPBC Act; the threat category of currently listed species may change; and current conservation advices or recovery plans will need significant revision. The result is that it is no longer plausible to claim that the prescription-based protections that are a key component of the CAR reserve system can achieve their objectives irrespective of whether the threatened species are found in a fire-impacted area or not.

It is important to understand that this summer's fires are not just a singular disruptive event but part of a pattern of increasingly frequent destructive and transformational forest fires that has been building for two decades and will continue.⁴¹ This raises fundamental questions for the whole RFA system and its future as a scheme for reconciling the competing objectives of resource extraction and conservation.

The provision of CAR reserves is linked by the RFA definition to assessments of environmental and other values. In NSW and Victoria, RFA forests and CAR reserves have been

catastrophically impacted by the fires. In other regions such events must be treated as probable if not inevitable in any assessment. This is a 'step change' in the environment, not susceptible to 'adaptive management' or 'continual improvement' responses.

Regardless of whether CAR reserves were previously comprehensive, adequate or representative, in 2020 parties to an RFA cannot reasonably believe or make such a claim.

4.4 RFAs – silent on responding to catastrophic impacts

RFAs do not require either State or Commonwealth governments to indicate that they recognise and will respond to the fundamental change presented by this summer's bushfires. Nor is there any sign that the Commonwealth or State governments are considering using RFAs in this manner. State-owned logging enterprises such as VicForests in Victoria and Forestry Corporation of NSW, and their regulators, are yet to indicate if and when they will respond to Commonwealth and State government post-bushfire biodiversity reviews and recovery planning.

In Victoria, VicForests has committed to not harvest in unburnt parts of forests affected by the 2019–20 fires until the ecological status of these areas has been assessed.⁴² It has however participated in removing 'excess timber' from roadsides and fire protection work, widely seen as excessive.⁴³ The wood can be used commercially.

The Victorian Supreme Court recently ordered an interlocutory injunction to halt logging in unburnt habitat of bushfire-affected threatened species. Citizen science group WOTCH's contentions included that the precautionary principle requires VicForests to await and adopt in certain ways State and Commonwealth government responses to the impact of this summer's fires on biodiversity. The Supreme Court found that this, among other arguments, raised a 'serious question to be tried' and logging is halted in certain areas until a full hearing.⁴⁴

The Court also found that the 'balance of convenience' weighed in favour of WOTCH and the making of the injunction:

While the defendant has demonstrated it will suffer some short-term loss, and that the long-term loss may exacerbate any likely shortfall in production, this pales in comparison to the potential threat of irreversible environmental damage to the fire-affected threatened species. All five of the threatened species have been identified by the state government as on the path to extinction. It goes without saying that once these species are extinct, there is no going back.⁴⁵

40 See: <https://www.wildlife.vic.gov.au/home/biodiversity-bushfire-response-and-recovery>

41 See: <https://www.sciencedaily.com/releases/2020/01/200114074046.htm>
<https://theconversation.com/as-bushfire-and-holiday-seasons-converge-it-may-be-time-to-say-goodbye-to-the-typical-australian-summer-holiday-129337>

42 See: <http://www.vicforests.com.au/fire-management-1/vicforests-bushfire-response>

43 See: <https://www.theage.com.au/national/victoria/conservation-watchdog-investigates-is-bushfire-tree-removal-overzealous-20200305-p5476c.html>

44 WOTCH v VicForests (No2) [2020] VSC 99 at [149].

45 WOTCH v VicForests (No2) [2020] VSC 99 at [144].

In NSW, logging is re-starting in compartments burnt just weeks earlier.⁴⁶ The EPA (regulator) has approved slightly modified conditions for the logging to proceed⁴⁷ but there is no reference to the need to assess the impacts on fire-affected species identified by the Commonwealth as requiring urgent management intervention.⁴⁸ This is despite the forests at stake being within the known pre-fire distribution of several of them.

46 Lindenmayer, D and Robinson, D (2020) Logging is due to start in fire-ravaged forests this week. It's the last thing our wildlife needs. The Conversation. <https://theconversation.com/logging-is-due-to-start-in-fire-ravaged-forests-this-week-its-the-last-thing-our-wildlife-needs-132347>

47 See: <https://www.epa.nsw.gov.au/your-environment/native-forestry/bushfire-affected-forestry-operations>

48 See: <http://www.environment.gov.au/biodiversity/bushfire-recovery/research-and-resources#a2>



5 Policy and legal implications

Several policy and legal implications flow from the analysis outlined above. In general, this summer's bushfires, but also past fires and the likelihood of similar fires in the future, challenge the basis of the RFA system as an approach for attempting to reconcile competing conservation and resource extraction objectives. RFAs are premised on a relatively unchanging environment. Global heating and especially this summer's fires demonstrate that, if this idea was ever tenable, the uncertainties and the impact of climate change and fires mean this is no longer the case.⁴⁹

In assessing the RFA system as an approach to meeting conservation objectives, it is important to be clear that these conservation objectives are not 'at large' – they are intended to achieve conservation outcomes that are the equivalent of those that would be achieved under the impact assessment and regulatory regime contained in the EPBC Act.⁵⁰ RFAs achieve EPBC Act objectives by substituting long-term and relatively inflexible commitments for the case-by-case assessment of logging under the EPBC Act. If RFAs are unable to achieve EPBC Act objectives because of the impact of the fires on the CAR reserve and the likelihood of similar impacts in the future, then the foundation of this substitute system is undermined.

A final important point in relation to the current status of RFAs is that the renewals that have already happened in NSW, WA and Tasmania have not been informed by an up-to-date comprehensive assessment. Governments have used assessments that are more than 20 years old with 'updates' to justify these renewed 20-year plans – even without the impact of the fires the basis for continuation of RFAs is questionable.

Specific policy and legal implications include the following.

5.1 Policy basis for RFAs has become untenable

As outlined above, the policy assumptions that inform the scheme (in particular that conservation values have been or can be secured through the CAR reserve) are no longer valid. This means that the RFA system is now based on an untenable premise which requires a political response – for example, abandoning the agreements.

5.2 Legal status as agreements

The legal status of intergovernmental agreements is uncertain – they are not the equivalent of private contracts although they may share some of the characteristics of these agreements.

Generally, 'intergovernmental agreements are exchanges of political promises without any contractual operation and

not otherwise creating legally enforceable obligations'.⁵¹ As a consequence 'the legal effect of an agreement between governments must be determined by reference to the rules that apply to an exercise of executive power'.⁵²

There may be situations however where the terms and expressed intention means that intergovernmental agreements take on the character of a private agreement.⁵³ The situation is complicated in the case of RFAs as they contain different statements as to their intended legal effect. For example, clause 9 of the East Gippsland RFA states that the agreement is 'not intended to give rise to legally enforceable rights or obligations between the parties' whereas some, but not all, of the NSW RFAs are intended to be binding.⁵⁴

If RFAs are considered to be private contracts, at least in some respects, then the impact of the fires would likely be sufficient for the agreement to be discharged by reason of frustration. 'Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract'.⁵⁵

It would be open to either the Commonwealth or a State party to act now to declare an RFA at an end or to refuse to enter a new one notwithstanding previous commitments to do so. Indeed, given the profoundly changed circumstances, governments ought to cancel the RFAs.

5.3 Possible invalidity?

Considering RFAs as an exercise in executive power rather than private agreement-making raises questions as to the validity of the exercise of that power where there has been a significant change in circumstances, such as the widespread destruction caused by the 2019-2020 bushfires. Whether or not new consequences such as invalidity in whole or in part apply in relation to agreements entered into prior to the past summer's fires is unclear. Different considerations are likely to apply to any fresh decision to enter into or extend an agreement. These considerations would be determined by reference to the terms of any governing legislation and the legal principles that govern administrative decision-making.

5.4 Flow-on consequences – RFA exemptions under EPBC may longer apply

A further legal consequence relates not so much to the validity of the RFAs but whether the RFAs provide a legally sound basis for the continued availability of exemptions

49 See for example Craig, Robin Kundis, 'Stationarity is Dead' – Long Live Transformation: Five Principles for Climate Change Adaptation Law (March 24, 2010). Harvard Environmental Law Review, Vol. 34, No. 1, pp. 9-75, 2010; FSU College of Law, Public Law Research Paper No. 355; FSU College of Law, Law, Business & Economics Paper No. 09-20. Available at SSRN: <https://ssrn.com/abstract=1357766>

50 Friends of Leadbeater's Possum v VicForests [2018] FCA 178 at [219] – [221].

51 French, Robert *Executive and Legislative Power in the Implementation of Intergovernmental Agreements* [2018] MelbULawRw 12; (2018) 41(3) Melbourne University Law Review 1383. See also Saunders, Cheryl, *Intergovernmental agreements and the executive power*, (2005) PLR 294, at 299.

52 Saunders (2005), *ibid*.

53 *Ibid*.

54 See for example clauses 16 and 105 of the Southern NSW RFA, <https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/forestry/rfa/2018-southern-rfa-variation.PDF>

55 Codelfa Construction Pty Ltd v State Raile Authority of [1982] HCA 24; (1982) 149 CLR 337

for forestry operations under the EPBC Act. The availability of the exemption to the regular referral, assessment and approval provisions contained in Part 3 and Part 9 of the Act depends on compliance with the State forest management systems accredited in the RFA.⁵⁶ It is arguable that compliance with the State-accredited schemes is no longer occurring because of the impact of the fires. For example, requirements intended to deal with changing circumstances or uncertainty, such as the precautionary principle, may not be met given continued logging in threatened species habitat pending the government assessment of and response to the impact of the bushfires on biodiversity. The WOTCH case (referred to at part 4.4 above) indicates there are serious questions to be tried in relation to compliance with the State scheme in Victoria following the fires..

⁵⁶ See *Friends of Leadbeater's Possum v VicForests* [2018] FCA 178 at [224] to [226].

6 Bushfires – implications for the RFA system

It will be months to years before the full impact of this summer's fires for Australia's forests and wildlife can be evaluated and medium- to long-term strategies for recovery formulated on the basis of monitoring and research. Global heating makes it certain that catastrophic fire events will be more frequent and increasingly severe across the country as time goes on.

6.1 RFAs cannot be fixed within the framework of the RFAs themselves

Current and future fires challenge the foundations of the RFA system. They are no longer a tenable basis for enabling native forest logging to continue exempt from contemporaneous impact assessments and Commonwealth scrutiny. This is because, under the factual circumstances of extreme fire changing the forest ecosystem so frequently and rapidly, it is impossible to proceed with logging without an impact assessment that considers the environment at the time of the proposed logging – that is, a contemporaneous assessment that looks at the forest being logged and the species in it at that point in time. The uncertainty makes planning and resource allocation based on long-term assessments impossible.

The damage to CAR reserves caused by this past summer's fires highlights the problem. The damage to the core conservation commitment of the RFAs demands a political response





but none has been forthcoming. Rather, the presumption appears to be business as usual. In NSW, forests burned just weeks earlier continue to be logged. In Victoria it is likely that RFAs due to expire on 31 March 2020 will be extended. The Commonwealth has given no indication that it will move in respect of RFAs to support priority species identified by its wildlife and threatened species bushfire recovery Expert Panel.⁵⁷

RFAs themselves do not provide a framework for resolving the problem. As noted above (section 3.4) the RFAs do not require the Commonwealth or Victoria or NSW to respond to the catastrophic impact of the fires.

The newer versions of RFAs adopted in NSW provide for five-year reviews and audit at the option of a party. These too are inadequate to the task of assessing and realigning forest management in response to the impact of fires that challenge the very basis of the RFA system. The next five-year review of NSW RFAs does not commence until 2024.

RFAs are legally uncertain in their current form but cannot be fixed within the framework of the RFAs themselves. They were failing before the fires and are even more untenable now.

⁵⁷ See: <http://www.environment.gov.au/biodiversity/bushfire-recovery/expert-panel>

6.2 A new era

Support to end native forest logging is widespread.⁵⁸ In an open letter to the Parliament of Australia a group of eminent scientists say:⁵⁹

Sadness at the losses from the fires sears our souls. Worse might well lie in wait.

We write to ask you to respond to the climate, fire, drought and biodiversity loss crises with an immediate nationwide cessation of all native forest logging.

This summer's fires mark the start of a new more threatening, complex and uncertain era for Australia's forests and wildlife. Their best chance for recovery is through a concerted well-funded Commonwealth-led program based on research and monitoring. The alternative is extinctions and ecosystem collapse.

⁵⁸ See: <http://forestsandclimate.org.au/national-overview/stop-logging-native-forests/>

⁵⁹ See' <https://www.tai.org.au/content/bushfire-response-international-experts-open-letter-call-native-logging-ban>

Environmental Justice Australia

Telephone: 03 8341 3100

Email: admin@envirojustice.org.au

Website: www.envirojustice.org.au

Post: PO Box 12123, A'Beckett Street VIC 8006

Address: Level 3, the 60L Green Building, 60 Leicester Street, Carlton

