

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

No. TAD 17 of 2005

ROBERT BROWN

Applicant

- and -

FORESTRY TASMANIA

Respondent

**APPLICANT'S OUTLINE OF SUBMISSIONS
IN SUPPORT OF AN INTERLOCUTORY INJUNCTION**

SUMMARY

1. The serious question to be tried is whether the proposed Forestry operations in coupes WT017E and WT019D in the Wielangta Forest are in breach of section 18(3) of the *Environmental Protection and Biodiversity Conservation Act, 1999* ("the EPBC Act") in that:-
 - (a) they are likely to have a significant impact on the Broad Toothed Stag Beetle ("BTSB"); and
 - (b) the exception to the application of section 18 which is contained in section 19(3)(a) does not apply because the forestry operations are not being undertaken "in accordance with" an RFA.
 - (c) The forestry operations are not "in accordance with" the Tasmanian RFA because the State has not complied with, or acted consistently with, clause 68 of the Tasmanian RFA.
 - (d) The forestry operations are not in accordance with "an RFA" because the Tasmanian RFA is not an RFA within the meaning of section 38(2) of the

Filed on behalf of the Applicant

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EPBC Act and section 6 of *The Regional Forests Agreements Act 2002* (“the RFA Act”)

2. The balance of convenience favours the grant of the injunction because:-
 - (a) there is a substantial risk of irreparable harm to the BTSSB if the Forestry operations proceed; and
 - (b) there are likely to be alternative areas available to the respondent for logging.

OVERVIEW OF STATUTORY PROVISIONS

3. The EPBC Act is designed to establish a regime for the protection, conservation and management of the environment within the Commonwealth of Australia, including the species which inhabit that environment. It implements a series of international obligations undertaken by Australia and embodies the interests recognised by the international community and the Parliament of Australia as being of international importance: *Booth v Bosworth* (2001) 114 FCR 49 at [115] per Branson J.
4. The Act expressly recognises the conservation of biodiversity as an objective: section 3(1)(c)
5. One of the principal mechanisms the Act employs is the imposition of broad prohibitions (with civil penalty consequences) on certain kinds of conduct, where that conduct has or is likely to have a “significant impact” on aspects of the environment or species which inhabit it. To avoid those prohibitions, approval for the conduct must be sought from the Commonwealth Minister under a somewhat complicated, resource and time intensive environmental approvals process.
6. Exemption from the need to go through this process is given, inter alia, to action taken in accordance with a Regional Forest Agreement. In other words, the very stringent, complicated, resource and time intensive process which the Act otherwise mandates can be avoided.
7. The BTSSB is listed as a threatened species in the endangered category under the EPBC Act.

8. To qualify as an endangered species, the species must satisfy the criteria set out in section 179(4) of the EPBC Act, relevantly:

“(b) it is facing a very high risk of extinction in the wild in the near future, as determined in accordance with the prescribed criteria¹.”

9. Section 18 of the EPBC Act prohibits “an action” that has or will have a significant impact on, amongst other things, a listed threatened species included in the endangered category
10. Section 18 can be enforced either by the Minister (who may seek an injunction or pecuniary penalty) or an “interested person” who may only seek injunctive relief. The meaning of “Interested person” is dealt with in section 475(6) and (7) of the EPBC Act, and includes a person who engaged in a series of activities for protection or conservation of the environment at any time in the two years immediately before the proposed conduct.
11. Section 38(1) of the EPBC Act provides that Part 3 of the Act (which includes section 18) does not apply to an RFA Forestry operation that is undertaken “in accordance with” an RFA. Section 6 of the RFA Act makes similar provision.
12. The definitions of an “RFA” and “RFA Forestry operations” in the RFA Act are adopted by section 38(2) of the EPBC Act.
13. Section 4 of the RFA Act defines “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, including:-

“(b) the agreement provides for a comprehensive, adequate and representative reserve system;

“(c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions... ”

14. Section 4 of the RFA Act defines “RFA Forestry Operations” to mean (relevantly):-

“(d) Forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) that are conducted in

¹ Prescribed by the EPBC Regulations 2000, reg 7.01

relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA)."

15. The Tasmanian RFA was made between the Commonwealth and Tasmania on 8 November 1997 and came into force on 1 September 2001. The Tasmanian RFA is divided into three parts: Part 1 deals with matters of interpretation, the duration of the RFA, dispute resolution and notices; Part 2 (which is declared in clause 18 to be "not intended to create legally binding relations") includes a number of commitments on the part of the Commonwealth and the State, including clause 68; and Part 3 includes a commitment by the state to develop and implement an environmental management system in accordance with certain principles.
16. Clause 68 of the Tasmanian RFA provides:-

"The State agrees to protect the Priority Species listed in Attachment 2 (part A) through the CAR reserve system or by applying relevant management principles."

The BTSB is one of the species listed.

17. By section 8(1) of the *Forestry Act 1920 (Tas)* Forestry Tasmania has the exclusive management and control of all State forests, including the removal of forest products and the establishment and tending of all forest operations in State forests. When it conducts forestry operations, it must do so on permission given to it under what is known as "Forest Practices Plans", issued to it under Part III of the *Forest Practices Act 1985 (Tas)*.

THE FACTS RELEVANT TO THE INTERLOCUTORY APPLICATION

18. The Applicant does not rely on that part of his application which deals with the wedge tailed eagle to support his interlocutory application. That is because in the time available, it has not been possible to gather all the necessary factual and expert evidence in relation to the impact of logging in these two coupes, or in Wielangta generally, on the eagle. However, the impact on the eagle is an issue which will be pressed at trial.

19. Rather, the applicant relies on the evidence about the impact of forestry operations on the BTSB.
20. The two coupes in the Wielangta Forest area are in State Forest.
21. The following facts can be drawn from the affidavit material filed in support of the application:
 - (a) The BTSB has existed in the Wielangta Forest area for millions of years. The present range for the beetle is only 27,950 hectares, however the actual area of occupancy within that range is much less. Although it appears to mostly live in wet sclerophyll forest, the BTSB has been found in dry sclerophyll forest as well, and hence it is not possible to predict location of the beetle by vegetation type.
 - (b) Similarly, whilst it lives in decaying old logs, the mere presence of those does not guarantee presence of the beetle. The beetle is a naturally rare insect.
 - (c) The BTSB has been found in numerous locations in the Wielangta Forest area by a number of scientists. In late 2004 it was identified as being present coupe WT017E, in an area of dry sclerophyll forest.
 - (d) There is only one prescription in the Forest Practices Plan for this coupe that deals with the beetle, namely, at p.8 under the heading "Wildlife Habitat Clumps" it provides "to maintain the habitat for the Broad Toothed Stag Beetle the harvest area should not be available for post-harvest fire wood collection." This in itself recognises the prospect that the beetle is likely to be found in these coupes, notwithstanding that they are described as dry sclerophyll forest.
 - (e) The proposed forestry operations in this coupe are likely to destroy the beetle population located within it. Because the beetle is so rare, and genetic diversity so important, the destruction of the beetles on this coupe will be a significant impact upon the BTSB as a species.
 - (f) A specimen of the BTSB has not been found in coupe WT019D, but that coupe is within the known range of the beetle and contains both wet and dry sclerophyll forest. The likely presence of the beetle is acknowledged by the

Forest Practices Plan for the coupe itself, as it contains prescriptions dealing with a 10 metre stream side reserve. However that type of reserve, and indeed the wildlife habitat clumps, are insufficient to provide a refuge for the beetle, particularly given that the type of logging envisaged will not provide corridors of movement for the beetle in future years.

- (g) Indeed these reserves are likely to become “sinks” for the beetles that might survive the logging operation, in the sense that they will be attracted to them, but food and genetic diversity will not be sufficient to enable long term survival of this component population, and they are all likely to die.

APPLICANT’S STANDING

22. Senator Brown clearly satisfies the definition of “interested person” and there can be no doubt that he has standing to bring this application.

IDENTITY OF RESPONDENT

23. Although the Forest Practices Plans in respect of both coupes show that Gunns Ltd is the entity most likely undertaking the actual work on the coupes, as a matter of statutory responsibility, section 8(1) of the *Forestry Act* gives the respondent the exclusive management and control of the forest: see *Coote v AR and GR Padgett Pty Ltd* [2004] TASSC 72 (which although the subject of a successful appeal, did not interfere with the reasoning of Blow J about the effect of section 8).
24. Further, it is the respondent who is recorded on the Forest Practices Plans as the applicant for permission to conduct forestry operations in these two coupes.

SERIOUS QUESTION TO BE TRIED

Section 18: “Action”

25. The respondent’s forestry operations are plainly an “action” for the purposes of the EPBC Act: see section 523.

Section 18: “significant impact” on the B T S B

26. The word “impact” in the EPBC Act has been construed by the Full Federal Court to involve considerations about the consequences of actions, including indirect consequences and to direct attention to adverse influences or effects from an “action”: *Minister for the Environment and Heritage v Queensland Conservation Council* [2004] FCAFC 190 at [53].
27. Thus, the phrase “significant impact” should be construed to mean significant consequences – that is, consequences that have some lasting or meaningful quality about them.
28. In this case, the evidence speaks for itself. There can be little doubt that the proposed forestry operations are likely to have a consequences (direct and indirect) for the B T S B which are of a lasting and meaningful kind.

Section 19(3)(a): Forestry operations not protected by the Tasmanian RFA

29. The exception to the application of section 18 which is contained in section 19(3)(a) does not apply because the forestry operations are not being undertaken in accordance with an RFA. This argument is put on two distinct bases, both resting on the construction issues arising from the EPBC Act, the RFA Act and the Tasmanian RFA itself.
30. The first argument is that the forestry operations are not “in accordance with” the Tasmanian RFA because the State has not complied with, or acted consistently with, clause 68 of the Tasmanian RFA.
31. The second argument is that the forestry operations are not in accordance with “an RFA” because the Tasmanian RFA is not an RFA within the meaning of section 38(2) of the EPBC Act and section 6 of the RFA Act.

FIRST ARGUMENT: “IN ACCORDANCE WITH”

32. In *Re La* (1993) 41 FCR 151 at 158 Gray J held that the phrase “in accordance with” in the *Industrial Relations Regulations 1989* (Cth) meant “in conformity with”. His Honour construed the regulations as requiring strict compliance.

33. The same approach should be adopted here. Part 4 of the EPBC Act places a State who has entered into an RFA in an extremely privileged position. It is exempted from a stringent, time consuming, expensive and complicated environmental approvals process where at each stage decision making could be subject to challenge and counter challenge. The whole system is bypassed. Parliament should be taken to have intended that this privilege only be available where there was strict compliance by the State with obligations under an RFA – in other words, where the State was doing exactly what the Commonwealth had agreed it must do under the RFA.
34. Protection afforded to endangered species by RFA assessment should not be construed as less than that afforded by the EPBC Act directly.
35. If the Tasmanian RFA is an RFA for the purposes of section 38(1) of the EPBC Act and section 6 of the RFA Act, then the exoneration provided by those sections only apply if the forestry operation “is undertaken in accordance with an RFA”. That must encompass both the legally enforceable and unenforceable obligations in the RFA.
36. The relevant obligation is in clause 68, by which the State “agrees to protect” (*inter alia*) the BTSB “through the CAR reserve system or by applying relevant management prescription.” It follows that if a forestry operation has significant impact upon the BTSB, then the State must have failed to protect the BTSB by either CAR reserve or management prescription, and hence the forestry operation is not in accordance with the RFA. That must logically follow because the forestry operation itself is effecting an outcome contrary to what the State has agreed to achieve in the RFA.

SECOND ARGUMENT: “AN RFA”

37. Section 4 of the RFA Act requires that the agreement in question satisfies certain specified conditions and it must do that because the agreement “provides for” certain matters. The two matters relied upon by the applicant are

“(b) the agreement provides for a comprehensive, adequate and representative reserve system;

(c) *the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions....”*

38. In the specific legislative context of the EPBC Act, the phrase “provides for” should be construed to mean “requires or establishes”. In this particular statutory context, there is no room for the notion that planning towards such goals is sufficient: cf *Stocks & Parkes Investments Pty Ltd v The Minister* [1971] 1 NSWLR 932 at 940 and *Minister v Stocks & Parkes Investments Pty Ltd* (1973) 129 CLR 385 at 392.
39. See also *Re Brown and Secretary, Department of Fisheries and Energy* (1989-1990) 18 ALD 543 at 553 at [25].
40. The reason why the Tasmanian RFA does not fit these criteria is because although it aspires to a CAR reserve system and ecologically sustainable management, the provisions which deal with that are expressly said to be “not intended to create legally binding relations”. Therefore the agreement cannot be said to require these two matters to be established, or indeed to establish them. The Commonwealth cannot enforce the establishment of these matters, and nor can anyone else.
41. The aspirational nature of the clauses of part 2 are patent from an examination of their language. For instance the provisions which deal with CAR reserves (clauses 48 to 50) establish no time frame and use deliberately imprecise language eg. “sufficiently” and “adequate”. Similarly the clauses that deal with ecologically sustainable forest management (clauses 62 to 64) are purely aspirational. For instance clause 62 says:

“The parties agree that ESFM is an objective which requires a long term commitment to continuous improvement ...”

42. Even on the most benevolent construction of the relevant clauses, it could not be said that the Tasmanian RFA requires or establishes a CAR reserve system, or ecologically sustainable management in use of forested areas. It simply talks about them, aspires to them, and expressly says that those provisions are not legally enforceable at the behest of the Commonwealth.

BALANCE OF CONVENIENCE

Irreparable harm to BTSSB

43. This is self evident from the evidence.

Alternative areas available to respondent for logging

44. The affidavit of Paul Edmund Smith demonstrates that Forestry Tasmania has a sophisticated contingency planning system.

Strength of the Applicant's case and other such factors

45. In *Richardson v Forestry Commission* (1988) 164 CLR 261 at 276 where, in considering whether the balance of convenience favoured the plaintiff in that case where the Tasmanian Forestry Commission was conducting logging operations contrary to a Commonwealth law, Mason CJ said:

"In any event, quite apart from the application of the principle to which I have referred, the balance of convenience favours the plaintiff. Notwithstanding evidence that the defendants and the interveners will suffer substantial loss by reason of the grant of the relief sought and that the injunctions will cause substantial consequential loss to persons engaged in the forestry industry, the timber industry and related activities in Tasmania, the possible loss of, or injury to, what may be a unique heritage must be regarded as the paramount factor."

46. This approach is consistent with the importance ascribed to the protection of the environment and the species which inhabit it by the EPBC Act, including the international recognition that lies behind this legislation.

UNDERTAKING AS TO DAMAGES

47. The applicant is not presently willing to proffer an unrestricted undertaking as to damages. He ought not be required to do so because

- (a) A strong prime facie case can be made in respect of a breach of section 18 and/or section 18A of the EPBC Act;
- (b) More particularly, if the injunction is not granted, the subject matter of the litigation (i.e. the BTSSB) could be severely affected, possibly eliminated, from the coupes in question, and its future survival significantly imperilled;

- (c) Forestry Tasmania was advised 6 years ago not to carry out forestry operations in Wielangta because of the effects on the BTSB and has chosen to ignore the advice;
- (d) The lack of an undertaking is but one factor to be considered in the balance of convenience: *Ross v State Rail Authority of NSW* (1989) 70 LGRA 91.

Dated this 2nd day of June 2005

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