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Details of Filing

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File Title:	FRIENDS OF LEADBEATER'S POSSUM INC v VICFORESTS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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A handwritten signature in blue ink that reads 'Warwick Soden'.

Registrar

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Federal Court of Australia
District Registry: Victoria
Division: ACLHR

No: VID 1228/2015

FRIENDS OF LEADBEATER'S POSSUM INC

Applicant

and

VICFORESTS

Respondent

APPLICANT'S SUBMISSIONS

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Introduction

1. On 17 November 2017 Mortimer J made an order that, pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth), 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 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. The applicant submits that the separate question should be answered as follows:

The logging of the logged coupes was not, and the proposed logging of the scheduled coupes, will not be, RFA forestry operations undertaken in accordance with the Central Highlands Regional Forest Agreement (the **CH RFA**). Accordingly, those forestry operations were not, and are not, exempt from the application of Part 3 of 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).

3. The applicant's submissions in support of that answer are, in summary, as follows:

- 3.1. For an RFA forestry operation to be “undertaken in accordance with an RFA”, the operation must be undertaken in accordance with all terms of the applicable RFA.
- 3.2. That construction of s 38(1) of the EPBC Act and s 6(4) of the *Regional Forest Agreements Act 2002* (the **RFA Act**) is supported by the text, purpose and context of the EPBC Act, the extrinsic materials for the EPBC Act and the RFA Act. The Acts and extrinsic materials indicate that the RFA regime was intended to replace the EPBC Act and provide an alternative regime, pursuant to which forestry operations could be conducted. It follows from the fact that the RFA regime was intended to replace the operation of the EPBC Act that compliance with all terms of the RFA regime (rather than isolated provisions) is necessary.
- 3.3. That construction is also consistent with and supported by *Forestry Tasmania v Brown (Forestry Tasmania)*,¹ which is authority for the proposition that the

¹ (2007) 167 FCR 34 at 50-52 [59]-[68].

RFA regime was intended to replace the EPBC Act, and that the regime applicable in RFA regions is found in RFAs themselves.

- 3.4. The applicant's case is that, once the terms of the CH RFA were agreed, those terms provided, and continue to provide, a framework that governs RFA forestry operations; and full compliance with that framework is required in order to attract the exemption in ss 38(1) and 6(4).
- 3.5. In the alternative to the applicant's primary submission, that all provisions of the RFA regime must be complied with (in the same way as all provisions in the EPBC Act would need to be complied with in the absence of an exemption), the applicant submits that:
 - (a) there must be compliance with all material provisions of the RFA; or
 - (b) alternatively, there must be substantial compliance with the provisions of the RFA.

Clause 36 of the CH RFA is a material provision, in respect of which there has been no compliance.

- 3.6. The enforceability of RFA provisions by the parties to the CH RFA or by VicForests is entirely irrelevant to whether s 38(1) of the EPBC Act or s 6(4) of the RFA Act exempts VicForests from the prohibitions in the EPBC Act. Compliance, by the parties to the CH RFA, with all terms (alternatively, with all material provisions) of the CH RFA is a precondition to the exemption of RFA forestry operations from the EPBC Act; and, in the absence of that compliance, there is no exemption from the EPBC Act for any person seeking to RFA forestry operations.
4. The consequence of the failure of the Commonwealth and the State of Victoria to carry out each of the first, second and third five-yearly reviews² is that, since at least the first failure to do so, RFA forestry operations carried out in the CH RFA Area have not been, and could not be, carried out in accordance with the CH RFA.

Facts

5. The applicant relies on the facts set out in the Agreed Statement of Facts filed by the parties on 7 December 2017 – including, in particular, the following facts:
 - 5.1. Logging has occurred and is scheduled to occur in the CH RFA Area.
 - 5.2. The CH RFA Area is home to species including the Leadbeater's Possum and the Greater Glider, which have been declared to be, respectively, listed threatened species in the critically endangered and vulnerable categories under

² See Agreed Statement of Facts, paragraphs 26-28: Court Book p 18.

the EPBC Act. Those species are described in their approved conservation advices.³

- 5.3. The applicant alleges that the past logging and the scheduled logging has had, will have or is likely to have a significant impact on the two species (within the meaning of s 18 of the EPBC Act, including that the past and scheduled logging is an action within the meaning of that Section).
- 5.4. The approved conservation advices for both Leadbeater's Possum and Greater Glider include, as one of the main reasons why the species is eligible for listing, habitat loss due to timber harvesting, including clear-felling.⁴
- 5.5. There is no approval in place pursuant to Part 9 of the EPBC Act.
- 5.6. The applicant contends that it follows from the above facts that the only basis on which the past logging has not offended, or scheduled logging will not offend, against s 18 of the EPBC Act would be that the logging attracted and will attract the exemptions in s 38(1) of the EPBC Act and s 6(4) of the RFA Act.

When will an RFA forestry operation be undertaken in accordance with an RFA?

6. Section 38(1) of the EPBC Act and s 6(4) of the RFA Act both provide, in identical terms, that Part 3 of the EPBC Act “does not apply to an RFA forestry operation that is undertaken in accordance with an RFA”. The critical question that arises is: what does it mean for an RFA forestry operation to be undertaken in accordance with an RFA?
7. The applicant submits that, for an RFA forestry operation to be undertaken in accordance with an RFA, the operation must be undertaken in accordance with all the terms of the RFA. That means that there must be, at the time when the operation (in the present case, logging) is undertaken, full compliance, by the parties to the RFA and any other person undertaking the RFA forestry operation, with all the terms of the RFA. Put differently, compliance with all terms of the RFA is essential for an RFA forestry operation to be exempted from the operation of the EPBC Act.
8. That construction is supported by the text, purpose and context of the EPBC Act, as well as extrinsic materials and Full Federal Court authority relating to the EPBC Act and the RFA Act.

³ See Annexure 6 to the Agreed Statement of Facts: Court Book pp 270-272, 275, 278; Annexure 7 to the Agreed Statement of Facts: Court Book pp 324-326.

⁴ See Annexure 6 to the Agreed Statement of Facts: Court Book pp 275-276, 278, 280-281, 288-289 313-320; Annexure 7 to the Agreed Statement of Facts: Court Book pp 326-330.

Text

9. Section 38(1) of the EPBC Act and s 6(4) of the RFA Act provide that “Part 3 [of the EPBC Act] does not apply to an RFA forestry operation that is undertaken in accordance with an RFA”.

9.1. In *Ramsay v Sunbuild*,⁵ when considering the meaning of the phrase “in accordance with [Part 3-4 of the Act]” in ss 501 and 502 of the *Fair Work Act 2009* (Cth), Reeves J said that “[i]n various, albeit context-specific situations, that expression has been held to mean: ‘in conformity with’, or ‘consistently with’ ...”.⁶ Justice Reeves found that the term, as used in ss 501 and 502 was to be read as a reference to the person “having acted in conformity with the provisions of [Part 3-4] and gained the status of a permit holder under it”.⁷

9.2. In *Re La*,⁸ Gray J held that the requirement, in reg 98(1)(a) of the *Industrial Relations Regulations 1989* (Cth), that an application to the Federal Court be made “in accordance with Form 11” meant the application was made “in complete agreement with”.

10. Both the natural meaning of the words “in accordance with” and authority therefore indicate that it is necessary to derive the meaning of that phrase from the surrounding context. In the current context (s 38(1) of the EPBC Act and s 6(4) of the RFA Act), the meaning of “in accordance with” is informed by the definitions of “RFA” and “RFA forestry operation” in s 4 of the RFA Act:

“**RFA or Regional Forest Agreement**” means an agreement that is in force between the Commonwealth and a State in respect of a region or regions, being an agreement that satisfies all the following conditions:

- (a) the agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions:
 - (i) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;
 - (ii) indigenous heritage values;
 - (iii) economic values of forested areas and forest industries;
 - (iv) social values (including community needs);
 - (v) principles of ecologically sustainable management;

⁵ (2014) 221 FCR 315.

⁶ (2014) 221 FCR 315 at 341 [95].

⁷ (2014) 221 FCR 315 at 341 [96].

⁸ (1993) 41 FCR 151 at 158.

- (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;
- (d) the agreement is expressed to be for the purpose of providing long-term stability of forests and forest industries;
- (e) the agreement is expressed to be a Regional Forest Agreement.

“**RFA forestry operations**” means:

- (a) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and New South Wales) 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); or
- (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); or
- (c) harvesting and regeneration operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Western Australia) 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); or
- (d) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) 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).

For the purposes of paragraph (b), the East Gippsland RFA (as in force on 1 September 2001) is taken to include a definition of *forestry operations* that is identical to the definition of *forestry operations* in the Central Highlands RFA (as in force on 1 September 2001).

11. Two matters are evident from those definitions.
12. The **first matter** is that RFAs are intended to accommodate a range of potentially competing values, including environmental and economic values, and to provide for the ecologically sustainable management and use of forested areas in the region or regions.
 - 12.1. That is consistent with the applicant’s submission that logging in accordance with an RFA must mean logging where there has been compliance with all terms of the RFA. RFAs will contain a range of provisions designed to meet the definition of the RFA.
 - 12.2. To allow logging where there is compliance with some terms of the RFA, but not with other terms, would result in a failure to achieve the balancing of competing values contemplated by the RFA regime.

13. The **second matter** is that, given that the definition of “RFA forestry operation” identifies a forestry operation conducted in relation to land in a region covered by an RFA (being land where those operations are not prohibited by the RFA), the phrase “RFA forestry operation that is undertaken in accordance with an RFA” must mean, at a minimum, something more than both: a forestry operation conducted in relation to land in a region covered by the RFA; and a forestry operation conducted in relation to land where those operations are not prohibited by the RFA.
- 13.1. That conclusion follows from the principle that all words in a statute must be given work to do, because it is “improbable that the framers of legislation could have intended to insert a provision which has virtually no practical effect”.⁹
- 13.2. The answer to the question, what do the words “in accordance with” add, is supplied by the purpose and broader statutory context of the EPBC Act and RFA Act, and the extrinsic materials and authority relating to that legislation.

Purpose and broader statutory context of the EPBC Act

14. The objects of the EPBC Act include to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance: s 3(1)(a).
15. One matter of national environmental significance, for which the EPBC Act aims to provide protection, is native species that is determined, in accordance with prescribed criteria, to be:
- 15.1. facing an extremely high risk of extinction in the wild in the immediate future (critically endangered category);
- 15.2. facing an extremely high risk of extinction in the wild in the near future (endangered category);
- 15.3. facing an extremely high risk of extinction in the wild in the medium-term future (vulnerable category);
- each of which is eligible to be listed threatened species: s 179.
16. The manner in which that objective in s 3(1)(a) is achieved is relevantly as follows.
17. Part 3 of Chapter 2 of the EPBC Act prohibits a person from taking an action that has, will have, or is likely to have a significant impact on certain aspects of the

⁹ *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 (Gummow J).

environment, unless the Minister has decided to give approval, give approval subject to specified conditions, or that approval is not needed. Relevantly to this case:

- 17.1. Section 18(2) provides that a person must not take an action that (a) has or will have a significant impact on a listed threatened species included in the critically endangered category; or (b) is likely to have a significant impact on a listed threatened species in the critically endangered category (in this case, the Leadbeater's Possum).
 - 17.2. Section 18(4) provides that a person must not take an action that (a) has or will have a significant impact on a listed threatened species included in the vulnerable category; or, (b) is likely to have a significant impact on a listed threatened species in the vulnerable category (in this case, the Greater Glider).
18. An action prohibited without approval from the Minister under Part 3 of the EPBC Act is known as a "controlled action": s 67. Controlled actions are rigorously regulated under the EPBC Act. If a person proposes to take a controlled action, that action must be subjected to the Chapter 4 referral, assessment and approval provisions. Chapter 4 includes:
- 18.1. provisions for deciding whether approval of actions is needed: Part 7;
 - 18.2. provisions for assessing the impacts of controlled actions: Part 8;
 - 18.3. provisions for approval of controlled actions subject to conditions imposed by the Minister: Part 9; and
 - 18.4. provisions for strategic assessments: Part 10.
19. The Minister's decision-making process in relation to approval is prescribed by the EPBC Act. Relevantly, s 139 provides that, in deciding whether or not to approve for the purposes of s 18 the taking of an action which has or will have, or is likely to have, a significant impact on a particular listed threatened species, and what conditions (if any) to attach to an approval, the Minister must:
- 19.1. not act inconsistently with Australia's obligations under relevant international conventions or with a recovery plan or threat abatement plan: s 139(1); and
 - 19.2. have regard to the approved conservation advice for the species: s 139(2); which advice must contain information about what could appropriately be done to stop the decline of, or support the recovery of, the species: s 266B(2)(b)(i).
- For example, the conservation advice for Leadbeater's Possum states that the most effective way to prevent further decline and rebuild the population of that species is

to cease timber harvesting within montane ash forests of the Central Highlands,¹⁰ all of which are within the CH RFA Area.¹¹

20. The statutory context demonstrates that the EPBC Act sets up a rigorous and informed process for regulating and making decisions concerning actions that will or are likely to have a significant impact on matters of national environmental significance.
21. Within that scheme, Part 4 of Chapter 2 provides for cases in which environmental approvals are not needed. Those cases include actions declared by a bilateral agreement, between the Commonwealth and a State or Territory, not to require approval, because alternative approval is contemplated: s 29; and actions declared by the Minister not to require approval, because the taking of the action is in accordance with a particular bioregional plan: s 37.
22. Division 4 in Part 4 is headed “Forestry Operations in certain regions”. Subdivision A in Division 4 is headed “Regions covered by regional forest agreements”. The only section in Subdivision A is s 38, which relevantly provides as follows:

(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 Forests Agreement Act 2002*.*

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

23. The Explanatory Memorandum accompanying the Bill that became the EPBC Act described the object of Subdivision A in the following terms:¹²

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

¹⁰ Annexure 6 to the Agreed Statement of Facts: Court Book p 302.

¹¹ “Leadbeater’s Possum is endemic to the Central Highlands of Victoria”, being a geographic and planning area, whose “boundary accords with the Central Highlands RFA boundary”: see the Central Highlands Forest Management Plan 1998, pp iii, 1, 4 and 21, as referred to in the Agreed Statement of Facts, paragraph 9; Annexure 6 to the Agreed Statement of Facts: Court Book p 271; and the Leadbeater’s Possum Interactive Map referred to in paragraph (a) of the Particulars to paragraph 12 of the Agreed Statement of Facts: Court Book p 16.

¹² Environment Protection Biodiversity Bill, Explanatory Memorandum, Notes on Clauses, cl 39 pp 38-39.

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 will be met through the RFA process for each region and, accordingly, the Act does not apply to forestry operations in RFA regions.

24. As the Full Court held in *Forestry Tasmania v Brown (Forestry Tasmania)*,¹³ the final sentence of the Explanatory Memorandum 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”.

25. Similarly to the extrinsic material for s 38(1) of the EPBC Act, the extrinsic material for s 6(4) of the RFA Act, which is in identical terms to s 38(1), said:¹⁴

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 those regions have been comprehensively assessed under relevant legislation during the RFA process and the RFAs themselves contain an agreed framework on the ecologically sustainable development of these forest regions over the next 20 years.

26. As the Full Federal Court said about that passage in *Forestry Tasmania*:¹⁵

Again, the message is that the Act (ie the *Environmental Protection and Biodiversity Conservation Act*) does not apply to forestry operations in RFA regions, and that the regime applicable in those regions is found in the RFAs themselves.

27. The statutory framework, of approval for actions caught by provisions such as s 18 of the EPBC Act and exemption from those provisions on the basis of an RFA under s 38(1) of the EPBC Act and s 6(4) the RFA Act, indicates that:

27.1. the RFA regime was intended to provide a complete framework, which would replace the EPBC Act in relation to RFA regions, as the extrinsic materials and authority referred to above confirm; and

27.2. there must be full compliance with the comprehensive framework provided by the RFA regime in order to attract the exemption in s 38(1) of the EPBC Act and s 6(4) of the RFA Act.

28. There are thus two elements to the applicant’s submission:

28.1. the RFA regime replaces the EPBC Act; and

¹³ (2007) 167 FCR 34 at 51 [61].

¹⁴ Regional Forest Agreements Bill 2002, Explanatory Memorandum, Notes on Clauses, cl 6.

¹⁵ *Forestry Tasmania v Brown* (2007) 167 FCR 34 at 51 [62].

- 28.2. there must be full compliance with that regime.
29. That submission is supported by the object of the EPBC Act and the broader statutory context because the object of the Act would be undermined if the rigorous and informed approvals process in Chapter 2 of the EPBC Act were replaced with a regime that purported to implement an agreed regionalised assessment of environmental and other relevant values, but did not require the parties to adhere to all the terms of that agreement in order to attract an exemption from the EPBC Act.
- 29.1. Just as a failure to carry out a public consultation (required by an Act as a precondition to a decision) would invalidate a decision,¹⁶ so a failure to conduct the five-yearly reviews (which would have provided for public comment) means that the exemption must cease to operate.
- 29.2. The EPBC Act intended that the RFA regime would continue to provide protection to the environment – albeit within the context of a regionalised agreed framework, rather than the EPBC Act.
- 29.3. The intention of the legislature must be that, in the absence of compliance with the entire RFA regime (which provides protection in the place of the EPBC Act), the exemption no longer operates and the EPBC Act comes back into operation.¹⁷
30. The extrinsic materials likewise support the applicant’s submission because those materials confirm that the RFA regime was intended to provide an “agreed framework for the ecologically sustainable development of [the] forest regions over ... 20 years”, and to allow “regional approaches to biodiversity and conservation” to be promoted.¹⁸
- 30.1. The extrinsic materials indicate that the RFA regime (not individual provisions within an RFA) was intended to govern forestry operations in relation to land in regions covered by an RFA.
- 30.2. The intention was to allow a more flexible, tailored system that would obviate the need to seek approvals under Ch 2 of the EPBC Act for forestry operations but nevertheless provide for a regime to govern those forestry operations and maintain the values of the EPBC Act.
31. Further the extrinsic materials extracted at paragraphs 23 and 25 above demonstrate that s 38(1) of the EPBC Act and s 6(4) of the RFA Act were passed against the

¹⁶ See, for example, *Nezville Pty Ltd v Australian Broadcasting Authority* [2001] FCA 29 at [37]-[39] (Sundberg J).

¹⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389 [91] (McHugh, Gummow, Kirby and Hayne JJ).

¹⁸ Environment Protection Biodiversity Conservation Bill, Explanatory Memorandum, p 11.

background of existing RFAs. The legislature in approving the scheme of exemption now found in s 38(1) of the EPBC Act and s 6(4) of the RFA Act must be taken to have been aware of the RFAs, including the anticipated length of the RFAs (20 years) and the fact that the terms of the RFAs required that they be reviewed at regular five-yearly intervals. The legislature should not be taken to have approved a scheme of exemption from the rigorous provisions in the EPBC Act on the basis that State and Commonwealth executive governments would treat compliance with the terms of the agreement as optional.

32. To summarise, it is clearly not the intention of s 38(1) of the EPBC Act and s 6(4) of the RFA Act that that RFA forestry operations are to be exempted from the rigours of the EPBC Act and not subject to any constraints at all. It would be entirely inconsistent with the objects and scheme of the EPBC Act if s 38(1) were construed as not requiring compliance with all terms of the RFA regime. Rather the intention of the exemptions provisions is that the constraints in the EPBC Act are to be replaced with the constraints, developed specifically in relation to each region, under the RFA regime for that region.
33. The applicant's submissions on the construction of s 38(1) of the EPBC Act and s 6(4) of the RFA Act are consistent with, and are supported by, the Full Court's judgment in *Forestry Tasmania*.
34. In that case, the trial judge had held that s 38(1) of the EPBC Act did not exempt the appellant from the requirement to obtain an approval under the EPBC Act before taking action covered by s 18 of the EPBC Act – because the relevant clause of the RFA, cl 68, required the State to protect relevant species and the protection measures adopted under the RFA did not protect them.
35. On appeal, the issue before the Full Court was how cl 68 of the Tasmanian Regional Forest Agreement 1997 (the **Tasmanian RFA**) should be construed. As the Full Court said:¹⁹

The question is whether cl 68 does require the State to protect the species in this way. In our view it does not. Clause 68 does not involve an enquiry into whether the [comprehensive, adequate and representative reserve system (**CAR**)] effectively protects the species. Rather it is the establishment and maintenance of the CAR reserves that constitutes this protection.

¹⁹ *Forestry Tasmania v Brown* (2007) 167 FCR 34 at 50 [59].

36. Strictly speaking, therefore, *Forestry Tasmania* only decided what was required by cl 68 of the Tasmanian RFA. That clause stated:²⁰

The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System or by applying relevant management prescriptions.

37. The Full Court, as is evident from the passage quoted in paragraph 35 above, concluded that cl 68 required the State to establish and maintain the CAR system, and by that system protect the relevant species, but did not require the State to take any action to protect the relevant species beyond the establishment and maintenance of the CAR system, nor to establish and maintain CAR in a manner that actually protected the relevant species. The Full Court found there was no breach of cl 68.

38. Properly understood, *Forestry Tasmania* is not authority for the proposition that breach of a clause of an RFA is irrelevant to whether s 38(1) of the EPBC Act or s 6(4) of the RFA Act will supply an exemption from Part 3 of the EPBC Act. Any suggestion that [63] of the Full Court's reasons (where the Court said that "unsatisfactory performance of the State's obligations can only be measured by the parties") might support the respondent's argument in this case should be rejected on the basis that the Full Court's proposition must be read in the context of the Court's reasons.

38.1. That context indicates that the Court was stating that the effectiveness of the CAR system in achieving protection of the protected species was a matter that could only be measured by the parties. That is to say, the effectiveness of the mechanisms chosen to protect flora and fauna were matters for the parties to determine.

38.2. The Full Court did not say that breach of a clause of an RFA was irrelevant to the operation of s 38(1) of the EPBC Act or s 6(4) of the RFA Act.

38.3. On the facts of that case, the Full Court found that there was no breach of the relevant clause of the RFA.

39. The construction of cl 68 of the Tasmanian RFA is entirely irrelevant to the present case. The applicant's case is simply that the terms of the RFA regime, once agreed by the parties, must be complied with in full in order to attract the exemption in s 38(1) of the EPBC Act and 6(4) of the RFA Act.

40. That submission is in fact supported by *Forestry Tasmania*. As the Full Court said:²¹

... the [EPBC] Act ... does not apply to forestry operations in RFA regions ... the regime applicable in those regions is found in the RFAs themselves.

²⁰ *Forestry Tasmania v Brown* (2007) 167 FCR 34 at 46 [41].

²¹ *Forestry Tasmania* (2007) 167 FCR 34 at 51 [62].

41. The Court did not say that the individual provisions of a relevant RFA were applicable to RFA forestry operations – it said that the RFA regime was applicable in those regions.

The significance of the non-compliance with the RFA

42. The Applicant's case is that the failure to conduct the five-yearly reviews leads directly to the consequence that forestry operations in the CH RFA Area cannot be said to be conducted in accordance with the CH RFA. No further inquiry as to the reasons for or consequences of that non-compliance is relevant or necessary.
43. Nonetheless, an understanding of the significance of the review requirements contained in the CH RFA assists in understanding the importance of those five-yearly reviews and reinforces the conclusion that failure to conduct those reviews in compliance with the CH RFA means that forestry operations subsequent to any failure to undertake a review cannot be said to be in accordance with the CH RFA. Put differently, the significance of the review requirements demonstrates the way in which the RFA regime replaced the operation of the EPBC Act.
44. The CH RFA is an agreement for a period of 20 years. A failure to conduct the required reviews of the RFA during that period would undermine the legislative recognition of RFAs as a mechanism that provides for protection of environmental values, otherwise provided for under the EPBC Act. The EPBC Act itself contains provisions that envisage additions to the threatened species list, changes in the status of threatened species, and review of recovery plans. The CH RFA similarly contains clauses that envisage such changes: cls 48 and 57.
45. The five-yearly reviews provide the mechanism for those threatened species developments, progress against RFA milestones, public comment and other relevant matters to be considered at regular intervals and, if necessary, accommodated in changes to the Agreement: as contemplated by cl 37; or attachments to the agreement such as the list of priority species for preparation and review of recovery plans and/or action statements: Attachment 2. The requirement in cl 36 of the CH RFA for the reviews to consider the results of monitoring of sustainability indicators specifically mandates consideration of threatened species matters at regular intervals. Relevantly to this case, the sustainability indicators include:
 - 45.1. Indicator 1.2a: The status of forest dependent species at risk of not maintaining viable breeding populations, as determined by legislation or scientific assessment;
 - 45.2. Indicator 1.2b: Area of habitat available for forest dependent indicator species; and

- 45.3. Indicator 1.2c: Representative indicator species from a range of habitats monitored at scales relevant to regional forest management.²²
46. The importance of the reviews is emphasised in s 10(6) of the RFA Act, which requires the reports of the five-year reviews to be tabled in parliament, and the Explanatory Memorandum:
- Implementation and Review Strategy ... The ten RFAs that have been signed to date will remain in force for 20 years and will be reviewed every five years. This process of reviews of progress with the performance and implementation of RFAs will provide an opportunity to examine the operation of the legislation.²³
47. In this case, the third five yearly review of the CH RFA in accordance with cl 36 of the CH RFA was required to consider but has not considered, for example, the change to the status of the Leadbeater's Possum following the 2009 fires, which were found to have burnt 34-36% of potential Leadbeater's Possum habitat and 45% of the best habitat within montane ash forest.²⁴

Alternative argument: all material provisions of the RFA must be complied with/the RFA regime must be substantially complied with

48. In the alternative to the applicant's primary submission that all provisions in an RFA must be complied with, the applicant submits that there must be compliance with all material provisions of the RFA, or alternatively that there must be substantial compliance with the RFA regime. Paragraphs 42-47 above demonstrate that cl 36 is a material provision to the CH RFA. The complete failure to comply with a material requirement of the CH RFA means that there has not been substantial compliance with the RFA regime. Rather there has been no compliance.

Enforceability of RFA, either by parties to RFA or by VicForests, is irrelevant

49. The enforceability of the provisions of the CH RFA is irrelevant to the exemption under ss 38(1) of the EPBC Act and 6(4) of the RFA Act. Indeed, the CH RFA states that the provisions in Part 2, where the requirement for five-yearly reviews are found, are not intended to create legally enforceable obligations between the parties. The significance of the CH RFA is not that it requires either the Commonwealth or the State of Victoria to adhere to the terms of the CH RFA, but that adherence creates an exemption from Part 3 of the EPBC Act.

²² Criteria and indicators for sustainable forest management in Victoria 2007, Annexure 5 to the Agreed Statement of Facts: Court Book pp 179-180, 198-200.

²³ Regional Forest Agreements Bill 2001, Explanatory Memorandum, Regulation Impact Statement, paragraph 8.

²⁴ Conservation advice for Leadbeater's Possum, Annexure 6 to the Agreed State of Facts: Court Book pp 273-274, 278-280, 284, 286, 288-290, 292-293, 312-316.

50. The fact that VicForests is unable to enforce compliance with the provisions of the CH RFA does not permit VicForests to assert in any way that logging in the absence of such compliance is lawful.²⁵ The ability of VicForests to conduct forestry operations without considering whether it needs to seek approval under the EPBC Act is conditional on the fact that the RFA regime is in place and is being complied with by the parties to the RFA regime. If that condition is not satisfied, VicForests cannot rely on the exemption in s 38(1) of the EPBC Act or s 6(4) of the RFA Act.

Was the logging of the logged coupes, and will the proposed logging of the scheduled coupes, be logging in accordance with the CH RFA?

51. Once it is established that s 38(1) of the EPBC Act only provides an exemption where all terms of the RFA have been complied with, it is relatively straightforward to establish that the logging of the logged coupes was not, and the proposed logging of the scheduled coupes will not be, logging in accordance with the CH RFA. That follows from the construction of cl 36 of the CH RFA and the Agreed Facts.
52. Clause 36 of the CH RFA provides:
- Within each five year period, a review of the performance of the Agreement will be undertaken.
53. The applicant submits that cl 36 required a review of the performance of the Agreement to be undertaken before the end of each five-year period. That construction of the agreement is mandated by the word “within”, and the word “undertaken” in past participle form: the text of cl 36 indicates that the review was required to be completed within each five-year period.
54. It is agreed between the parties that:²⁶
- 54.1. the first five-yearly review for the CH RFA was not undertaken within the first five-year period fixed by cl 36 of the CH RFA;
- 54.2. the second five-yearly review for the CH RFA was not undertaken within the second five-year period fixed by cl 36 of the CH RFA; and
- 54.3. the third five-yearly review for the CH RFA was not undertaken within the third five-year period fixed by cl 36 of the CH RFA.
55. Accordingly, there has not been compliance with all terms of the CH RFA since at least the end of the first five-year period, which was 28 March 2003. Any logging carried out since that time has not been “in accordance with” the CH RFA.

²⁵ See *Environment East Gippsland v VicForests* (2010) 30 VR 1 at 74 [418].

²⁶ Statement of Agreed Facts, paragraphs 26-28: Court Book p 18.

56. The logging of the logged coupes took place between 2004 and 2017.²⁷ It occurred at a time when there was less than complete compliance with the terms of the CH RFA – in particular, with cl 36 of the CH RFA. That logging was not in accordance with the CH RFA, and not exempt from the EPBC Act by reason of s 38(1) of the EPBC Act or by reason of s 6(4) of the RFA Act.
57. Likewise, the proposed logging of the scheduled coupes cannot be carried out in accordance with the CH RFA because the first, second and third five-yearly reviews have not been carried out within the time prescribed by cl 36 of the CH RFA. That logging therefore cannot attract the exemption from the EPBC Act by reason of s 38(1) of the EPBC Act or by reason of s 6(4) of the RFA Act.
58. The same result follows on the applicant's alternative arguments because there has been no compliance with a material provision of the CH RFA.

Dated: 11 December 2017

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²⁷ Statement of Agreed Facts, paragraph 6: Court Book p 9.