

**IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY**

No: TAD 17 of 2005

ROBERT BROWN

Applicant

FORESTRY TASMANIA

Respondent

COMMONWEALTH OF AUSTRALIA

First Intervenor

STATE OF TASMANIA

Second Intervenor

SECOND FURTHER AMENDED APPLICATION

**Amended the 31st August 2006 pursuant to an Order made by the
Honourable Justice Marshall on 29th August, 2006**

**PURSUANT TO THE ENVIRONMENT PROTECTION AND BIODIVERSITY
CONSERVATION ACT 1999 (CTH) AND THE JUDICIARY ACT 1903 (CTH)**

APPLICATION

Application pursuant to section 475 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the *EPBC Act*") and s 39B (1A)(c) of the *Judiciary Act 1903* (Cth) ("the *Judiciary Act*") in respect of contraventions of s 18 of the *EPBC Act*.

Filed on behalf of the Applicant

FitzGerald and Browne Lawyers

Level 2, 115 Collins Street, Hobart 7000

DX 246 Hobart Tel: (03) 6224 6777 Fax: (03) 6224 6755

E: rolandb@fablawyers.net.au

APPLICANT'S STANDING

The Applicant is an "interested person" within the meaning of s 475(6) of the *EPBC Act*.

GROUND

The grounds of the application are:

1. The respondent is incorporated under s 6(1) of the *Forestry Act 1920* (Tas) and is:
 - a) the "responsible person" within the meaning of s 17 of the *Forest Practices Act 1985* (Tas);
 - b) the person able to undertake a forestry operation purportedly pursuant to the *Regional Forest Agreements Act 2002* (Cth) and the Tasmanian Regional Forest Agreement 1997 ("the Tasmanian RFA") in respect of the land known as the Wielangta Forest area (Wielangta Forest") in the State of Tasmania.
2. The respondent has undertaken, or proposes to undertake whether by itself or through its contractors and sub-contractors:
 - a) the harvesting of timber and the clearing of trees; and
 - b) the construction of a road in connection with the activities referred to in paragraph 2(a)

in coupes within the Wielangta Forest area, of which two coupes are identified as coupes WT017E and WT019D (hereafter, "the respondent's forestry operations").

3. The Broad Toothed Stag Beetle (*Lissotes latidens*):

- a) is listed as an endangered species pursuant to both the *Threatened Species Protection Act 1995* (Tas) and the *EPBC Act*;
- b) is a Priority Species listed in Attachment 2 (Part A) of the Tasmanian RFA;
- c) is found within the Wielangta Forest; and
- d) has been found in coupe WTO17E;
- e) is likely to be present in coupe WT019D;
- f) is likely to be present in other coupes in Wielangta.

4. The Wedge-tailed eagle:

- a) is listed as an endangered species pursuant to both the *Threatened Species Protection Act 1995* (Tas) and the *EPBC Act*;
- b) is a Priority Species listed in Attachment 2 (Part A) of the Tasmanian RFA;
- c) is found, and nests, within the Wielangta Forest; and
- d) has at least one nest site adjacent to coupe WTO19D;
- e) is likely to be present in other coupes in Wielangta.

4A. The Swift Parrot:

- a) is listed as an endangered species pursuant to both the *Threatened Species Protection Act 1995* (Tas) and the *EPBC Act*;
- b) is a Priority Species listed in Attachment 2 (Part A) of the Tasmanian RFA;
- c) is found, and nests, and feeds within the Wielangta Forest;
- d) has at least one nest site adjacent to coupes WTO19D and WT017E;
- e) is likely to be present in other coupes in Wielangta.

5. The respondent's forestry operations are the taking of an "action" for the purposes of s 18 of the *EPBC Act* that will have, or will be likely to have, a significant impact on the Broad Toothed Stag Beetle, the Swift Parrot and the Wedge-tailed eagle.

6. The respondent does not have an approval for its forestry operations under Part 9 of the *EPBC Act*.

7. Part 4 of the *EPBC Act* does not let the respondent undertake the respondent's forestry operations without an approval under Part 9 because the Tasmanian RFA is not a "Regional Forest Agreement" within the meaning of s 38(2) of the *EPBC Act* and s 4 of the *Regional Forest Agreements Act 2002* (Cth).

Particulars

- i) Section 38(2) of the *EPBC Act* incorporates the meaning given to the phrase "regional forest agreement" by s 4 of the *Regional Forest Agreements Act 2002* (Cth)
- ii) Section 4 of the *Regional Forest Agreements Act 2002* (Cth) defines an RFA to mean an agreement in force between the Commonwealth and a State in respect of a region or regions and satisfying all of the specified conditions in s 4.
- iii) Two of the specified conditions which must be satisfied are that the agreement provides for:
 - (1) a comprehensive, adequate and representative reserve system; and
 - (2) the ecologically sustainable management and use of forested areas in the region or regions.
- iv) Properly construed, the phrase "provides for" in s 4 means that an RFA must establish an enforceable regime that meets the two specified conditions referred to in sub-paragraph (iii) above before forestry operations commence.
- v) To the extent that the two conditions referred to in sub-paragraph (iii) above are not enforceable at the suit of the Commonwealth or otherwise, the Tasmanian RFA does not satisfy those two specified conditions.

8. Further or alternatively to paragraph 7 above, Part 4 of the *EPBC Act* does not let the respondent undertake the respondent's forestry operation without an approval under Part 9 because the respondent's forestry operations in the Wielangta Forest are not being undertaken in accordance with the Tasmanian RFA and therefore are not protected by s 38(1) of the *EPBC Act* from the requirement to obtain an approval before taking an action covered by s 18.

Particulars

- i) By clause 68 of the Tasmanian RFA Tasmania "agrees to protect" the Priority Species listed in Attachment 2 (Part A) of the Tasmanian RFA.
- ii) This includes both the Broad Toothed Stag Beetle, the Wedge-tailed eagle and the Swift Parrot.
- iii) Properly construed, the phrase "agrees to protect" in cl 68 means Tasmania agrees to take steps which will in fact protect those species, rather than Tasmania agrees that it intends to

- protect those species.
- iv) The CAR reserve system as it operates in the Wielangta Forest, does not in fact protect the Broad Toothed Stag Beetle, the Wedge-tailed eagle or the Swift Parrot from forestry operations or at all.
 - v) The management prescriptions contained in the Forest Practices Plans for coupes WT017E and WT019D and proposed to be applied with respect to forestry operations in other coupes within the Wielangta forest area do not in fact protect the Broad Toothed Stag Beetle, the Wedge-tailed eagle or the Swift Parrot from forestry operations or at all.
 - vi) To the extent that Priority Species listed in Attachment 2 (Part A) of the Tasmanian RFA

(1) are not in fact protected before forestry operations commence in Wielangta; alternatively

(2) remain exposed to a significant impact from the commencement of forestry operations in Wielangta

those forestry operations are not in accordance with the Tasmanian RFA.

INTERLOCUTORY RELIEF

The applicant claims by way of interlocutory relief:

- A. The time limited for service of the application for interlocutory relief and supporting affidavits be abridged pursuant to Order 3 r 3 and/or Order 4 r 11.
- B. Pursuant to Order 19 subrule 2(2) that the requirements of Order 19 subrule (1) be dispensed with.
- C. Pending the hearing and determination of this proceeding, an injunction pursuant to s 475(2) of the *EPBC Act* restraining the

respondent, whether by its servants, agents or howsoever otherwise from undertaking any forestry operations, or any activities in connection with forestry operations in the two coupes within the Wielangta Forest identified as coupes WT017E and WT019D.

PERMANENT RELIEF

The Applicant claims by way of permanent relief:

- A. A declaration that the Tasmanian Regional Forest Agreement 1997 is not a Regional Forest Agreement within the meaning of section 38(2) of the *EPBC Act* and s 4 of the *Regional Forest Agreements Act 2002* (Cth).
- B. A declaration that the respondent's forestry operations in the Wielangta Forest are likely to have a significant impact on the Broad Toothed Stag Beetle.
- C. C. A declaration that the respondent's forestry operations in the Wielangta Forest are likely to have a significant impact on the Wedge-tailed eagle.
- D. A declaration that the respondent's forestry operations in the Wielangta Forest are likely to have a significant impact on the Swift Parrot.

- E. A declaration that the respondent's forestry operations in the Wielangta Forest have not been undertaken in accordance with the Tasmanian Regional Forest Agreement 1997.
- EA. A declaration that the respondent's forestry operations in the Wielangta Forest will not, under the present forest practices system in Tasmania, be undertaken in accordance with the Tasmanian Regional Forest Agreement 1997.
- F. Pending the granting of any approval under Part 3 of the *EPBC Act*, an injunction pursuant to s 475(2) of the *EPBC Act* restraining the respondent, whether by its servants, agents or howsoever otherwise from undertaking any forestry operations, or any activities in connection with forestry operations, in the Wielangta Forest .
- G. Such further or other orders as the Court sees fit.
- H. Costs

DATE: 31st August, 2006

.....
Fitzgerald and Browne
Solicitors for the Applicant.

To the respondent, Forestry Tasmania of 79 Melville Street, Hobart

If there is no attendance before the Court by you or by your counsel or solicitor at the time and place specified below, the application may be dealt with and you will be liable to suffer judgment or an order against you in your absence.

Before any attendance at that time you must file an appearance in the Registry.

**APPOINTMENT FOR HEARING OF CLAIM FOR INTERLOCUTORY
RELIEF**

Time:

Date:

Place: Federal Court of Australia, Commonwealth Law Courts Building, 39 Davey Street, Hobart.

The time by which this application is to be served had been abridged by the Court to

Dated:

(Registrar)

The applicant is Robert James Brown.

The applicant's address is 133 Waterworks Road in Dynnyrne in Tasmania

The applicant's address for service is:

Fitzgerald and Browne Lawyers,
Level 2, T & G Building,
115 Collins Street Hobart 7001,
DX 246 Hobart

The applicant's solicitors are

Fitzgerald and Browne Lawyers,
Level 2, T & G Building,
115 Collins Street Hobart 7001,
DX 246 Hobart

Ph: 03 6224 6777

Fax: 03 6224 6755

E: TheFirm@fablawyers.net.au