

IN THE FEDERAL COURT OF AUSTRALIA

TASMANIA DISTRICT REGISTRY

No. TAD 17 of 2005

Between

ROBERT BROWN

Applicant

and

FORESTRY TASMANIA

Respondent

and

COMMONWEALTH OF AUSTRALIA

First Intervener

and

STATE OF TASMANIA

Second Intervener

CLOSING WRITTEN SUBMISSIONS OF THE STATE OF TASMANIA

1. In order to avoid unnecessary repetition, the State relies upon the Outline of Submissions of the Commonwealth, dated 1st December 2005, paragraphs 9-29 and 32-40.

Insofar as the Closing Written Submissions of the Commonwealth expand upon and are in support of those, the State relies upon them too.

2. The State also relies upon the Respondent's Closing Written Submissions dated the 26th June 2006, paragraphs 241-269, paragraphs 270, 272(a), (b), (d), (e), 273, 276, 278-297 (save for the last sentence in that last paragraph which is not material to the matters in respect of which the State was granted leave to intervene).

Filed and served on behalf of the Second Intervener

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3. The State seeks only to stress two matters:

- First, that it is, with respect, inappropriate for this Court to adjudicate upon issues arising out the Regional Forest Agreement, between the Commonwealth and the State, which are non-justiciable between them – for example, clause 68 of the Agreement. In that regard it is apposite to adopt that which was said by Gummow J in *Re: Bitfort; ex parte Deputy Commissioner of Taxation (NSW)* (1988) 83 ALR 265 at 287 – “...nevertheless there will be no “matter” if the plaintiff seeks an extension of the Court’s true function into a domain that does not belong to it, namely the consideration of undertakings and obligations depending entirely on political sanctions. Such non-justiciable issues include agreements and understandings between Governments within the Federation (*South Australia v Commonwealth* (1962) 108 CLR 130 at 141)...”. Whilst plainly in a different contest to the present, in the submission of the State, it highlights that courts ought not be eager to consider non-justiciable issues, regardless of how they are sought to be brought before the court.
- Secondly, the phraseology used in clause 68 of the Regional Forest Agreement, upon its true construction, is that the State assumes a non legally bonding obligation to protect certain species (as a whole, and not individual specimens or aggregations of such specimens) by means of employing a particular mechanism, being the CAR reserve system. It is wholly inapt to construe clause 68 as simply imposing an unqualified obligation to ensure the protection of species. The State’s obligation is satisfied, not through the actual protection of species – which is the contention of the Applicant (and as to which there is significant dispute between the parties, which is not for the State, as intervener, to address) – but through the employment of the CAR reserve system.

Dated 10th July 2006:

T J Ellis SC
DIRECTOR OF PUBLIC PROSECUTIONS

Per: 
Solicitor for the State of Tasmania