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SUBMISSIONS OF THE COMMONWEALTH

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
Division: General **No VID 1228 of 2017**

FRIENDS OF LEADBEATER'S POSSUM INC
Applicant

VICFORESTS
Respondent

COMMONWEALTH OF AUSTRALIA
Intervener

STATE OF VICTORIA
Intervener

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PART I INTRODUCTION

1. On 17 November 2017, the Commonwealth was granted leave to intervene in so much of these proceedings as concern the preliminary question set down for separate determination, pursuant to r 9.12 of the *Federal Court Rules 2011*.

2. The Commonwealth submits that the preliminary question should be answered in the affirmative for the reasons set out herein, including (including, most relevantly for present purposes, because the Court is not at liberty to depart from the reasoning of the Full Court of the Federal Court in *Forestry Tasmania v Brown* (2007) 167 FCR 34 at [44(c)-(e)], [55], [62]-[63], [68], [78] and [97]).

PART II CONSTRUCTION OF RELEVANT LEGISLATIVE PROVISIONS

General

3. Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (the **EPBC Act**) sets out requirements for environmental approvals and prohibits the taking of various 'actions', enumerated therein, without an approval.[1]

4. Non-compliance with the prohibitions contained in Part 3 generally constitutes the commission of a criminal offence and/or exposes the contravener to imposition of a civil penalty.[2] Criminal liability for most offences created by Part 3 is strict (such that, under s 6.1 of the Criminal Code, there are no fault elements for any of the physical elements of the offences);[3] and, in accordance with orthodox principle, liability to a civil penalty does not depend upon deliberate or intentional non-compliance.

5. However, Parts 3 and 4 of the EPBC Act generally envisage a person being in a position to know whether there is a need to obtain an environmental approval *before* taking particular action. VicForests, contractors and sub-contractors who intend to perform 'RFA forestry operations' might reasonably be expected to form a view as to whether a particular operation accords with applicable provisions of a Regional Forest Agreement (**RFA**). However, they will rarely, if ever, be in a position to know whether the parties to an RFA have fully implemented and 'complied' with each and every aspect of an RFA, including its non-binding provisions, over its entire life (or at the time in question). Indeed, for the reasons explained in *South Australia v Commonwealth* (1962) 108 CLR 130, it is wholly inapt to apply the concept of 'compliance' – let alone attach legal consequences - to provisions of Commonwealth/State agreements which are not intended to create legally enforceable relations between the parties.

6. The Applicant's construction places VicForests and other third parties in a difficult, if not impossible, position in terms of assessing what may be required of them. This reality invokes the following observations in *Australian Building and Construction*

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1 'Action' has the meaning given in Subdivision A of Division 1 of Part 23: see s 528.

2 See ss 486A and 486C of the EPBC Act.

3 For examples of exceptions to strict liability see ss 22A and 24E.

Commissioner v Powell [2017] FCAFC 89 (per Allsop CJ, White and O'Callaghan JJ), albeit in a different statutory context:

> [15] Before doing these two things [recounting the facts and analysing relevant legislative provisions], it is helpful to say something as to the approach to the provisions, in both the *FW Act* and the *2004 Victorian Act*, and indeed in the other legislation to be mentioned. First, to the extent that a provision is a civil remedy or civil penalty provision a necessary clarity of meaning should be striven for, to the extent that is possible and conformable with the language employed and context legitimately available. Secondly, notwithstanding the closely regulated environment of industrial and employment legislation, provisions as to entry on to work sites and the regulation thereof should be construed conformably with the language used by Parliament practically and with an eye to commonsense so that they can be implemented in a clear way on a day-to-day basis at work sites. The legislation needs to work in a practical way at the work site, and if at all possible not be productive of fine distinctions concerning the characterisation of entry on to a site.[4]

General scheme of carve-outs in Part 4 of the EPBC Act

7. Part 4 of the EPBC Act (which includes s 38) sets out a range of circumstances in which environmental approvals are not needed. Significantly, the provisions of ss 29(1), 30(3), 31, 32, 33, 37, 37M, and 38 all permit the taking of actions described in Part 3 without environmental approvals by reference to particular agreements or arrangements put in place by Commonwealth officials, namely: bilateral agreements (ss 29(1), 30(3), and 31); accredited management arrangements or accredited authorisation processes (ss 32 and 33); bioregional plans (ss 37); conservation agreements (s 37M); and regional forest agreements (s 38, hereafter referred to as **RFA**s).

8. A consideration of all of these provisions makes clear that the 'carve-outs' effected by them are consistently expressed to operate by reference to 2 factors: **first**, the relevant agreement, arrangement, process or plan must be operative (that is, in force); **secondly**, the particular action in question (here, 'an RFA forestry operation') must be taken 'in accordance with' the relevant agreement, arrangement, process, or plan (or declaration relating thereto).[5] The second of these factors requires only that *the particular action* be undertaken 'in conformity with' or 'consistently with' the relevant agreement, arrangement, process, plan or declaration relating thereto.[6]

9. None of these carve-out provisions requires that *any* (let alone *every*) matter or thing which happens to be dealt with in the relevant agreement, arrangement, process or plan must be the subject of historic and/or extant observance or implementation by the issuing party or parties. The reason for this is clear: in each and every case, the EPBC Act recognises that implementation of any provisions of the relevant agreement, arrangement, process or plan *may* be dealt with (if at all) by Commonwealth officials, at

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4 Special leave to appeal was refused by the High Court on the basis that 'there is not sufficient reason to doubt the correctness of the decision of the Full Court of the Federal Court of Australia to warrant the grant of special leave': *Powell v Australian Building and Construction Commissioner & Anor; Victorian Workcover Authority v Australian Building and Construction Commissioner & Anor* [2017] HCATrans 239 (17 November 2017).

5 See ss 29(c) and (e), 30(3) and the Note thereto, 31(d), (e) and (g), 32(b) and (d), 33(1) and (2), 37, 37M(b) and (c), and 38 (noting that the definition of an RFA in ss 38(2) picks up the meaning in the *Regional Forest Agreements Act 2002* which requires that the RFA be 'in force').

6 See *Walker v Wilson* (1990-1991) 172 CLR 195 per Deane, Dawson, Toohey and McHugh JJ at 208.2.

an executive or legislative level e.g. by exercising a discretion to amend or terminate the relevant agreement, arrangement, process or plan (or declaration relating thereto) in accordance with its terms and/or applicable provisions of the EPBC Act.[7]

10. In each case, the EPBC Act expressly recognises that compliance issues with respect to matters other than the taking of specific 'actions' might arise under the agreement, arrangement, process or plan – but it is clear the legislature intended that any such compliance issues would ***not*** defeat the carve-out unless and until the Commonwealth decided to suspend or terminate the relevant agreement, arrangement, process or plan (or declaration relating thereto).[8]

The language of s 38 of the EPBC Act and s 6(4) of the RFA Act

11. The terms of s 38(1) of the EPBC Act and s 6(4) of the RFA Act are crisp and concise in their meaning and effect. They do not contain any language which supports the Applicant's construction.[9] In their terms, these provisions stipulate that a forestry operation will come within the carve-out from Part 3 if:

    11.1. an RFA is in force;

    11.2. the forestry operation in question is an RFA forestry operation, as defined; and

    11.3. the RFA forestry operation is *undertaken in accordance with* the RFA.

12. The Applicant does not assert that the first two elements have not been met. The sole issue is, therefore, whether RFA operations are being undertaken in accordance with the Central Highlands RFA (**CH RFA**).

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7 Bilateral agreements *may* be suspended, in whole or in part, or cancelled in the event of non-compliance by the relevant State or Territory: see ss 57-64; accrediting of management arrangements and authorisation processes may be revoked under s 33(3) of the *Acts Interpretation Act 1901* (Cth), accredited management arrangements and accredited authorisation processes may be amended under s 36A of the EPBC Act, and declarations with respect to accredited arrangements and processes may be revoked under s 35 of the EPBC Act; bioregional plans prepared under s 176 may be revoked under s 33(3) of the *Acts Interpretation Act 1901* and declarations relating thereto may be revoked under s 37K of the EPBC Act; conservation agreements made under s 305 may be varied under s 308(1) and may be terminated (i) by agreement under s 308(3)(a), (ii) in accordance with their terms as contemplated by s 308(3)(b); and (iii) by unilateral decision of the Minister under ss 308(4) and (5).

8 For example, s 57(2) expressly contemplates that contraventions of a bilateral agreement might occur with respect to provisions not governing the taking of the particular action, without those contraventions affecting the carve-out under s 29. Sections 37 and 176(4) make clear that the carve-out effect of s 37 does not direct attention to, let alone depend upon, whether the person in question has always been, and continues to be, compliant with every aspect of a bioregional plan – the carve-out depends only upon satisfaction of the stipulated conditions in sub-paras (a) to (c). Similarly, the contravention of a provision of a conservation agreement described in s 306(2)(a) may be dealt with by way of a variation under s 308(1) without affecting the carve-out provided for specific declared actions under s 37M.

9 See *Alcan (NT) Alumina v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47] and [51]. As to the primacy of text and the relevance of context see also *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at 539 [47]; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 28 [57]; *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468 at 473 [10].

13. Significantly the Applicant does not seek to rely upon any *particular* RFA forestry operation(s); nor does the Applicant seek to analyse or contrast, let alone establish a conflict or inconsistency between (i) the manner in which any particular RFA forestry operation is actually *being undertaken*; and (ii) the manner in which that particular RFA forestry operation is *required to be undertaken* by the CH RFA.

14. Instead, the Applicant seeks to rely upon a proposition which (i) finds no voice in the language of the provisions; and (ii) necessarily involves a very substantial rewriting of those provisions.

15. According to the Applicant, as a matter of statutory construction, an RFA can only be regarded as authorising the undertaking of *any* RFA forestry operation(s) if the first, second and/or third 5 yearly reviews were/are conducted in accordance with the CH RFA.[10] Presumably, on the Applicant's construction, an RFA can only be regarded as authorising the undertaking of *any* RFA forestry operation(s) if *every* other binding and non-binding provision of the CH RFA, and all other RFAs, have been completely implemented, historically and currently.

16. If the Applicant does not contend for that extraordinary outcome, various questions necessarily arise. How does the Applicant suggest that the plain terms of ss 38 and 6 are to be read? Does the carve-out from Part 3 turn on (i) compliance with a particular subset of binding provisions or compliance with all such provisions (and if the former, which subset of binding provisions, and why)? (ii) compliance with a particular subset of non-binding provisions, or compliance with all of them (and if the former, which subset of non-binding provisions, and why? (iii) strict or substantial compliance, which might depend in turn on whether the non-compliance relates to whether something binding or non-binding is done at all, or whether something binding or non-binding is done within a stipulated time? and (iv) historical and/or contemporary compliance?

17. These are not idle or irrelevant questions. They go to the heart of the Applicant's suggested construction of ss 38 and 6(4). It is not enough for the Applicant to simply say 'whatever else ss 38 and 6(4) may mean, they limit the carve-out from Part 3 to RFA operations undertaken in accordance with RFAs which have been the subject of fully implemented first, second and third five-yearly reviews'. Nor is it enough for the Applicant to plead the operative effect of ss 38 and 6(4) as a series of alternatives, as set out at [112(f)(iv)-(vi)].

18. Essentially, the Applicant's construction requires that both ss 38 and 6(4) be read as including the following sorts of italicised words: '…. in accordance with an RFA, *provided that the RFA has been wholly [or substantially] implemented by [a nominated party or both parties] at [all times or at the time the RFA operation is being undertaken] according to its terms*, *including with respect to time stipulations contained in [any terms expressed to be non-binding or specified non-binding terms*]'. The Commonwealth submits that the introduction of these kinds of words is attended by extraordinary uncertainty and, whatever formulation is adopted, substantially alters the plain meaning of the language of the provisions.[11]

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10 Statement of Claim, para 112.

11 See *Taylor v The Owners - Strata Plan No 11564* at [37]-[40].

19. The Applicant's inability to 'nail its colours to the mast' is emblematic of non-satisfaction of the 3 criteria which must be satisfied, in accordance with Lord Diplock's famous test,[12] before *any* additional words can be read into a statutory provision: the first criterion is that the Court must know the mischief with which the statute is dealing; the second criterion is that the Court must be satisfied that by inadvertence Parliament overlooked one or more eventualities which must be dealt with if the purpose of the legislation is to be achieved; the third criterion is that the Court 'must be *abundantly sure of the substance*, although not necessarily the precise words, the legislature would have enacted' but for its inadvertence.[13]

20. As to the first criterion, the primary mischief to which ss 38 and 6(4) are directed is the conduct of RFA forestry operations otherwise than in accordance with an RFA which is in force (that is, an RFA which has not expired or been terminated). A secondary mischief might arguably be avoidance of compliance by a State with the provisions of an RFA – but even if that is accepted as a mischief, it is accommodated by the tightly regulated provision for termination of an RFA for non-compliance contained in s 7 of the RFA Act.

    20.1. As noted by the Full Court of the Federal Court in *Forestry Tasmania v Brown* (2007) 167 FCR 34 in relation to a different non-binding provision in the Tasmanian RFA:

> [44] …
>
> (d) although failure to comply with cl 68 enables the Commonwealth, subject to certain conditions, to bring the agreement to an end, the Commonwealth has no power to enforce the clause.
>
> ……
>
> [63] The fact that the State's obligations under Part 2 are expressed to be unenforceable points against the view that by cl 68 the State warrants that CAR will in fact protect the species. It follows that satisfactory performance of the State's obligations can only be measured by the parties, the sanction for inadequate performance by the State (in the Commonwealth's opinion) being termination of the agreement under cl 102.

    20.2. In this regard the statement of main objects in s 3(a) of the RFA Act is worthy of emphasis: it refers to one main object of the RFA Act being 'to give effect to *certain* obligations *of the Commonwealth* under Regional Forest Agreements' - the object was not described as being to give effect to any particular (or every) obligation *of a State* contained in an RFA.

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12 See *Jones v Wrotham Park Estates* [1980] AC 74 at 105 and *Inco Europe Ltd v First Choice Distribution* [2000] 2 ALL ER 109 at 115, affirmed and applied in *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531.

13 See *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 per French CJ, Crennan and Bell JJ at [38]-[39] and footnote 68 (emphasis added). See also Gageler and Keane JJ in *Taylor's* case at [65]: 'The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative inattention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair'. As Bromberg J noted in *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union (No 2)* [2016] FCA 2 at [91]: 'The way in which a court avoids speculation or repair, and adheres to its explanatory role, is to apply Lord Diplock's three-step test (as adapted in *Taylor* at [39]-[40]'.

20.3. The Full Court in *Brown* accepted at [53] that s 6(4) is referrable to the main object stated in s 3(a). The Full Court then stated:

> [55] The provisions of an RFA are not otherwise given effect by the RFA Act.

20.4. The reasoning of the Full Court in *Brown* stands against the RFA Act being directed to the mischief of a State's non-compliance with one or more non-binding provisions of an RFA (noting, of course, that it was Sch 1 to the RFA Act which inserted the current terms of s 38 into the EPBC Act).

21. As to the second criterion, the Applicant is silent as to the exact eventualities which must be dealt with if the purpose of the RFA Act is to be achieved – for example, is it only non-compliance with five-yearly reviews which must be dealt with? If so, why and what principle of statutory construction justifies that outcome? What is the position with respect to other possible eventualities referred to at [16] above?

21.1. Again, the reasoning of the Full Court in *Brown* stands against the proposition that, in enacting s 6(4) and s 38, the legislature overlooked, through inadvertence, expressly dealing with the legal effect of a State's non-compliance with any non-binding provisions of an RFA. In *Brown*, the Full Court held that *advertent* features of the statutory scheme were that (i) performance of parties' obligations under RFAs would be sorted out by them (including, potentially, by resort to termination as the only sanction for non-performance); and (ii) non-compliance by a State with any non-binding obligation under an RFA would not defeat the carve-out effected by s 38 (subject, of course, to any termination by the Commonwealth).

22. As to the third criterion, the Commonwealth (i) repeats and relies upon paragraphs [17]-[18] above; and (ii) notes, again, that in *Brown* the Full Court at [68] rejected the argument that, if the State of Tasmania was in breach of a non-binding obligation under the Tasmanian RFA, s 38 did not exempt the operations of a third party (Forestry Tasmania) from Part 3 of the EPBC Act.

23. Finally, as noted in *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 by French CJ, Crennan and Bell JJ at [39], even assuming the Court were to find that Lord Diplock's criteria are satisfied:

> ….any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour's further observation, '[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances.'

24. Here, the only 'state of affairs' covered by ss 38 and 6(4) is whether RFA operations are undertaken in accordance with an RFA which is in force. The Applicant seeks to introduce an entirely different and unexpressed set of circumstances as an additional limit upon the carve-out: namely, whether five-yearly reviews (and, perhaps, other matters) have been undertaken in accordance with the RFA.

Context

Regulatory context in which ss 38 and 6(4) were enacted

25. When ss 38 and 6(4) were enacted and commenced operation on 3 May 2002, an extensive Victorian regulatory regime was in place.[14] The Victorian regime consisted of the *Conservation Forests and Lands Act 1987* (Vic), the *Forests Act 1958* (Vic), the *Flora and Fauna Guarantee Act 1988* (Vic), and various statutory instruments thereunder including the 'Leadbeater's Possum Action Statement', the Central Highlands Plan, and other Action Statements and Recovery Plans.[15]

26. Significantly, when ss 38 and 6(4) commenced operation in May 2002 the RFAs set out in the definition of 'RFA forestry operations' in s 4 of the RFA Act were already in existence. It is not in dispute that the CH RFA was one such RFA. It specifically noted (in the first para of Attachment 2) that a Recovery Plan for Leadbeater's Possum had been approved under the *Endangered Species Protection Act 1992* (Cth).[16] The CH RFA noted that various environmental laws were in place at Commonwealth and State level, and specifically addressed them - for instance, in Table 1 and clauses 23 and 24 of the CH RFA, which provided:

> 23. The Commonwealth, in signing the Agreement, confirms that its obligations under the *Environment Protection (Impact of Proposals) Act 1974* have been met. The Commonwealth also confirms that, under the administrative procedures of the Act, any activities covered by the Agreement, including the 5 yearly review and minor amendments to the Agreement, will not trigger any further environmental impact assessment.
>
> 24. The Commonwealth, in signing the Agreement, confirms that its obligations under the *Endangered Species Protection Act 1992* have been met.

27. In short, ss 38 and 6(4) reflected a legislative endorsement of a longstanding executive view that any regulatory interests or concerns of the Commonwealth with respect to the conduct of any RFA forestry operation(s) on land covered by RFAs (for present purposes, Victorian State Forests) were adequately protected if (i) an RFA, as defined in s 4, was in force at the time; and (ii) RFA forestry operations are undertaken in accordance with the applicable RFA.[17]

28. That *legislative* judgment cannot be set to nought on the basis of a judicial assessment of subsequent *executive* acts on the part of Victoria and/or the Commonwealth.

Terms of the RFAs form part of the relevant context

29. When the Parliament enacted ss 38 and 6(4), it can be presumed to have been aware of the terms of the RFAs – which, in the case of the CH RFA, specifically acknowledged 2 things**: first**, the possibility of disputes and differences between Victoria and the

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[14] Indeed, when the EPBC Act initially commenced operation in July 2000 it included an iteration of s 38, albeit not in identical terms.

[15] The Victorian regulatory regime was reviewed by Tate JA in *MvEnvironment v VicForests* (2013) 42 VR 456; [2013] VSCA 356 at [33]-[77].

[16] A Leadbeater's Possum Plan was first introduced in 1995.

[17] See *Wilderness Society Inc v Turnbull* (2007) 166 FCR 154; [2007] FCAFC 175 at [32] (Branson and Finn JJ).

Commonwealth 'as to the interpretation or implementation of the Agreement';[18] and **secondly**, the State and/or Commonwealth might fail to comply with one or more provisions of the RFA.[19]

29.1. Accordingly, when the legislature enacted ss 38 and 6(4) it necessarily understood and intended that the CH RFA would, absent termination, continue in force and effect notwithstanding non-compliance with one or more of its provisions by the State and/or Commonwealth.

29.2. If there were any doubt about this, it is wholly resolved by the terms of s 7 of the RFA Act which provides:

> **Termination of RFA by Commonwealth**
>
> The termination of an RFA by the Commonwealth ***is of no effect*** unless it is done in accordance with the termination provisions of the RFA, being those provisions as in force:
>
> (a) at the time of commencement of this section; or
>
> (b) at the time the RFA comes into force;
>
> whichever is later. (Emphasis added.)

30. The Applicant might consider that (i) the Commonwealth, at an executive level, should have triggered observance of the dispute resolution procedures in clauses 10-14 of the CH RFA in response to any lack of progress in relation to five-yearly reviews; (ii) the Commonwealth should have, thereafter, terminated the RFA (assuming that would have been possible under cl 92(c)), thereby bringing the carve-out effected by ss 38 and 6(4) to an abrupt end; and (iii) the environmental objectives of the RFA Act and EPBC Act would have been better served had those steps been taken by the Commonwealth at an executive level. But those considerations simply cannot justify the Court rewriting the terms of the legislative carve-outs enshrined in ss 38 and 6(4) and ignoring the plain and immutable effect of s 7 of the RFA Act: see *Taylor's* case at [40].

Relevance, if any, of parliamentary accountability and oversight

31. Accountability and oversight of the conduct of the Commonwealth in relation to enforcement and implementation of non-legally binding aspects of RFAs is, clearly enough, exercisable only by the Parliament (save and except, perhaps, if a non-binding provision were to be relied upon to terminate an RFA): see s 10 of the RFA Act.

32. Whether or not Parliament has, or has not, exercised any accountability or oversight role in relation to non-binding aspects of the CH RFA is not a matter this Court can consider: see s 16 of the *Parliamentary Privileges Act 1987*. However, to the extent it has any relevance, the very *availability* of Parliamentary oversight of non-legally binding aspects of RFAs is a factor which tends against acceptance of the Applicant's construction.

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[18] See clause 8.

[19] See the failures identified in paras (b) and (c) of clauses 92 and 93.

Extrinsic materials

33. The Explanatory Memorandum to the *Regional Forest Agreements Bill 2002* (the **EM**) makes clear that, long before the passage of ss 38 and 6(4), the National Forest Policy Statement of 1992 provided a nationally agreed framework 'for a long-term and lasting resolution of conservation, forest industry and community interests and expectations concerning Australian forests'. The 1992 Statement 'required joint Commonwealth-State comprehensive regional assessments of environmental, heritage, economic and social values of forests', which assessments formed the basis of RFAs between the Commonwealth and the State that 'provide for both future forest management and the basis of an internationally competitive and ecologically sustainable forest products industry'.[20]

34. The EM also stated that the RFA Bill 'seeks to underpin the agreements' by inter alia (i) 'preventing application of Commonwealth environmental and heritage legislation as they relate *to the effect of forestry operations* where an RFA, based on comprehensive regional assessments, *is in place* (reflecting provisions already in the EPBC Act)' (emphasis added); and (ii) 'ensuring that the Commonwealth is bound to the termination … provisions in RFAs'.[21] No reference was made in the EM to underpinning RFAs by tying the regulatory carve-outs in ss 38 and 6(4) to executive implementation of one or more provisions of RFAs.

35. The EM also stated in regard to the impact assessment of the Bill:[22]

> The Regional Forest Agreements Bill does not impact on the Government's RFA commitments. These commitments are being implemented; the Bill does not interfere with implementation of these agreements. The Bill simply provides more certainty to RFA outcomes by binding the Commonwealth Government to commitments to State Governments as contained in the RFAs.

36. The EM also referred to s 6 as providing that 'forestry operations in regions subject to RFAs are excluded from certain Commonwealth legislation. This is because the environmental and heritage values of these regions have been comprehensively assessed under relevant legislation during the RFA process and the RFAs themselves contain an agreed framework on ecologically sustainable development of these forest regions over the next 20 years.'[23] In *Brown*, the Full Court attached significance to this passage in the EM at [62].

37. There is simply no support in the EM for the Applicant's construction.

38. Similarly, there is no support in the Minister's Second Reading Speech for the Applicant's construction. Rather, the Minister made several statements indicating that any non-compliance with the provisions of an RFA would be dealt with 'through

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20 EM, 2 (para 1).

21 EM, 3 (para 4, 2nd and 3rd dot points).

22 EM, 4 (last para) to 5 (first para).

23 EM note on Clause 6.

processes set out in the RFAs'.[24] Again, no mention was made of parties' non-compliance with provisions of an RFA triggering application of Part 3 of the EPBC Act.

Commonwealth's construction of ss 38 and 6(4)

39. So long as (i) an RFA is in force because, relevantly, it has not been terminated by the Commonwealth (as contemplated by s 7 of the RFA Act) or by the State in accordance with its terms; (ii) RFA forestry operations are being conducted; and (iii) those forestry operations are being undertaken in accordance with the RFA, the carve-out from Part 3 provided for by ss 38 and 6(4) was intended to apply. Disputes about performance issues arising *between the parties to the RFAs* (such as the conduct of 5 yearly reviews) would be resolved under the RFAs and would not affect the carve-out unless and until an RFA was validly terminated by one or other party.[25]

40. The provisions in the RFA Act for tabling of various things were not intended to go to the validity or operative effect of an RFA: see, for instance, ss 9(2), 10(1), 10(3), 10(4), 10(6) (and the since repealed provisions of ss 11(9) and (10)).[26]

41. The non-performance of a five-yearly review has no self-executing effect on the ongoing operation of an RFA under the RFA Act.

42. The provisions of s 7 make clear that once an RFA comes into force, it remains in effect (until expiry) unless and until it is terminated. The principal legal effect of an RFA being in place, under the RFA Act, is as described in ss 38 and 6(4): namely, Part 3 of the EPBC Act does not apply to any RFA forestry operation that is undertaken in conformity with it.[27]

43. It could not have been the intention of Parliament to attach drastic, unexpressed legal consequences to the non-timely fulfilment of non-binding clauses in an RFA.

44. Both parties to the CH RFA, and the Commonwealth Parliament when it enacted ss 38 and 6(4), intended that 5 yearly reviews would be conducted as matters of *non-enforceable* good public administration (in order to identify matters which might be the subject of minor amendment), without any intention to fundamentally alter the status or legal effect of RFAs.

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24 See *Parliamentary Debates*, Thursday 21 March 2002, page 1853.5ff.

25 See *Brown* at [63]; EM, the note on clause 6.

26 Commonwealth laws sometimes make provision for reports on the operation of an Act to be provided to a Minister and then tabled in Parliament. The ongoing validity of those laws has never been considered by the Parliament or by courts to depend on fulfilment of those tabling requirements. Similarly, Commonwealth laws occasionally require that particular contracts or agreements be tabled in Parliament: see s 7 of the *Medical Indemnity Agreement (Financial Assistance - Binding Commonwealth Obligations) Act 2002*; s 8 of the *Forestry Marketing and Research and Development Services Act 2007*; s 68C of the *Australian Meat and Livestock Industry Act 1997*; and s 6 of the *Sugar Research and Development Services Act 2013*. It is clear that the ongoing validity of those contracts/agreements does not depend upon compliance with those tabling provisions. Indeed, given s 16 of the *Parliamentary Privileges Act 1987*, the fact of non-tabling could never be relied upon in any legal proceedings.

27 An RFA being in force also has the effect of 'switching off' the application of the *Export Control Act 1982* in relation to 'RFA wood' as defined.

45. One can test the Applicant's construction by supposing the conduct of forestry operations before and after the first scheduled five-yearly review. At what precise, identifiable point in time would Part 3 of the EPBC Act commence to apply, on the Applicant's argument, if one or other (or both) of the parties was/were somewhat dilatory or less-than-conscientious in engaging in the review? The truth is that one could never pinpoint a precise time absent a judicial determination declaring the day (or hour) upon which Part 3 of the EPBC Act suddenly commenced to apply – thereby retrospectively putting forestry operations conducted as and from that point in breach of the EPBC Act.

46. Indeed, on the Applicant's construction, if Part 3 of the EPBC Act did suddenly commence to apply, the executive officers of VicForests,[28] contractors or sub-contractors might be personally liable under provisions of the EPBC Act for criminal and/or civil penalty contraventions of Part 3 of the EPBC Act.[29] These possible exposures support reading the exemption provisions otherwise than as contended for by the Applicant.[30]

47. Further, the Applicant claims that the consequence of the failure to undertake the 5 yearly reviews on time or at all means that forestry operations in the area covered by the CH RFA have not been, are not and cannot *in the future* be undertaken in accordance with the RFA.[31] The proposition that a past breach of a non-binding requirement under an RFA means that ss 38 and 6(4) can never again operate as carve-outs is self-evidently startling.

48. The Court should reject any argument by the Applicant that the language of ss 38 and 6(4) should be given an expansive, beneficial interpretation.

49. In circumstances where, as here, legislation balances competing interests and is expressed in plain and simple language which does not readily accommodate an expansive interpretation, the beneficial principle of statutory construction is of little assistance.[32]

Date: 11 December 2017

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TIMOTHY GOODWIN

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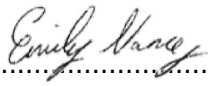
28 See EPBC Act, s 494 and s 495(2).

29 Noting, of course, that Part 9 approvals cannot be obtained instantly. Given public notice periods, a forestry operator might have to seek an approval well in advance of the time for completion of an implementation requirement.

30 See at [5] and [6] above.

31 Statement of Claim, para 112 at particular (f).

32 *Carr v Western Australia* (2007) 232 CLR 138 at [5] (Gleeson CJ); *MyEnvironment v VicForests* (2013) 42 VR 456 at [5] (Warren CJ) and [148] (Tate JA).



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