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Details of Filing

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File Title:	FRIENDS OF LEADBEATER'S POSSUM INC v VICFORESTS
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A handwritten signature in blue ink that reads 'Warwick Soden'.

Registrar

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IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN REGISTRY

VID 1228/2017

BETWEEN:

FRIENDS OF LEADBEATER'S POSSUM INC

Applicant

and

VICFORESTS

Respondent

OUTLINE OF SUBMISSIONS ON BEHALF OF VICFORESTS

A. THE SEPARATE QUESTION

1. Pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth), on 17 November 2017 the Court ordered the following question be heard separately from any other questions in the proceeding:

Was the logging of the Logged Coupes, and will the proposed logging of the Scheduled Coupes be, RFA forestry operations undertaken in accordance with the Central Highlands Regional Forest Agreement such that those forestry operations are exempt from the application of Part 3 of the *Environment Protection Biodiversity Conservation Act 1999* (Cth) (the EPBC Act), pursuant to either s 38(1) of the EPBC Act or s 6(4) of the *Regional Forest Agreements Act 2002* (Cth)? (the separate question).

2. By a ruling made on 1 December 2017 the Court ruled that the hearing of the separate question will proceed on the basis of agreed facts pursuant to s 191 of the *Evidence Act 1995* (Cth):

so that if the separate question is, ultimately, seen as raising both questions of law and questions of fact, or mixed questions, the Court has adopted an approach which is consistent with the authorities.¹

¹ *Friends of the Leadbeater's Possum v VicForests* (Unreported, Federal Court of Australia, Mortimer J, 1 December 2017), [3].

3. On 7 December 2017 the parties filed and serve an agreed statement of facts together with annexures comprising all agreed documents.
4. Having regard to the principles of statutory interpretation set out below, and the fact that this Court is bound by the decision of the Full Federal Court in *Forestry Tasmania v Brown*,² the answer to the separate question must be yes.

B. PRINCIPLES OF STATUTORY INTERPRETATION

5. The primary object of statutory construction is to construe the relevant provision so that its legal meaning is consistent with:
 - (a) language of the relevant provision, being the text; and
 - (b) the legislative purpose of the statute.³
6. The legal meaning is ‘the meaning that the legislature is taken to have intended the provision to have’. It may or may not be the same as the literal meaning.⁴
7. The High Court has emphasised the primacy of the text, so that the process of statutory interpretation starts and ends with the text.⁵
8. To ascertain the legislative purpose, the Court must first consider the text of the relevant provision in its context. The context means:
 - (a) the whole of the Act or other instrument;
 - (b) the existing state of the law; and
 - (c) the legislative history.

² (2007) 167 FCR 34.

³ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 [69] (McHugh, Gummow, Kirby and Hayne JJ).

⁴ *Ibid* 384 [78].

⁵ *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ). The expression was adopted by the High Court in *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ) and also by the Victorian Court of Appeal in *DPP v Walters* [2015] VSCA 303, [2] (Maxwell P, Redlich, Tate and Priest JJA).

9. It is only after exhausting this approach that one can have reference to parliamentary debates or other extrinsic material;⁶ and such material cannot displace the clear meaning of the text.⁷
10. In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose is expressly stated in the Act) is to be preferred to each other interpretation.⁸
11. After the identification of alternative constructions, the High Court has explained that:

If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.⁹

12. Further:

[I]nconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which ... is reasonably open and more closely conforms to the legislative intent.¹⁰

13. In *MyEnvironment v VicForests*,¹¹ where one of the purposes of the relevant legislation was to protect the habitat of the Leadbeater's Possum, the Victorian

⁶ *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252, 265 [33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); quoted in *Di Paolo v Salta Constructions Pty Ltd* [2015] VSCA 230, [36] (Osborn and Kyrou JJA).

⁷ *Northern Territory v Collins* (2008) 235 CLR 619, 642 [99] (Crennan J).

⁸ *Acts Interpretation Act 1901* (Cth) s 15AA.

⁹ *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321 (Mason and Wilson JJ).

¹⁰ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 348, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

¹¹ (2015) 42 VR 456 (*MyEnvironment*).

Court of Appeal was invited to construe the relevant provisions expansively with a view to furthering this legislative purpose.¹² The Chief Justice observed:

In my view, the authorities can be seen as supporting two related propositions. First, that it is rarely, if ever, the case that legislation pursues a single purpose to the fullest extent possible. Rather legislation is typically the result of a carefully considered attempt at balancing multiple and sometimes competing objectives. To assume that the apparently confined words of a provision must be given an expansive operation on the basis of what is perceived to be the legislation's primary purpose may frustrate rather than effectuate legislative intent.¹³

14. Tate JA said:

When construing legislation that has a multiplicity of purposes, or seeks to strike a balance between competing interests, it is necessary to keep in mind the observation of Gleeson CJ in *Carr v Western Australia* that the purposive rule of statutory interpretation, embodied in Victoria in s 35(a) of the *Interpretation of Legislation Act 1984*, is of limited assistance in construing legislation, or regulatory instruments, that embrace numerous potentially conflicting objectives in relation to which the court has to determine from the language used where the intended balance lies. In that context, he expressly eschewed the adoption of a construction that furthered the pursuit of one of the competing objectives to the greatest extent possible while leaving the other objectives unfulfilled.¹⁴

15. Tate JA concluded that the competing aims in the regulatory context—which sought to balance conservation objectives with a viable timber harvesting industry— showed that there had been a ‘compromise’, and it was a ‘circumstance in which “[t]he purpose or object identified does not compel any particular construction.”¹⁵ The fact that the legislative scheme was directed at the fulfilment of multiple purposes meant that the ‘correct construction ... must depend on the words used’, within the relevant context.¹⁶

¹² See also *Baytech Trades Pty Ltd v Coinvest Ltd* [2015] VSCA 342, [60]–[62], where the Court of Appeal (Maxwell P, Tate JA and John Dixon AJA) summarised with approval relevant passages from the judgment in *MyEnvironment*.

¹³ *MyEnvironment*, 462 [14].

¹⁴ *Ibid* 497–8 [148].

¹⁵ *Ibid* 500 [155], quoting from *Kelly v R* (2004) 218 CLR 216, 233 [43].

¹⁶ *Ibid* 500 [155]; see also *Baytech Trades Pty Ltd v Coinvest Ltd* [2015] VSCA 342, [62].

16. Relevant for this case, too, is s 13(2)(d) of the *Acts Interpretation Act 1901* (Cth) to the effect that headings to Chapters, Parts, Divisions or Subdivisions are also part of an Act. In *Silk Bros Pty Ltd v State Electricity Commission (Vic)*,¹⁷ Latham CJ said:

The headings in a statute or in Regulations can be taken into consideration in determining the meaning of a provision where that provision is ambiguous, and may sometimes be of service in determining the scope of a provision ... “But where the enacting words are clear and unambiguous, the title, or headings, must give way, and full effect must be given to the enactment” (*Bennett v. Minister for Public Works (N.S.W.)* (1908) 7 CLR 372 at 383 per Isaacs J).¹⁸

C. RELEVANT STATUTORY PROVISIONS

17. Section 38 of the EPBC Act is located in subdiv A of div 4 of that Act. Division 4 is titled ‘Forestry operations in certain regions.’ Subdivision A is titled ‘Regions covered by regional forest agreements.’ Section 38 reads:

Division 4—Forestry operations in certain regions

Subdivision A—Regions covered by regional forest agreements

38 Part 3 not to apply to certain RFA forestry operations

- (1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.
- (2) In this Division:

RFA or *regional forest agreement* has the same meaning as in the *Regional Forest Agreements Act 2002*.

RFA forestry operation has the same meaning as in the *Regional Forest Agreements Act 2002*.

Note: This section does not apply to some RFA forestry operations. See section 42.

¹⁷ (1943) 67 CLR 1.

¹⁸ *Ibid* 16.

18. The *Regional Forest Agreements Act 2002* (Cth) (**RFA Act**) defines the phrase “RFA Forestry Operations” in s 4. Relevant to this case is subparagraph (b) of the definition:

- (b) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Victoria) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA).

19. Section 42 of the EPBC Act provides that subdivs A and B of div 4 and sub-s 6(4) of the RFA Act do not apply to RFA forestry operations, or to forestry operations, that are:

- (a) in a property included in the World Heritage List; or
- (b) in wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention; or
- (c) incidental to another action whose primary purpose does not relate to forestry operations.

20. Subsection 6(4) of the RFA Act is in the following terms:

6 Certain Commonwealth Acts not to apply in relation to RFA wood or RFA forestry operations

- ...
- (4) Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

21. Collectively, s 38 of the EPBC Act and s 6(4) of the RFA Act are referred to as the **exempting provisions** in these submissions.

22. Part 3 of the EPBC Act is headed ‘Requirements for environmental approvals.’ It contains a number of provisions that create offences. Relevant to this case is s

18 which provides that a person must not take an action that has or will have, or is likely to have a significant impact on:

- (a) critically endangered species (s 18(2));
- (b) endangered species (s 18(3)); and
- (c) vulnerable species (s 18(4)).

D. THE PROPER CONSTRUCTION OF THE EXEMPTING PROVISIONS

23. VicForests submits that on the proper construction of the exempting provisions, any forestry operations that:

- (a) are forestry operations as defined by an RFA as in force on 1 September 2001; and
- (b) are conducted in relation to land:
 - (i) in a region covered by the RFA; and
 - (ii) where those operations are not prohibited by the RFA

are exempt from the operation of pt 3 of the EPBC Act.

E. ANALYSIS

E.1. Considered in context, the text of the exempting provisions indicates that Part 3 of the EPBC Act does not apply to forestry operations conducted in RFA regions

24. The Applicant alleges that the logging of the logged coupes, and the proposed logging of the scheduled coupes, is not *undertaken in accordance with* the CH RFA, and therefore those forestry operations are not exempt from the

application of pt 3 of the EPBC Act, pursuant to either s 38(1) of the EPBC Act or s 6(4) of the RFA Act.¹⁹

25. The factual basis alleged to justify the characterisation of the forestry operations as being not ‘undertaken in accordance with’ the CH RFA concerns the failure to have three five-yearly reviews for the CH RFA undertaken within stipulated time periods.²⁰
26. VicForests submits that it is irrelevant whether (and when) any reviews have occurred because, on the proper construction of the exempting provisions, an RFA forestry operation is ‘undertaken in accordance with an RFA’ if it is conducted in a region covered by an RFA, where the applicable RFA permits that area to be logged.
27. On this construction the words ‘undertaken in accordance with an RFA’ may appear somewhat superfluous having regard to the definition of RFA forestry operations in the RFA Act. However, when regard is had to subdivs B and C of div 4, it is clear that the legislature intended to draw a distinction between regions covered by regional forest agreements (subdiv A) and regions for which a process of developing and negotiating a regional forest agreement is being, or has been, carried on (subdiv B). Only the former were to be exempt from pt 3 of the EPBC Act with the latter not requiring approval under pt 9 for the purposes of a provision of pt 3 if there is not a regional forest agreement in force for any of the region.
28. It would be a curious outcome if, on the Applicant’s preferred construction:
 - (a) forestry operations in an RFA region (but in a region where no RFA was in force, i.e. subdiv B operations) did not require approval under pt 9 for the purposes of pt 3 by reason of s 40(1) of the EPBC Act;
 - (b) but RFA forestry operations in an RFA region (i.e. forestry operations that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA))

¹⁹ Statement of claim, [113].

²⁰ Statement of claim, [112].

where the applicable RFA had not been reviewed within the stipulated time frame but where the RFA remained in force:

- (i) were not exempt from pt 3 of the EPBC Act; and
- (ii) were not protected by the regime established by s 40 of the EPBC Act;

such that subdiv B operations had less stringent environmental controls notwithstanding they are, by definition, not the subject of an RFA.

29. Further, s 38 must be read harmoniously with s 42. Section 42 provides that subdivs A and B (containing s 38 and s 40 respectively) and subsection 6(4) of the RFA Act, do not apply to RFA forestry operations, or to forestry operations, that are:
- (a) in a property included in the World Heritage List; or
 - (b) in wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention; or
 - (c) incidental to another action whose primary purpose does not relate to forestry operations.
30. There is no reference in s 42 of the EPBC Act to RFA forestry operations ‘undertaken in accordance with an RFA’; rather that section draws a distinction merely between RFA forestry operations, and forestry operations. Those distinctions must be understood to be distinctions between operations covered by subdiv A (RFA forestry operations) and subdiv B (forestry operations in an RFA region but without an RFA).
31. Thirdly, the legislative history of s 38 of the EPBC Act reveals a lack of care in the definition of RFA forestry operations in any event revealing inadvertent

error. In its form prior to being repealed by the passage of the Regional Forests Agreement Bill 2002,²¹ s 38 provided that:

Division 4—Forestry operations in certain regions

Subdivision A—Regions covered by regional forest agreements

38 Approval not needed for forestry operations permitted by regional forest agreements

- (1) A person may undertake RFA forestry operations without approval under Part 9 for the purposes of a provision of Part 3 if they are undertaken in accordance with a regional forest agreement.

Note: This section does not apply to some forestry operations. See section 42.

- (2) In this Act:

regional forest agreement has the same meaning as in the *Regional Forest Agreements Act 1999*.

RFA forestry operations has the same meaning as in the *Regional Forest Agreements Act 1999*.

32. But the Regional Forest Agreements Bill 1998 was never enacted, so the EPBC Act (prior to its amendment by the passage of the RFA Act) defined ‘RFA forestry operations’ by reference to legislation that did not exist. The definition of ‘RFA forestry operations’ contained in s 3 of the Regional Forest Agreements Bill 1998 read:

RFA forestry operations means forestry operations that:

- (a) are conducted in relation to land in a region covered by an RFA (being land where those operations are not prohibited by the RFA); and
- (b) are conducted in relation to a forest (within the meaning of the RFA).

33. Further the CH RFA does not impose any obligations on VicForests at all. VicForests is not a party to it. All that the phrase ‘undertaken in accordance with an RFA’ can mean, is really that included in parenthesis in the definition of ‘RFA forestry operations’ in the RFA Act, i.e., the forestry operations are

²¹ Schedule 1 to the RFA Act in its original form repealed s 38 of the EPBC Act.

conducted in relation to land where those operations are not prohibited by the RFA.

34. For these reasons, although the words ‘in accordance with an RFA’ appear otiose on VicForests’ construction of the exempting provisions, the text and context of div 4 of the EPBC Act, together with the legislative history and the absurdity that would result on the Applicant’s construction, evince a legislative intention that RFA forestry operations conducted in an RFA region on land not prohibited by the applicable RFA are exempt from the operation of pt 3 of the EPBC Act.
35. As set out below, the extrinsic material also supports this construction.

E.2. The extrinsic material supports VicForests’ construction of the exempting provisions

36. It is legitimate to consider extrinsic material to confirm the ordinary meaning of the provision is the ordinary meaning conveyed by the text, or to determine the meaning of the provision when it is ambiguous or obscure, or the ordinary meaning would lead to absurd or unreasonable results.²²

E.2.1. Extrinsic material related to the RFA Act

37. The Revised Explanatory Memorandum to the Regional Forests Agreement Bill 2002 explained in its introduction to the ‘Regulation Impact Statement’:

Particularly since the 1970s, governments have faced the task of balancing competing interests of environment/conservation, industry and recreation regarding the use, management and conservation of forests and forest resources. The National Forest Policy Statement of 1992 provided a framework agreed by Commonwealth and all State Governments for a long-term and lasting resolution of conservation, forest industry and community interests and expectations concerning Australian forests. The Statement required joint Commonwealth-State comprehensive regional assessments of environmental, heritage, economic and social values of forests.

These assessments formed the basis of negotiated Regional Forest Agreements (RFAs) between the Commonwealth and the States, that provide for both future forest management and the basis of an internationally competitive and ecologically

²² *Acts Interpretation Act 1901* (Cth) s 15AB(1).

sustainable forest products industry. The agreements provide for a comprehensive, adequate and representative forest reserve system and clearly identify those forest resources available for multiple use, including resources for sustainable timber harvesting.

38. The revised explanatory memorandum goes on to explain that RFAs have been agreed in 10 regions, and that the RFA Bill seeks to underpin the agreements by, amongst other things:

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).²³

39. Under the heading 'Impact Assessment' it is noted that:

The provision in the Bill that Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) does not apply to an RFA forestry operation has no new implications for industry or the environment, since it reflects Section 38 of the EPBC Act.²⁴

40. Concerning cl 6 of the Bill (which became s 6 of the RFA Act), the revised explanatory memorandum explained:

This clause provides 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.

...

Subsection (4) provides that Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) does not apply to RFA forestry operations.²⁵

41. Each of the above passages from the Revised Explanatory Memorandum supports VicForests' construction of the exempting provisions, in that they emphasise that the exemption concerns RFA forestry operations, that is forestry operations where an RFA, based on comprehensive regional assessments, is in

²³ Revised explanatory memorandum, Regional Forests Agreement Bill 2002 (Cth), 4.

²⁴ Ibid 6.

²⁵ Ibid 7-8 (emphasis added).

place. However, for RFA forestry operations to come within the definition of that phrase provided in the RFA Act, they must not only be conducted in relation to land in a region covered by the RFA, but must also be conducted on land where those operations are not prohibited by the RFA (and in this sense, be ‘undertaken in accordance with’ the RFA).

42. Commenting on the above revised explanatory memorandum, the Full Federal Court has said, ‘[a]gain, the message is that the [EPBC] Act does not apply to forestry operations in RFA regions, and that the regime applicable in those regions is found in the RFAs themselves.’²⁶ To this, it must be noted that, in addition to the land protected by the CH RFA, there is a sophisticated legislative scheme at the State level that governs timber harvesting in Victorian State Forest, and that includes significant protections for threatened flora and fauna.²⁷
43. The Second Reading Speech for the Regional Forest Agreements Bill 2002 explained the first objective of the Bill (to give effect to certain obligations of the Commonwealth under the RFAs)²⁸ involved, amongst other things, ‘ensuring that forestry operations in regions subject to RFAs are excluded from Commonwealth legislation relating to export controls, the environment and heritage (clause 6).’²⁹ The speech went on to say:

In excluding RFA forestry operations from certain Commonwealth legislation, the Bill draws a line in the sand for political or bureaucratic goal shifting. The environmental, heritage and economic values of these regions have been comprehensively assessed through the RFA process and each RFA was signed only after the Commonwealth had satisfied itself that State regimes adequately address sustainable forest management, environmental protection and heritage. **There is, therefore, no need for further assessment at the Commonwealth level for the 20 years of these agreements.** Any forestry operation inconsistent with the commitments in RFAs processes are to be addressed within State processes and reported in the annual RFA reports and 5 yearly reviews.³⁰

²⁶ *Forestry Tasmania v Brown* (2007) 167 FCR 34, 51 [62].

²⁷ See generally *MyEnvironment*, the *Sustainable Forests (Timber) Act 2004* (Vic), the *Flora and Fauna Guarantee Act 1988* (Vic), the *Conservation, Forests and Lands Act 1987* (Vic) and the *Code of Practice for Timber Production 2014*.

²⁸ RFA Act s 3(2)(a).

²⁹ Commonwealth, *Parliamentary Debates*, Senate, 13 February 2002, 1-2 (Ian Campbell).

³⁰ *Ibid* 2 (emphasis added).

E.2.2. Extrinsic material related to the EPBC Act

44. Consistent with the above, the explanatory memorandum to the Environment Protection and Biodiversity Conservation Bill 1998 said, in relation to subdiv B of div 4:

The object of this subdivision recognises that in each RFA region a comprehensive assessment is being, or has been, undertaken to address the environmental, economic and social impacts of forestry operations. In particular, environmental assessments are being conducted in accordance with the *Environment Protection (Impact of Proposals) Act 1974*. In each region, interim arrangements for the protection and management of forests are in place pending finalisation of an RFA. The objectives of the RFA scheme as a whole include the establishment of a comprehensive, adequate and representative reserve system and the implementation of ecologically sustainable forest management. These objectives are being pursued in relation to each region. **The objects of this Act will be met through the RFA process for each region and, accordingly, the Act does not apply to forestry operations in RFA regions.**³¹

45. Commenting on the above passage in *Forestry Tasmania v Brown*, the Full Federal Court said:

In our view the emphasised passage indicates that the Act does not apply to forestry operations in RFA regions, and the way in which the objects of the Act will be met in relation to those operations is to be ascertained by reference to the relevant RFA.³²

46. One of the central purposes of the EPBC Act was to rationalise Commonwealth's responsibilities in dealing with environmental issues vis-à-vis those of the States, and limit the Commonwealth's involvement to matters of national significance.³³ The second reading speech to the Environment Protection and Biodiversity Conservation Bill 1998 says:

Commonwealth assessment is confined to impacts on the matters of national environmental significance (the Commonwealth will not assess matters which are more appropriately the responsibility of the States).³⁴

³¹ Explanatory memorandum to the Environment Protection and Biodiversity Conservation Bill 1998 (Cth), 38-9 [113] (emphasis added).

³² (2007) 167 FCR 34, 51 [61].

³³ EPBC Act s 3(2)(a).

³⁴ Commonwealth, *Parliamentary Debates*, Senate, 12 November 1998, 211 (Rod Kemp).

47. Section 38 obviates the need for Commonwealth involvement in approval of routine forestry operations. Were it not for s 38, forestry operations would need approval under Pt 9 of the EPBC Act to ensure they did not breach s 18. Under the Applicant's construction, forestry operations would require Pt 9 approval in each case. Under that approach, Commonwealth involvement would not be confined to matters of national significance. On the contrary, the Commonwealth would be required to routinely assess matters of purely local significance.
48. VicForests does not dispute that threatened species constitute a matter of national significance.³⁵ However, Parliament's intent in enacting s 38 was to approve the RFA regime and thereby spare the Commonwealth from making assessments on a coupe-by-coupe basis. Section 38 reflects legislative intent to adopt the RFA regime as setting an appropriate standard and system for dealing with threatened species.

E.3. The nature of RFAs supports VicForests' construction

49. Consistently with the extrinsic material above, the nature of RFAs themselves supports VicForests' construction of the exempting provisions.
50. One of the purposes of the CH RFA is to establish the framework for the management of the forests of the Central Highlands (Recital A). Recital B explains that the CH RFA:
- (a) identifies a Comprehensive, Adequate and Representative Reserve System and provides for the conservation of those areas;
 - (b) provides for the ecologically sustainable management and use of forests in the region;
 - (c) is for the purpose of providing long-term stability of forests and forest industries; and
 - (d) has regard to studies and projects carried out in relation to the region.

³⁵ See eg *ibid* 210.

51. The CH RFA is to remain in force for 20 years: cl 7. Stability is obviously a central feature of the RFAs. As the second reading speech for the Regional Forest Agreements Bill 2002 explained, there is no need for further assessment at the Commonwealth level for the 20 years of these agreements. In *Wilderness Society Ltd v Turnbull, Minister for the Environment and Water Resources*,³⁶ a majority of a Full Court of the Federal Court said:

the RFA Act itself makes provision for a separate regime built upon regional forestry agreements which itself takes account of environmental and other values in relation to forests and forestry operations that are subject to such an RFA.³⁷

52. It was for this reason that the majority found that s 38 of the EPBC Act creates a 'general exemption' whereby 'Pt 3 is not to apply to an RFA forestry operation.'³⁸

53. Clauses 10 to 15 of the CH RFA, which deal with dispute resolution, provide further stability. A dispute must be resolved in accordance with those clauses. The CH RFA can only be terminated in accordance with cls 92 and 93.

54. Clause 54 of the CH RFA provides:

The Parties agree that the CAR Reserve System, actions under the Flora and Fauna Guarantee Act 1988 and the Endangered Species Protection Act 1992, and the application of a range of management strategies in the Central Highlands Forest Management Plan provide for the protection of rare or threatened flora and fauna species and ecological communities.

55. By cl 60 of the CH RFA the parties agree that the primary function of the CAR Reserve System is to ensure the conservation and protection of environment and heritage values. By cl 62, Victoria agreed to implement the CAR Reserve System. By cl 66 the parties recognised that all Victorian rainforest is protected from harvesting through the range of mechanisms described in Attachment 1. By clause 61 of the CH RFA the parties agree that each element of the reserve system will be administered in accordance with Victorian legislation.

³⁶ (2007) 166 FCR 154.

³⁷ *Ibid* 161 [30].

³⁸ *Ibid*.

56. The above clauses are consistent with a construction of the exempting provisions that provides that as long as the forestry operations are conducted in an RFA region on land not prohibited by the RFA, such operations are exempt from the Commonwealth environment protections in pt 3 of the EPBC Act.
57. The requirement to conduct five yearly reviews is contained in cls 36–38, within pt 2 of the CH RFA. Part 2 is not intended to create legally binding relations. The Applicant contends that the failure to conduct reviews within the time stipulated renders VicForests’ logging in the coupes and the scheduled coupes as being not ‘undertaken in accordance with’ an RFA.
58. But the failure to conduct a review within the time stipulated does not entitle a party to terminate the RFA; rather it remains in force, so that any RFA forestry operations are in fact undertaken in accordance with the RFA. If the five yearly reviews were crucial to the validity of the RFAs, they would have been framed as a five year agreement with an option to extend it three times, or a failure to conduct a review within the time stipulated would enable a party to terminate the RFA. Further, if the Applicant was correct on its construction, the mere failure to conduct a review on time would forever mean that forestry operations conducted in that RFA region would not be undertaken in accordance with an RFA. That construction is inconsistent with:
- (a) the lack of prominence given to the review requirement in the RFA itself;
 - (b) the fact that the RFA is meant to last for 20 years; and
 - (c) the certainty to industry that the RFA was intended to provide.
59. Rather, the five year review time frame is merely aspirational.

60. In the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999³⁹ (**the Hawke Report**) Dr Hawke observed, after citing the passage from the explanatory memorandum above, that:

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.⁴⁰

61. The Hawke Report recommended that the EPBC Act be amended so that the Environment Minister could apply the full protections of the Act if satisfied that the review of an applicable RFA, amongst other things, had not occurred within the timeframe specified in the RFA.⁴¹ This recommendation was based on the view that:

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.⁴²

62. In the Australian Government Response to the Hawke Report⁴³ the Government responded to the above recommendation in the following terms:

The government does not agree to the recommendation to change section 38 of the Act, as the existing mechanisms for continuous improvement contained with the RFAs can be used to achieve ecologically sustainable forestry outcomes.⁴⁴

63. Further, the review process is only directed towards a review of the *performance* of the RFA, not the requirements of the RFA itself. The review process cannot open up the RFA to re-negotiation, although the parties may

³⁹ *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Final Report* (2009).

⁴⁰ *Ibid* 197 [10.10].

⁴¹ *Ibid* 203 (Recommendation 38).

⁴² *Ibid* 198 [10.22].

⁴³ *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2011) (**the Australian Government Response**).

⁴⁴ *Ibid* 71.

agree to some minor modifications to incorporate the results of the review: cl
37. As a result, any failure of the non-binding requirement to conduct a review within a stipulated time frame has no effect on the validity of the RFA.

64. Each of these features of the CH RFA indicate that the failure to conduct a review in a timely fashion (or at all) was not intended to affect the exemption from pt 3 of the EPBC Act for forestry operations conducted in relation to land in a region covered by an RFA (being land where those operations are not prohibited by the RFA).

F. ANSWER TO THE SEPARATE QUESTION

65. The logging of the Logged Coupes, and the proposed logging of the Scheduled Coupes, were and will be RFA forestry operations undertaken in accordance with the CH RFA as they are and will be forestry operations conducted in relation to land in a region covered by the CH RFA (being land where those operations are not prohibited by the CH RFA).

66. For this reason, the answer to the separate question must be 'yes'.

67. It follows that the application should be dismissed with costs.

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