

Robert Crews Submission

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Leg Co
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Introduction

The debate surrounding the Tasmanian Forest Agreement Bill 2012 (the Bill) has mostly focused on the merits or otherwise of the proposed reservation of a significant parcel of land. This is the political element but of equal importance is the decline in the respect for the legislative process and the enormous and often excessive pressure being applied to Members of Parliament to make hurried decisions, when their role is one of careful consideration free of intimidation, threat or coercion.

This submission does not make a case for or against the worth of forests versus reserves, instead considers whether the process utilised to arrive at the contents of the Bill is consistent with sound governance. A series of questions is posed to test the validity of the various stages leading up to the creation of the Bill.

Does the Bill achieve the stated aim of ending conflict?

For the Bill to actively manage the potential for conflict, at the very least, one would expect the elements that represent “conflict” to be contained somewhere within the document and the means by which such elements will be overcome, prevented or proscribed. Yet within both the Bill and the Agreement there appears to have been significant effort made to avoid any wording that in any way suggests what form the conflict had taken up to this point or what might be hoped to be avoided in the future. The nearest that can be ascertained with even a remote connection to such future aspirations is found in Schedule 1 (6) ... ***“respect for employees and contractors rights and social protection throughout the supply chain”***, ironically attached to the ***“Vision for industry”***. There is no mention whatsoever of what the Environmental Non Government Organisations (ENGO’s) will contribute towards the attainment of “Peace in the Forests”.

The emphasis on the term “durability report”, seems to suggest that this report or the lack of will by some unexplained means, resolve the conflict. Most of what constitutes a “durability report” is aimed at ensuring the gains of the ENGO’s are protected rather than the aim of ending the practices engaged in by those ENGO’s, with what would be in these reports expressed, not in the Bill, but in the Tasmanian Forests Agreement 2012 (the Agreement), being most importantly:

“42. All elements of this agreement should be reviewed as part of each durability report, with key elements to be considered including progress with recognition of the agreed vision in legislation, implementing the reserve gazettal’s; achievement of wood supply commitments including specialty timbers; agreed transition plan and its implementation; short, medium and longer term residue solutions; ongoing public and proactive support for the outcomes of this agreement, including in markets for Tasmanian forest products; support for the recommendation that governments assess the World Heritage nomination; adequate progress with the achievement of certification, adequate and satisfactory outcomes in respect of this agreement, including but not limited to the clauses about Institutional Arrangements

for Parks and Production Forest Management; equitable implementation of the industry restructuring and assistance packages; and support by governments for implementation of this agreement.”

It is to be remembered that the Agreement is notionally only binding on the signatories. Non-signatory ENGO's have expressed no commitment to the Agreement or Bill, and in any event there is very little required to commit to. Virtually all of the measures contained in the Bill relate to what the industry is prepared to sacrifice, with no compensatory consideration forthcoming from the ENGO's, nor does it include financial benefits in dollar terms, these only being expressed mostly via media release.

The original Statement of Principles that began the process of negotiation, called for the inclusion of **“sanctions”** in any subsequent Agreement. Sanctions would be a necessary component of any binding agreement where one party gives up a tangible financial benefit and the other party effectively either gives no enforceable promise or, where there exists third parties that are outside the agreement that can frustrate the negotiated terms, a means of bringing them into the overall coverage. Such sanctions would possibly be by way of increased penalties for actions previously undertaken by protestors which exceed legitimate political activities. For instances, where activists enter an excluded zone and place themselves in harms way in order to frustrate the carrying on of lawful work, then a penalty significantly greater than that which applies at present, and without provision for judicial reduction, could apply.

Is the Agreement legally enforceable?

On the surface of the Agreement, there appears to be a chance that it could be enforceable by way of court action. Given that the principle terms are obligations owed by the forest industry, with no specific actionable offering by the ENGO's, it would only be in the event of a claim for breach of contract lodged by an ENGO that could precipitate court proceedings. Nothing within the Agreement provides any recourse to the courts for the Forest Industry signatories.

However, the courts also take into consideration the intent of parties to any contract, and a signed agreement such as this would constitute a contract. The only consideration that the ENGO's could foreseeably give to the forest industries, is that they would cease carrying out past practices, many of which have resulted in prosecutions for unlawful acts. Courts view the promise to not do a certain act as a form of consideration to an agreement, eg If a company car is provided for use between home and work provided the recipient promises not to use it for any other private purpose, then that would be an enforceable contract.

What is not permissible in any contract is the doing of any unlawful act, which automatically voids and renders unenforceable any contract. Thus, any implied undertaken, whether written in the contract or not, that involves the doing of or not doing of an illegal or unlawful act would nullify the contract. The import of this is clearly expressed in the following quote by the eminent jurist Lord Holt:

“Upon this reasoning , which seems to be conclusive, all the late decisions have been founded, and the rule is now perfectly established, that no agreement to do an act forbidden by statute, or omit to do an act enjoined by statute is binding”

In this respect, Section 73 (1) and 74 of the Tasmanian Criminal Code Act 1924, relating to Unlawful assembly ; Section 118 (1) Disobedience to lawful authority; Sect 141 Creating a nuisance; Section 273 Unlawful injuries to property; and Section 298 Inciting to commit crimes, would all be relevant actions that would have occurred in the past, and as described in the Minister’s Second Reading speech as a ***“decades long and destructive conflict”*** [Pg 1].

The question to be answered by the Legislative Council then, is whether they can enact legislation to give force to an unenforceable agreement?

Is the Agreement lawful?

It is a separate matter as to whether an agreement is legally valid or whether it is unlawful. An unlawful agreement contains a specific act that violates either a common law tenet or is in breach of a statute.

A general principle of law is that it is wrongful to interfere with the contractual rights of another and to knowingly and intentionally induce a breach of a contract, is a civil wrong and has long been accepted by the decision of *Lumley v Gye (1853) 2 E & B 216*. A person who is responsible for inducing a breach of contract is liable for the injury caused by that breach.

Under the Agreement, Clause 4 (b), requires:

4. The Signatories agree to ongoing native forest and plantation wood supply for industry from State forest, including high quality sawlogs, peeler wood and specialty timber in the following terms:

b. Peeler wood supply to meet renegotiated contracts arising out of this agreement.

This refers to a contractual obligation between Forests Tasmania (FT) and Ta Ann, known as the Wood Supply Agreements, which specifically guarantee the supply and purchase of a defined amount of peeler wood. Neither FT nor Ta Ann were signatories to the Agreement or agreed to the renegotiation of the contracts prior to the signing of the agreement. Even though there has been a reduction in the compulsory purchase of wood due to an oversupply at Ta Ann, this was post Agreement and represents a financial loss to FT. Under the terms of the Wood Supply Agreements, if either party fails to meet its supply or purchase volumes, then compensation must be paid for the unmet quantity at the full purchase price. Thus, both FT and Ta Ann would face a potential financial loss arising from the Agreement: FT will lose even if there is no claim for compensation as their contractually guaranteed revenue will be reduced by any renegotiated supply volume and Ta Ann will lose the future income potential from the previous agreed volumes once the market improves.

It is also an established tenet of law that both parties to an agreement that causes harm to another party through any action designed to cause a breach of contract, are equally liable for any subsequent loss. Thus all signatories to the Agreement would be held financially liable to any and all losses sustained by non-signatories whose rights have been transgressed. Even though the forest industry representatives could be considered to be colluding under duress, the common law has been clearly established through superior court rulings that there was always the option to abstain from such acts.

The signatories to the Agreement stand to gain a financial benefit either directly, through the payment of allowances for participation, or indirectly through the provision of funding for industry restructure. With the money for this is being provided by the Commonwealth, the actions of the signatories would fall within the scope of certain Commonwealth statutes, specifically the ***Criminal Code Act 1995 Division 138 Unwarranted Demands with Menaces***.

Menaces is defined as:

(a) a threat (whether express or implied) of conduct that is detrimental or unpleasant to another person: or

(b) a general threat of detrimental or unpleasant conduct that is implied because of the status, office or position of the maker of the threat.

The only bargaining position brought to the negotiating table by the ENGO's was the ability to continue to carry out acts of menace as described previously as being of an illegal nature. It is not necessary that the threat, expressed or implied, be made in secret, merely that it be made. A reasonable person would be likely to view a threat to continue a campaign of disruption as an unwarranted menace.

For an act to be considered a threat under Division 138, then:

For an individual

***(a) (i) the threat would be likely to cause the individual to act unwillingly; and
(ii) the maker of the threat is aware of the vulnerability of the individual; or***

(b) the threat would be likely to cause a person of normal stability and courage to act unwillingly

For a person not an individual

(a) the threat would ordinarily cause an unwilling response; or

(b) the threat would be likely to cause an unwilling response because of a particular vulnerability of which the maker of the threat is aware.

There can be a reasonable assumption that the ENGO's were fully cognisant of the vulnerability of the forest industry and it would be unlikely that the industry representatives would be willing to consider any association with those that have had a part in their current predicament.

The defence against a claim of unwarranted menaces is that the person making the threat believes that their actions are a proper means of reinforcing their demands and that they have reasonable grounds for making the demands. As the actions taken by the ENGO's in the past have resulted in penalties being proscribed by courts, it would be difficult for a defence based on the premise of justifiable social demand. To conclude that unlawful acts are justified by virtue of a privately held social belief, would be in direct conflict with the Australian legal system.

This could be illustrated by notionally progressing down the path of social activism driving legislative enactment through the coercion of a third party, such as where activists opposed to horse racing on the grounds of animal cruelty, perpetuate acts of vandalism upon racetracks or sit upon a tripod erected in the middle of the racetrack on race day, causing the racetrack owner to agree to ceasing all races involving horses and just having the jockeys run around the track. Here a legitimate activity under current statutes, horse racing, would be subject to the reasonable grounds of animal welfare justifying the means to the end.

It could also be argued that because the Agreement has been supported and enabled by both the Tasmanian and Commonwealth Governments, then it would automatically receive immunity from any unlawfulness. *Division 139.2 of the Criminal Code Act 1995* has the effect of joining by association any Commonwealth official with the making of an unwarranted demand with the intention of causing a loss that is directly or indirectly related to the official's capacity as a public official or any influence that official has.

The question to be answered by the Legislative Council then is, is the Agreement legally enforceable and or unlawful, and if so, can the Legislature enact legislation based on unenforceable or unlawful contracts?

Is there a legal nexus between the Bill and the Agreement?

For the previous section to apply, there needs to be a direct nexus between the Bill and the Agreement. Strangely, there is no mention of the existence of the Agreement within the Bill. It would be expected that some form of reference giving providence to the outcomes of the Agreement would be made. This could possibly be an attempt to insert a legal firewall between any adverse court ruling on the Agreement and the Bill.

Courts take into consideration when examining legislation subject to a legal challenge, what the intent was at the time of formulation and also the content of the Ministerial readings when tabling the Bill. Despite there being no nexus other than in the name of the Bill contained within it, the Minister's Second Reading does expand on this. Most significantly, the use of the word "enacted" in the speech, unequivocally binds the Bill with the Agreement:

“This Bill is a continuation of the Tasmanian Government’s commitment to support that process - it is a Bill that establishes a robust and transparent process by which the Agreement reached by the members of the Reference Group of Signatories can be publically debated and enacted by the Parliament.”

The Legislative Council is therefore asked to determine whether the Agreement is valid, as it is this document that is being debated, not the contents of the Bill. If the first stage of the process, the Agreement reached by the Reference Group is invalid, then it would appear a natural progression that it would be unsound to “enact” legislation based upon it.

A further nexus between the Bill and the Agreement in the Second Reading speech is:

“The Bill requires the Minister, by order, to establish a Special Council. With the Signatories as the initial members, the Council is responsible for promoting the Vision contained in the Agreement; overseeing the implementation of the Agreement; preparing durability reports for the Minister; providing advice to the Minister on such matters in relation to the administration of the Act as are specified in the Minister’s order; and such other matters as the Minister specifies.”

The Legislative Council is also thus being asked to approve the appointment to a Special Council, members of the Reference Group that have shown to be in favour of unlawful acts as a means to achieve their social objectives. This is an important decision as, rather than the Bill ending the conflict, it in essence continues the process of negotiation, as the members of the Special Committee will still have to reach full agreement as to what constitutes “Durability”; it not being a defined term.

The question the Legislative Council must answer here is, should the legal status of the Agreement be determined before debating the Bill, through a proper examination by a court of relevant jurisdiction?

Has the original Statement of Principles been carried forward into the Agreement and the subsequent Bill?

Whilst some areas of the original Statement of Principles have been expanded upon, one vital principle has been very quietly dropped from the Agreement and the Bill; that of any binding sanctions against the parties if they fail to observe their commitments. Note:

“Legislation Require State and Federal legislation to implement agreed outcomes arising from these Principles including appropriate review mechanisms, milestones and sanctions”

The Statement of Principles as a relevant document was effectively excised by the final Agreement:

“59. This agreement stands alone and supersedes all previous agreements between the Signatories, including the Statement of Principles 2010.”

So, whilst the original intention was to have sanctions, any possible adverse measure against the parties, and one would be excused from concluding that the ENGO's would stand to lose most from any sanctions, has been removed.

Does the Legislative Council believe that sanctions should be reinstated into the Bill in accordance with the original Statement of Principles?

Will the Bill enhance or detract from the perceived investment environment of Tasmania?

There have been many previous attempts at resolving the forest industries problems. A considerable amount of government funding has already been expended on attracting private investment to the State only to have the sovereign risk of doing business in Tasmania increased by subsequent actions. Businesses invest capital for the long term and may take decades to recover the initial amount.

Only six years prior to this current "peace deal", the government entered into binding wood supply agreements with Ta Ann that supposedly provided resource security to at least 2026. At that time even the status of Tasmanian sovereign risk was considered the equivalent of a third world politically unstable nation, necessitating an unheard-of inclusion of a provision relating to the demise of the agreement by virtue of a change of political direction. Note the following extract from the Houn Wood Supply Agreement:

21. SOVEREIGN RISK

21.1 If an Event of Force Majeure arises due to a change in Law, or an exercise of executive power, the Purchaser and Forestry Tasmania agree to cooperate with each other to the extent reasonably practical in order that each Party may seek compensation from the relevant Crown for loss suffered as a result of that Event of Force Majeure.

21.2 For the avoidance of doubt, the Purchaser acknowledges that, despite being a governmental statutory corporation, Forestry Tasmania does not have the power to prevent the occurrence of the Events of Force Majeure referred to in Clause 21.1.

One of the advocates of passing this Bill, is on record as having given unqualified belief that Tasmania had turned the corner as far as sovereign risk associated with the forest industry:

Statements of Support for Ta Ann Tasmania

"With such extensive areas of forest protected and new projects such as Ta Ann's rotary veneer mills underway, I believe that Tasmanians can look proudly to their regrowth forests as the basis of a world class timber industry." - The Hon. Paul Lennon, former Premier of Tasmania

Can the Legislative Council have total confidence in this Bill sending a positive sovereign risk message to potential investors in Tasmania?

Does the Bill achieve the stated aim of ending the conflict?

There seems little doubt that the Bill will not end conflict, only pass the activist baton to a different group of ENGO's. Even during the negotiation process when it would be normal to expect an effort would be made to demonstrate that an agreement would lead to a new political paradigm, illegal trespass and disruptive acts against Ta Ann were undertaken by ENGO's outside the process. These ENGO's have indicated that they will continue to protest until all logging in native forests ceases.

Another consideration is that by acceding to the demands of activists in the forests, they will be emboldened to launch a major offensive against the next environmental target; the mining industry. One of the quirks of the Bill is that it bans the removal of trees for the purposes of timber-getting but allows the removal of those same trees for mining. It would seem more desirable to remove a tree for forestry, which would then be renewed by regrowth, as contrasted by strip mining that might take several decades to even start to regenerate.

The need to constantly reach a consensus between the warring parties as to what constitutes durability, when just getting to a theoretical agreement took an inordinate amount of time, may well prove to be wishful thinking and just lead to a reopening of negotiations.

Taking into consideration all the past attempts at achieving peace in the forests, is the Legislative Council one hundred percent certain that this Bill will result in a durable outcome of at least 10 years?

Are there alternatives to this Bill?

All discussion around the issue of forest management has centred on the parties to the Agreement. There has been no genuine consideration of other possible outcomes. Minister Burke was most forceful in his pronouncement of there being "no Plan B". As any competent practitioner of applied innovation will attest, there is always a Plan B (and C, D, E etc).

What has not been discussed is the current forest practices versus possible alternative forest practices. As someone with decades long experience with environmental management, it is clear that it is the past practices of the forest industry which is unsustainable and detrimental to native forests, not the extraction of timber per se. In particular, the massive amount of clear-felling of coupes, has caused a concerted backlash against forestry and images of this are shown whenever a media story airs on television, regardless what angle the story involves.

By applying controls on forest practices, through legislation or regulation, much of the angst emanating from the issue would be minimised. There are prime examples of where past low impact forest harvesting has led to no long term degradation; as demonstrated at Liffey Falls Reserve.

Walking through these areas, unless one notices the stumps of harvested trees, the average visitor would be forgiven for thinking it was virgin forest.

Plan B could include:

- No clear-felling in Native Forests; restricted to plantations
- Maximum amount of timber to be extracted per hectare on a percentage basis
- Established minimum harvesting cycle (circa 20 years)
- Prohibition on harvesting of steep slopes
- Extended buffer zones bordering water courses to avoid siltation and to protect this most bio-diverse zone
- Prohibit the felling of old trees that provide essential habitat to native animals
- Emphasis on introducing more higher-value specialty timbers to plantations instead of low-value pulpwood species
- Research into low impact harvest techniques which reduces the construction of roadways (eg commercially available airships that can lift 500 tonnes)
- Moratorium on wood chip exports
- Fast-track alternative uses for residues, of which many are available

There are many more possibilities to formulate a vastly superior offer to the one being debated, including merely placing the area of contention under moratorium for a period of say five years via a sunset clause Regulation. It achieves the stated aim of protecting the areas but keeps future options open.

Has there been an attempt to influence the Legislative Council by way of threat?

By far the most disconcerting element of this debate has been the amount of undue pressure that has been applied to members of the Legislative Council. Having an independent composition, the vote cannot be marshalled along strict party lines, as in the lower house. It is this independence that provides Tasmania with an opportunity for a genuine house of review.

Whilst there is nothing wrong with concerned stakeholders lobbying and voicing their opinions on any issue before the House, it is quite another matter for any person to attempt to apply undue influence to any or all members by way of any threat. The *Tasmanian Criminal Code Act 1924* makes specific provision for any such event:

Clause 70 Interference with Parliament: Unlawfully influencing Members

(1) Any person who, by force or fraud, or by threats or intimidation of any kind, interferes with the free exercise by either House of Parliament of its authority, or with the free exercise by any Member of either House of his duty or authority as such Member, is guilty of a crime.

Charge:

Interfering with Parliament

(2) Any person who, directly or indirectly, by fraud, or by threats or intimidation of any kind, influences a Member of either House of Parliament in the exercise of his duty or authority as such Member, or induces him to absent himself from the House or from any Parliamentary committee, is guilty of a crime.

Charge:

Unlawfully influencing a Member of Parliament

Very careful consideration must be given to the foregoing. What is acceptable lobbying and what is a threat, intimidation or fraud?

In this respect, the threat made by Ta Ann to withdraw from their operation in Tasmania if the Bill was not approved by the Legislative Council by the end of the year, may well have constituted an offence under Clause 70 of the Criminal Code. Ta Ann has in place contractual protection for its rights under the Wood Supply Agreements, so its financial position was ensured regardless of the outcome of the vote. The claim that the ongoing environmental process was damaging its sales is contrary to what is declared on Ta Ann's website, where the decline is attributed to the collapse of the Japanese economy; Japan representing the vast majority of plywood uptake. Japan is also not noted for being overly environmentally conscious; witnessed by the insistence on continuing southern ocean whaling.

Ta Ann's most recent Annual Report makes no mention of damage caused by the ongoing conflict but does highlight that a new process has been developed that will replace a large quantity of hardwood veneer with a Malaysian grown specie of Acacia and that the roll-out of this technique is one of their top priorities, along with the expansion of their palm oil business which is currently providing the majority of their profit. Palm oil production is a far more environmentally controversial activity than is controlled forestry.

Not surprisingly, when the Council voted to send the Bill to committee, Ta Ann's motivation became more obvious through the negotiation of lower contractual supply of veneer logs from FT, without any incurred penalties, as provided for under the Wood Supply Agreements. Could this constitute a fraud?

Another potential attempt to influence Parliament, was the threat by Minister Burke to cancel the funding package for the forest industry restructure if the Bill was not passed by the end of 2012. This was despite numerous extensions given to the Reference Group by the Executive Government. Again, post event this threat seems to have evaporated and could thus be viewed as being merely an attempt to influence Parliament. There would be no statutory protection of a Commonwealth Minister who attempts to use undue influence to intimidate a Member of the Tasmanian Parliament.

The Legislative Council should give serious consideration as to whether such actions as these are a permissible part of the argy-bargy of politics or represent a crime under the Criminal Code, thus requiring referring the matters to the appropriate authority for investigation.

Summary

The Members of the Legislative Council have an unenviable task in deliberating this Bill. It is one of the most contentious issues imaginable. Yet, beyond the politics of the issue, must be a strict adherence to the law making process or else our society may well descend into anarchy.

Whether or nor the Bill is passed as is, amended or rejected is irrelevant. This should be taken as an opportunity to re-establish the authority of Parliament to be above and beyond the sort of blatant intimidation that has occurred in recent times, by adhering strictly to the rule of law.

It is neither the end of the world if the Bill is rejected, nor the beginning of an era of peace if it's passed, just a bend in the road that divides social philosophies. What is needed is a totally new approach where Parliament leads the debate rather than has its arm constantly twisted by vested interests, usually with the threat of job losses which inevitably seem to occur regardless.

About the Author

The author has over 20 years working in environmental management in National Parks, on Endangered Species Recovery, degraded land recovery and lecturing in Environmental Management as well as consultancy work. In addition, the author holds Post Graduate qualifications in Leisure & Tourism Management, Applied Innovation and is currently in the final stage of a Masters degree in Entrepreneurship.

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