

Chapter 10: Regional Forest Agreements

- 10.1 The operation of Regional Forest Agreements (RFAs) is a highly contentious issue and opinion about the outcomes and successes of these agreements is polarised. The Interim Report examined these issues in detail.
- 10.2 Like the debate itself, responses to the Interim Report fell into two camps – those who oppose any changes to RFA forestry arrangements¹ and those who will only accept full application of the EPBC Act under all circumstances.² There was, however, agreement from the forest industry and environmental NGOs that the failure to complete reviews of the RFAs needs to be rectified.³
- 10.3 RFAs are intended to be a means of managing forest resources to deliver environmental outcomes as well as economic and resource security to the forest sector. Environmental protection under the RFAs relies on the implementation of commitments to establish a Comprehensive, Adequate and Representative (CAR) reserve system together with ecologically sustainable forest management systems that deliver continuous improvement.
- 10.4 RFAs have provided considerable certainty for forest industries through reduced Commonwealth regulation and the establishment of long-term frameworks for forest management. As well, they have increased reserves and conservation outcomes. RFAs have reduced community conflict over native forest harvesting but have been implemented in a way that has not realised the envisaged benefits in transparency and public accountability. If this issue is not addressed it could form the basis for renewed conflict, undermining public support for continuation of the current RFA arrangements into the future.
- 10.5 Notwithstanding arguments about the benefits of RFAs, there is significant community concern that the environmental outcomes from RFAs are not being delivered. Public submissions to this Review were critical of the content and administration of the RFAs, as well as the limited mechanisms for ensuring that RFA forestry operations are compliant and best practice. Submissions also raised concerns about the impacts of RFA forestry operations on protected matters and argued for increased transparency of their operation.
- 10.6 The re-involvement of the Commonwealth in coupe-by-coupe assessment of forest practices that would follow from winding back the RFAs would not represent best practice regulation and would cause unnecessary duplication and delay without necessarily providing increased conservation benefits.
- 10.7 Submissions from forest industry groups highlighted that RFAs have resulted in the reservation of large tracts of forests, providing substantial protection for biodiversity. The National Association of Forest Industries describes the extent of the reserve system as follows:

To ensure adequate protection of forest biodiversity, the RFAs established a CAR reserve system. Overall, the aim was to place in nature conservation reserves 15% of the pre 1750 distribution of each forest type, 60% of the existing distribution of each forest type if vulnerable, 60% of existing old growth forest, 90% or more of high quality wilderness forests, and all remaining occurrences of rare and endangered forest ecosystems. In most regions these targets were exceeded. For example in Tasmania, 79% of old growth forests are protected in the reserve system, while in Western Australia 100% of old growth forests are protected.⁴
- 10.8 As a consequence of the Tasmanian RFA, 79 per cent of old growth forest and 97 per cent of high quality wilderness is in reservation.⁵ This exceeds the global target of effective conservation of 10 per cent each of the world's ecological regions, set out under the *Convention for Biological Diversity*.⁶ These achievements, which often go overlooked or unremarked in debate, deserve greater public recognition.

1 See e.g. Interim Report Comment 9: Timber Communities Australia (Derwent Valley Branch); Interim Report Comment 10: Timber Communities Australia (Huon Resource Development Group); Interim Report Comment 11: Timber Communities Australia (Meander Resource Management Group); Interim Report Comment 16: Timber Communities Australia (Southern Tasmanian Branch); Interim Report Comment 17: Timber Communities Australia (Bruny Island Primary Industries Branch); Interim Report Comment 20: Timber Communities Australia (Hellyer Branch); Interim Report Comment 27: Timber Communities Australia (East Coast Tasmania Branch); and Interim Report Comment 28: Timber Communities Australia (West Coast Tasmania Branch).

2 See e.g. Interim Report Comment 97: Mr Tom Baxter; Interim Report Comment 92: Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden; Interim Report Comment 36: The Green Institute.

3 See e.g. Interim Report Comment 106: National Association of Forest Industries (NAFI), p.4; and Interim Report Comment 77: National Parks Association of NSW.

4 Submission 133: National Association of Forest Industries.

5 Interim Report Comment 112: Tasmanian Government, p.6.

6 *Convention on Biological Diversity* Conference of the Parties (COP) Decision VII/30, Target 1.1.

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- 10.9 Notwithstanding this, concerns remain among environmental groups, for example the Wilderness Society stated that:
- Large scale clear felling and burning of forests continues, most notably in Tasmania and Victoria with significant impacts on resident forest species.⁷
- 10.10 The interaction between the EPBC Act and forestry operations is often referred to as an ‘exemption’. This term does not, however, accurately reflect the relationship. The rationale for the RFA provisions in the Act recognises ‘that in each RFA region a comprehensive assessment has been undertaken to address the environmental, economic and social impacts of forestry operations’.⁸ Rather than being an exemption from the Act, the establishment of RFAs (through comprehensive regional assessments) actually constitutes a form of assessment and approval for the purposes of the Act.
- 10.11 Correspondingly, like other activities assessed and approved under the Act, RFAs should be regularly monitored and audited to ensure they continue to meet the agreed conditions of that approval. The weakness in this area needs to be rectified.
- 10.12 The RFA exemption terminology is problematic. Although the RFA provisions of the Act read like an exemption, they operate akin to a licence. The problem has been that the approval has continued to operate irrespective of the extent to which the commitments contained within the agreements have been implemented, particularly in relation to environmental outcomes. The absence of transparent mechanisms to test non-compliance with RFAs and assess governments’ performance on RFA obligations causes community concern and mistrust. The lack of transparency also limits the ability of parties to verify whether core environmental commitments or ‘license conditions’ of the RFAs are being met. In the absence of such verification, the credibility and sustainability of RFAs is at risk.
- 10.13 The Commonwealth Forestry Minister and the Commonwealth Environment Minister both have a significant interest in the performance of the RFAs. While joint decision-making by the two Ministers is one possibility in relation to the RFAs, it would be more appropriate for each Minister to be given primary responsibility for different aspects of them. Consistent with this, the recommendations of this Review rest on the basis that the Commonwealth and State Forestry Ministers should continue to be primarily responsible for completing adequate RFA reviews but questions about whether the provisions of the EPBC Act should apply to any RFA are a matter for the Environment Minister.
- 10.14 The proposals in this Chapter aim to transform the interaction between the Act and RFA forestry operations so that they better reflect an ongoing arrangement akin to a licence. The approval, which has been issued on certain terms (as outlined in the RFAs themselves) allows forestry operations to occur without being subject to Part 3 of the Act. If the terms of the approval are not complied with, or if there is insufficient reporting information to verify that compliance, then the approval should be terminated.
- 10.15 The existing approval granted by s.38 should continue, subject to improvements in Commonwealth oversight, public input mechanisms and performance assessment, to ensure that the precise terms of the RFA are being followed and best practice outcomes are being achieved as envisaged.
- 10.16 To the extent that governments, as RFA signatories, are properly implementing the agreements and regularly presenting the data and evidence to verify this, these changes would not alter existing regulatory arrangements for RFA forestry activities.

DEMONSTRATION OF ENVIRONMENTAL OUTCOMES

- 10.17 The reserve system delivered by the RFAs has generated significant environmental benefits. However, where the reserve system is not of itself sufficient to deliver security for biodiversity, the biodiversity outcomes of RFAs are also determined by the forest management practices applied to harvest strategies.
- 10.18 Reporting on the biodiversity outcomes of RFAs, particularly the on-ground performance of RFAs and adaptive management capacity of forest management practices, has been patchy and has not been delivered according to agreed RFA timeframes. Failure to complete timely reviews and inadequate processes for public complaints has fuelled public mistrust in the management of RFA forests and does not engender the level of confidence needed to continue the current treatment of RFA forestry operations under the Act.

⁷ Submission 153: The Wilderness Society, p.13.

⁸ Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1999 (Cth), para.[113].

RFA Reviews

- 10.19 Each RFA requires a review of its operation every five years. Completion of these reviews is a joint responsibility of the Commonwealth and the relevant State. Tasmania is the only State to have completed RFA reviews on time. Reviews have not been completed for the other RFA regions, and while some review processes have begun, all mainland State reviews are now well behind schedule. This is clearly unacceptable.
- 10.20 A range of submissions agreed that the RFA reviews needed to be completed. The Australian National Office of Timber Communities Australia submitted that:
- Provided the RFA's are properly reviewed and any changed social, environmental and economic factors considered as appropriate through those reviews TCA considers that there is no justification to alter the current interactions between the EPBC Act and the RFA's.
- 10.21 In order to demonstrate that environment protection outcomes are being achieved in RFA forests, the RFA reviews need to focus on the performance of RFAs in achieving their objectives, including protecting biodiversity, and not just report on processes under the agreements. Reviews should specifically address relevant matters of national environmental significance (NES) and report on verifiable information.
- 10.22 The Act should be amended so that the special treatment of RFAs under the EPBC Act continues only if the conduct and reporting of agreed RFA obligations and commitments, particularly through RFA five yearly reviews, is satisfactory. The performance requirements for continuation of the approval under s.38 of the Act should be set out in legislation. These should be linked to the original commitments contained in the RFAs themselves, and should be conducted by the Commonwealth Forestry Minister in consultation with the Commonwealth Environment Minister.
- 10.23 Each RFA agreement provided for accreditation of ecologically sustainable forest management systems, with an emphasis on continuous improvement and adaptive management. RFA reviews should therefore focus on the performance of a state's Ecologically Sustainable Forest Management (ESFM) framework in delivering sustainable forest ecosystems.
- 10.24 This could give rise to opportunities for streamlining forest reporting. The result of the RFA reviews could be re-accreditation of the State's ESFM framework for the purposes of the Act. This could also help increase the credibility of state forest management. The reviews should include a consideration of performance within the CAR Reserve System as well as on lands where RFA forestry operations take place (public and private).
- 10.25 Key matters to consider when undertaking a review should be whether the following have been demonstrated:
- the state's ESFM framework is capable of adapting to new information in a timely manner – this could include systems to ensure harvesting plans are consistent with recovery plans, conservation advice and action statements;
 - matters of NES are consistently and uniformly incorporated into the state's ESFM framework and given appropriate consideration (consistent with information provided under the Act, such as listing advice);
 - there is an ongoing commitment to regular, comprehensive and statistically powerful assessment, monitoring and analysis against relevant indicators;
 - data collection records attributes of both the Reserve System and the RFA production forest;
 - data collection is carried out at appropriate spatial scales and frequencies;
 - analysis of data is robust, transparent, consistent with best practice scientific methods and available for peer review;
 - feedback received through research and compliance and audit processes is incorporated into forest practice systems;
 - ongoing performance is reported and such reports are publicly available;
 - forest-based staff are provided with regular training and development opportunities in site assessment, survey and monitoring methods; and

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- public access to data, planning and reporting information is provided wherever possible.

These reviews should provide clear evidence of:

- a transparent, systematic and credible process for investigating alleged breaches of forest practice systems and the RFAs;
- a regular, independent performance auditing program that is applied to forest plans and their environmental outcomes and is capable of demonstrating compliance with management arrangements and of providing a public feedback loop for best practice management;
- an ESFM framework that is sufficiently flexible to adapt to emerging threats to forest values and changes in public values; and
- a CAR reserve system that is being adequately maintained and managed.

- 10.26 The internationally agreed criteria for measuring sustainable management of temperate and boreal forests, the *Montreal Process Criteria and Indicators on the Conservation and Sustainable Management of Temperate and Boreal Forests* (the Montreal Process Criteria and Indicators) and the complementary *Framework of Regional (Sub-National) Level Criteria and Indicators of Sustainable Forest Management*, should be used where appropriate to report against RFA commitments. The Montreal Criteria include seven criteria relating to:
- (1) conservation of biological diversity;
 - (2) maintenance of productive capacity of forest ecosystems;
 - (3) maintenance of forest ecosystem health and vitality;
 - (4) conservation and maintenance of soil and water resources;
 - (5) maintenance of forest contribution to global carbon cycles;
 - (6) maintenance and enhancement of long-term multiple socio-economic benefits to meet the needs of society; and
 - (7) legal, institutional, and economic framework for forest conservation and sustainable management.⁹
- 10.27 Underneath these seven criteria are 64 indicators designed to assess current conditions and monitor change over time.¹⁰ The Montreal Criteria and Indicators are widely used for forest reporting in Australia – for example in Australia’s *State of the Forest Reports* (SOFR) and forest reporting in Victoria¹¹ – and, if consistently and comprehensively applied, would form a reasonable basis for more effective performance auditing of RFAs.
- 10.28 All RFAs contain provisions for the State to develop sustainability indicators consistent with the Montreal Process Criteria and then to implement and monitor them, subject to them being practical, measurable, cost-effective and capable of being implemented at the regional level. To the extent that some Australian states have not settled these indicators they should be finalised as a priority, by no later than the end of 2010.
- 10.29 These indicators are likely to form the basis for performance monitoring, and by extension, retention of the s.38 approval. Accordingly, the Commonwealth Environment Minister should have a role in their final approval.
- 10.30 Assessments of the performance of RFAs would be more meaningful, transparent and robust if a nationally consistent and independent system of auditing was implemented on a regular basis during the periods between the scheduled five yearly reviews. This would ensure that RFA systems were maintained, improvements agreed in five yearly reviews were implemented and forestry operations continuously improved.
- 10.31 Systems which could be audited include codes of forest practice; management plans for CAR reserves; implementation of recovery plans for threatened species; the completeness of threatened species lists; compliance systems; the abundance, condition and extent of listed communities, species and critical habitat; and any other major systems agreed in the RFAs. These performance audits would be at a strategic level, that is, not coupe-by-coupe. The results of these systems audits should be publicly available.

⁹ Further information on the Montreal Criteria and Indicators can be found at: <http://www.daff.gov.au/forestry/international/fora/montreal>.

¹⁰ It may be reasonable to not use all 64 criteria, as occurs in Victoria, if the criteria cannot be measured against or the measurement would not be meaningful.

¹¹ Interim Report Comment 111: Victorian Association of Forest Industries.

- 10.32 Comments received in response to the Interim Report noted the range of reporting on forestry that currently occurs through the SOFR.¹²
- 10.33 These reports are not suitable substitutes for RFA reviews as they do not provide sufficiently targeted information. The sustainability indicators for the RFA reviews are based on the Montreal Process Indicators which make up parts of the indicators for the SOFR. Hence the SOFR and the RFA reviews could be completed concurrently. The benefit of this would be that RFA reviews would then use the most up to date sustainability information for this part of the review.

Mechanism to Ensure Completion of Adequate Reviews

- 10.34 Effective and timely completion of robust scheduled reviews is critical to monitoring the performance of RFAs. A process should be established through amendment of the RFA and EPBC Acts whereby the full provisions of the EPBC Act can be applied to RFA forestry operations where adequate reviews have not taken place or serious non-performance is identified.
- 10.35 The Commonwealth Forestry Minister should be responsible for ensuring that RFA reviews are completed in a timely fashion and their recommendations implemented. The Forestry Minister should also be responsible for providing advice to the Environment Minister on the performance of the RFA.
- 10.36 After consulting with the Forestry Minister, the Environment Minister would then determine whether or not to suspend s.38, in full or in part, and apply the protections of the EPBC Act. The tests for this decision should be based on the extent to which:
- the RFA reviews are not completed;
 - the RFA reviews indicate serious non-performance, including: failure to implement and maintain forestry codes of practice, failure to commit to and implement recovery plans for threatened species in RFA areas, failure to establish management plans for CAR reserves, failure of the ESFM framework to protect species and failure to investigate alleged breaches of the RFA and correct any proven breaches; or
 - the RFA reviews are deemed to be inadequate to judge performance against the Agreement.
- 10.37 As with other key decisions, the Act should specify that, before making this decision, the Commonwealth Environment Minister must consult with other relevant Commonwealth Ministers. In cases where the RFA review does not contain the information specified in the Agreements or the Regulations, or when the information provided is inadequate for the Minister to assess the impact of forest operations on matters of NES, the Environment Minister should have the power to request further information.
- 10.38 The power to suspend s.38 and apply the provisions of the Act to individual forestry operations would have significant consequences and should not be taken lightly. Given the potential significance of this sanction it would be necessary to precisely specify the 'termination events' identified above and thresholds representing a material breach.
- 10.39 As a natural justice provision, the Environment Minister would initially issue a warning notice that highlights the failure to complete a required review, where the outcomes of previous reviews have not been implemented to previously agreed standards, or where performance under an RFA is assessed as inadequate in a scheduled review. The notice would specify a period within which this non-compliance can be remedied before it is decided whether to issue the suspension notice. In general, this suspension would apply 90 days after notification. This mechanism is intended to provide a strong incentive to undertake the reviews and implement their recommendations, to report on the performance of the RFA and to ensure good forest practice, and to do so in a timely fashion.
- 10.40 Provided the reviews were satisfactorily completed, and the results of monitoring and audit demonstrated that forest management practices have delivered environmental outcomes that are part of the agreement, the current RFA arrangements would remain. It would only be where the Environment Minister was not satisfied that the review was adequate for judging performance, or the Minister deemed the review outcomes unsatisfactory, that alternative regulation should be applied.

¹² Interim Report Comment 10: Timber Communities Australia (Huon Resource Development Group), p.4. See also Interim Report Comment 59: Mr Alan Ashbarry; and Interim Report Comment 112: Government of Tasmania.

- 10.41 As the RFA reviews for mainland States are all in arrears, a transitional period of two years could be set to allow these reviews to be completed before deciding whether a warning notice should be issued. At the end of this two year period, s.38 of the Act would be suspended and the protections of the Act would apply to the RFAs unless the Commonwealth Environment Minister certified that the reviews had been completed satisfactorily.

Ability for the Environment Minister to Direct Compliance Investigations

- 10.42 A recurring issue has been the ability of the Environment Minister to be satisfied that operations in RFA forest regions with potential impacts on matters of NES are actually consistent with the RFA, and therefore satisfy s.38 of the Act. If implemented, the systemic mechanisms for performance assessment and review discussed above should be the mechanism for ensuring compliance with RFAs.
- 10.43 If systemic reforms are not implemented, then the Environment Minister should be able to undertake compliance audits and investigations of forest operations, where the Minister has reasonable belief or suspicion that forestry operations are not being undertaken in accordance with the RFA and are having a significant impact on matters of NES. Amendments to the Act would be required to extend the current compliance powers to forests.

Memorandum of Understanding for RFAs

- 10.44 DEWHA and the Australian Government Department of Agriculture, Fisheries and Forestry (DAFF) currently have a Memorandum of Understanding (MOU) in relation to the ongoing RFA obligations, compliance and monitoring. Under the MOU, DEWHA has limited capacity to request information from forestry operators relating to compliance with RFAs and must refer all third party notifications of suspected non-compliance to DAFF for follow-up.
- 10.45 The MOU between DAFF and DEWHA should be re-negotiated to strengthen DEWHA's capacity and role in the investigation of suspected non-compliance with RFAs and provide for greater regulatory oversight, efficiency and opportunities for increased inter-agency cooperation.

Public Notification of RFA Breaches

- 10.46 Submissions raised concerns about the inadequacy of mechanisms for members of the public to bring forward complaints about RFA forestry operations having significant environmental impacts. They argued that these were not as good as those available under the compliance and reporting provisions of the EPBC Act. It should be noted that some cases of RFA non-compliance should be managed by State agencies, rather than intervention by Commonwealth Ministers.
- 10.47 While complaint procedures do exist for allegations of RFA or forest practice code breaches, submissions suggest that they are poorly understood, and their standards and requirements are unclear. There were also concerns regarding independence. This affects the credibility and proper governance of the RFAs.
- 10.48 The current concerns would be addressed if the parties to the RFAs compiled information about the number and nature of complaints made and the actions taken to address any identified problems, and released this information to the public on an annual basis. The Commonwealth and States should develop processes for regular public reporting of all complaints received and the outcomes of investigations. Independence of the complaints investigation system should be one of the performance criteria for continued operation of s.38.

Senate Inquiry into the Operation of the Act

- 10.49 The Senate Inquiry into the operation of the Act recommended that this Review:
- recommend proposals for reform that would ensure that RFAs, in respect of matters within the scope of Part 3 of the EPBC Act, deliver environmental protection outcomes, appeal rights, and enforcement mechanisms no weaker than if the EPBC Act directly applied.¹³
- 10.50 The Review proposes that the full mechanisms of the Act should be applied to RFA forestry operations if there is demonstrated non-compliance with an RFA, and there should be greater compliance monitoring and performance auditing. The aim is to improve the landscape based system of environmental management provided by RFAs rather than add on elements of the case-by-case system of approvals.
- 10.51 Overall, RFAs provide a solid and effective structure for environmental protection, however, significant gaps exist in implementation, monitoring and compliance auditing, and it is these gaps that present ongoing risks. The aim is to strengthen RFA implementation, reporting and compliance, and to provide for alternative assessment and regulation only where this does not occur.

Rolling Renewal of RFAs

- 10.52 The concept of rolling renewal of RFAs was raised during a consultation with Timber Communities Australia.¹⁴ The idea was that good performance could be rewarded with extension of the existing RFAs. Currently RFAs are to remain in force for 20 years, with the parties jointly determining the process for extending the agreement as part of the third five yearly review.
- 10.53 One approach could be that if a State is meeting its obligations under an RFA to an acceptable standard the RFA could be extended for a further ten years at the completion of the 15 year review (that is, the RFA would run for another 15 years from the 15th anniversary of the RFA's commencement), with five yearly reviews continuing at 20 and 25 years from commencement.
- 10.54 In theory the rolling renewals could operate so that:
- if a State meets the performance requirements specified above and the outcome of the 15 year review is satisfactory, the Commonwealth could offer the State a ten year extension of the RFA;
 - States that do not meet these performance requirements should not be offered an extension of the RFA until they demonstrate that these requirements are being met; and
 - States that do not wish to extend an RFA may allow that Agreement to lapse at the end of its 20th year.
- 10.55 If a system of rolling renewals were to be implemented it would need to provide a forward looking mechanism for incorporating emerging threats and policy issues such as changing community values, climate change adaptation, carbon values and projections of resource availability.
- 10.56 The reforms proposed in this section of the Report are significant and introduction of a system of rolling renewals could be an important catalyst for change.

¹³ The Senate Standing Committee on Environment, Communication and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999: First Report* (2009) para.[1.106] http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/final_report/index.htm.

¹⁴ Mr Jim Adams, Timber Communities Australia (pers. comm.), 10 September 2009; Mr Allan Hansard, National Association of Forest Industries (pers. comm.), 6 October 2009.

Recommendation 38

The Review recommends that the current mechanisms contained in the Act for Regional Forest Agreement (RFA) forest management be retained, but be subject to rigorous independent performance auditing, reporting and sanctions for serious non-compliance.

The Commonwealth and States should agree on sustainability indicators by the end of 2010. Subject to the concurrence of the Environment Minister, these indicators would provide a basis for performance auditing.

The RFA reviews undertaken by the Commonwealth Forestry Minister (Forestry Minister) and the relevant State party, in consultation with the Environment Minister, should and be expanded to focus on the performance of RFAs in meeting their agreed outcomes, including protecting biodiversity and continuous improvement of a State's Ecologically Sustainable Forest Management (ESFM) framework.

The Act should be amended so that the Environment Minister may apply the full protections of the Act, if, after consulting with the Forestry Minister, the Environment Minister is satisfied that the review:

- (1) has not occurred within the timeframe specified in the RFA;
- (2) indicates serious non-performance, including -
 - (a) failure to implement and maintain forestry codes of practice;
 - (b) failure to commit to and implement recovery plans for listed threatened species in RFA areas;
 - (c) failure to establish management plans for Comprehensive, Adequate and Representative (CAR) reserves;
 - (d) failure of the ESFM framework to protect species;
 - (e) failure to investigate alleged breaches of the RFA and correct any proven breaches; or
 - (f) the audit outcomes are not implemented to agreed standards; or
- (3) does not provide enough information to judge if there are serious non-performance issues.

The Review notes that a number of RFA reviews are outstanding and recommends a transitional period for the conduct of these reviews. Section 38 will continue to apply to RFA forestry operations if the Environment Minister certifies that the review process has been satisfactorily conducted within two years of the commencement of the amendments.

Recommendation 39

The Review recommends that the Australian Government work with the States to:

- (1) improve the independence of compliance monitoring; and
- (2) develop processes to make publicly available information about the number and nature of complaints about Regional Forest Agreement operations and the results of any investigations.