



South East Forest Rescue

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"this is about recognising that the amount of greenhouse gas emissions from cutting down trees is very significant. The world puts a lot of carbon into the atmosphere because people cut trees down [rather] than preserve them. And we know that deforestation is a significant driver of greenhouse gas emissions. [We] are about looking at ways in which we can preserve these forests. It's in our national interest to find ways to do that because these forests put carbon into the atmosphere when they are cut down." Penny Wong, Minister for Climate Change (Cth), 2010.

Dear Sir/Madam,

I am writing to inform you of the civil war on the south coast between Forests NSW and conservationists, and why conservationists are choosing direct action. It is time for your government to act by either repealing the civil litigation exemptions in the *Forestry and National Park Estate Act 1998* (NSW) and/or ending native forest logging.

Summary of Facts

The rights of NSW citizens to participate in enforcing appropriate levels of environmental quality in native forests under Forests NSW control abruptly ceased with the enactment of the *Forestry and National Park Estate Act 1998* (NSW) and the consequent signing of the *Regional Forest Agreements*.¹ The exemption or privation clause under s40 of the Act ensures there is no environmental democracy and no consultation in areas covered by the RFAs. Individuals or communities call a meeting, the community objects, Forests NSW log regardless.² The rights of public participation is limited to making submissions to the State and Federal governments if the various pieces of legislation come up for review.³

It is understood that privileged groups seldom give up their privileges voluntarily. Reinhold Niebuhr states 'groups tend to be more immoral than individuals'.⁴ Therefore it should come as no surprise that the FNPE Act and its subordinate regulations were enacted to further the interests of Forests NSW, South East Fibre Exports, the Construction Forestry Mining and Energy Union, the National Association of Forest Industries, the logging and haulage contractors.⁵

Sometimes legislation arises to further the interests of one group or another, against other interest groups and sometimes the entire society.⁶

When the legislation was introduced by the government the community was given assurances that:

The agencies which currently have enforcement and compliance powers will continue to have those powers and continue to use them to ensure that the licences are adhered to.⁷

Despite numerous legitimate and often severe breaches referred to the Department of Environment, Climate Change and Water by various communities and organisations, there has not been a

¹ For an historic overview of the RFAs see Jan McDonald, 'Regional Forest (DIS) Agreements: The RFA Process and Sustainable Forest Management,' *Bond Law Review* [1999] 295.

² The last meeting was called by the police 10/9/08 to announce they would have 'zero tolerance' to protest in Bermagui where the community were trying to protect remnant koala population on the South Coast.

³ See Aidan Ricketts & Nicole Rogers 'Third Party Rights in NSW Environmental Legislation: the Backlash' 16 EPLJ [1999] 2.

⁴ Reinhold Niebuhr was pre-eminent US philosopher and 20th century theologian and is Barack Obama's favourite theologian.

⁵ Now Nippon Paper Group trading as South East Fibre Exports; NAFI is the very well funded lobbying body of the woodchip industry, based in Canberra.

⁶ See W. Chambliss & R. Seidman, *Law, Order and Power*, Addison-Wesley Pub. Co., 1982, pp77-78.

⁷ Minister Yeadon, *NSW Legislative Assembly Hansard*, 12 November 1998.

prosecution for breaches of any regulation on the south coast since the FNPE Act was introduced.⁸ This is contrary to Section 2 of the *Interpretation Act 1987* (NSW) which states:

In any Act or Instrument, the word 'shall', if used to impose a duty, indicates that the duty must be performed.

The legislation exemptions were put in place because the environmental impact statement processes were costly, time consuming and became increasingly more difficult for Forests NSW to comply with as their anachronistic practices were held up to the microscope. Protests were also very costly and time consuming for the police and the State.⁹ The labour government attempted to deal with the conflict by imposing the exemptions and restrictions on civil litigation but:

Since the contradictions remain the same, and the legislation is merely an overlay, it is likely to give rise to further conflicts at a later date.¹⁰

Is This Just?

The legislated exemptions of the *Forestry and National Park Estate Act 1998* (NSW) are not 'rightly framed' and are classic examples of 'flawed legislation.'¹¹ They are in breach of international obligations on the environment and human rights, they are inequitable, unjust and unfair. Their only purpose is to serve the 'grasping' at the expense of community.

The grasping man who is concerned with goods, and the unfair man who commits unjust acts are unjust, unfair and unequal.¹² The equitable man is the man who chooses and does such acts and is no stickler for his rights but tends to take less than his share, and this state of character is equity, which is a sort of justice,¹³

And:

The law bids us to do both the acts of a brave man (not to desert our post), a good tempered man (not to strike another), and those of a temperate man (not to commit adultery) and the rightly framed law does this rightly.¹⁴

If the equity maxims that 'equity will not suffer a wrong to be without a remedy' and that 'equity looks on that as done which ought to be done' then the exemptions, in the *Forestry and National Park Estate Act 1998* (NSW) and all subordinate legislation, are inequitable.¹⁵

St Thomas Aquinas stated 'an unjust law is a human law that is not rooted in eternal law and natural law'. Using the law merely for the sake of law is insufficient to maintain a cohesive society. When law and order fail to establish justice they become 'dangerously structured dams that block the flow of social progress'.¹⁶ Solzenhitsyn stated:

Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyses man's noblest impulses.

A just law is any law that uplifts humanity, any law that keeps humanity oppressed is unjust. It is unjust because it is a distortion of our common idea of right. The exemptions are unjust because the RFA regime traps both conservationists and loggers in a system of deception that distorts their common perceptions of each others shared humanity. It is unjust because the lawbreakers are protected by the police, who we perceive to be the upholders of the law. We believe that society must protect the robbed and punish the robber. Conservationists see loggers as the robbers of the future of the planet, and loggers may see conservationists as the robbers of their livelihoods, but:

⁸ Information provided by Ian Cranwell, head of DECC EPRG, (2009).

⁹ For an extensive history of native forest logging and the RFA process see Ajani J., *The Forest Wars*, Melbourne University Press, 2007.

¹⁰ Bottomely S., and Parker S., *Law in Context*, Federation Press, 1997, p81.

¹¹ Sax JL, *Defending the Environment*, Vintage Books, 1971, Ch 6 pp 155-156.

¹² Aristotle, "The Nicomachean Ethics" *Book V* in *Society, Law and Morality*, Frederick A Olafson (ed.) (1961) Prentice-Hall Inc. NJ. p26.

¹³ Ibid at p 34.

¹⁴ Ibid at p27.

¹⁵ Cook, Creyke, Geddes and Hamer, *Laying Down the Law* 7th ed. LexisNexis Butterworths Aust. (2009) [2.10] p19.

¹⁶ Martin Luther King Jnr., Letter from a Birmingham Jail, in *Why We Cant Wait*, (1964), Signet Classic, (2000) p 64; viewable online at <http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf> as of 1/03/2010.

It is somehow wrong to despoil the environment, to act in ways that waste natural resources and wildlife, and to gratify pleasures of the moment at the expense of living creatures who are no threat to us.¹⁷

What better example of humanity's tragic separation, from each other and the earth, their awful estrangement, than the killing of the very thing which provides them with life.

Why Direct Action?

The steps that are taken toward non-violent direct action are not taken lightly. Firstly there is a collection of facts to determine whether injustice exists. Then there is a process of negotiation with the people who are likely to affect change. Following this there is a period of self examination and questioning and then, if there has been no remedy, direct action.

We have been waiting a very long time for action on climate change and for the realisation that the industrial destruction of our native forests is one of the biggest causes. The European nations are moving with broadband light-speed toward combating the climate crisis, meanwhile we creep snail-mail like toward any sort of consensus that climate change exists. Perhaps it is easy for those whom it is a constant and very pleasant 21°, due to their home, car then office's air conditioning, to say 'wait', but when you see the razing of once beautiful and majestic native forests, the escalating rates of extinction of birds and animals, and the dry creek beds then maybe you will understand why we cannot wait.

We have sought negotiations only to find that the power structures of both the State and Federal governments and their subordinate departments are unwilling to act in good faith. It is argued by the governments that NSW must meet it's wood supply agreements, but as is common knowledge, the wood supply agreements were flawed from the outset, the hectare figures for area available for logging were incorrect. The wood supply volumes were designed to log a hundred years worth of logs within twenty years.¹⁸ FNSW has been logging over quota since the RFAs were signed therefore they are running out of product. An example of good faith, accountability and transparency is, FNSW regional manager Mr Ian Barnes, when asked for a copy of the wood supply agreements stated:

The Regional Forest Agreements and Forest Agreements require Forests NSW to establish long term wood supply agreements. I am not aware of a document which describes these wood supply agreements.¹⁹

The Victorian Government declared a *force majeure* on Vic Forests contracts in the wake of the bushfires. Under the 'doctrine of frustration' if the community blockade for an extended period of time your government may declare a *force majeure*.²⁰ As Forests NSW native forests section were \$16 million in the red this year and \$14 million last year we see this as an advantageous economic alternative.

As You probably aware force majeure means an event (other than the payment of money) arising from;

- (a) an act of God, an epidemic, disease, fire, rain, flood, storm, accident, natural disaster, calamity.
- (b) an industrial dispute.
- (c) an act or omission of government or government department or instrumentality including in relation to obtaining any approvals from government agencies and changes of law.

¹⁷ D'Amato A., 'What Obligation Does Our Generation Owe the Next? An Approach to Global Environmental Responsibility' 84 *American Journal of International Law* [1990] 190.

¹⁸ *Return of the Ark: The Adequacy of Management Strategies to Address the Impacts of Climate Change on Biodiversity*, Legislative Assembly, Standing Committee on Natural Resource Management (Climate Change), Sydney, NSW, 2009.

¹⁹ Pers Com Ian Barnes to Tony Whan, 4/03/2009.

²⁰ See Butterworths, *Halsbury's Laws of Australia*, (at 4 March 2010) 110 Contract, V11 Discharge of Contract, (8) (A) and (B).

(d) war, sabotage, riot, blockade, demonstration, civil disobedience or unlawful act by any other person.

(e) explosion, failure of power supply, loss, destruction or failure of plant or equipment.

Or any similar act which prevents a party from performing its obligations (in whole or in part) for a period usually in excess of 1 month.

Other events include;

(a) a world wide collapse in market demand which causes the closure or cessation of operations or production for a period not less than three months

(b) a collapse in market demand as a result of variations in the exchange rate of the Australian dollar which causes the closure or cessation of operations or production for a period not less than three months

(c) the party being or under legislation presumed or taken to be insolvent (other than as a result of failure to pay a debt or claim they are the subject of a good faith dispute)

If the company is prevented from complying by force majeure then no claim can be made by Forests NSW.

Similarly no claim can be made by the company if Forests NSW is prevented by force majeure. The State of NSW will only be excused for any failure to perform its undertakings if prevented from doing so by force majeure.

Until such action is taken it seems the only real recourse for conservationists and community organisations, in areas covered under the RFAs, is to stand up, sit down and lock on for justice, by actions of civil dissent. As Lon Fuller so aptly put it:

The rule of law actually justifies disobedience, if governments do not govern in accordance with certain norms which are at the real core of the ideal. Particular violations of the rules of law by a government have the consequence that the government rules are not laws at all and so there is no moral obligation to follow them.²¹

A person who breaks a law that their conscience tells them is unjust and accepts the penalty in order to arouse the conscience of the wider community, is expressing the highest respect for the law.

This holds true for all of us. The situations that affect local communities in areas that fall under the RFA regimes throughout the country impact everyone. Greenhouse gas emissions in one State know no boundaries. No one is an outsider when it comes to combating climate change just as no one is an outsider when it comes to pursuing justice - injustice anywhere is a threat to justice everywhere, and this injustice will continue unless the civil litigation exemptions in the *Forestry and National Park Estate Act 1998* (NSW) are repealed and native forest logging is ended.

You are in the most effective position to do what is honourable, to be chronicled as the peacemakers of this conflict. I hope you and the people will rise to meet the challenge of these dire hours, but even if you do not I have hope for the future. We will have action because our common goal is one of survival. The fight is unstoppable.

*"We must not forget that what we are looking for is not only what is just without qualification, but also political justice."*²²

Kind Regards

L. Stone BA(Com)

Lisa Stone

South East Forest Rescue

²¹ Lon Fuller, *The Morality of Law*, Yale UP, 1964, Ch 2.

²² Aristotle, above n 12 p31.