

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 11/12/2017 9:19:39 AM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Outline of Submissions
File Number:	VID1228/2017
File Title:	FRIENDS OF LEADBEATER'S POSSUM INC v VICFORESTS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 11/12/2017 9:32:23 AM AEDT

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

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN REGISTRY**

VID 1228/2017

BETWEEN:

FRIENDS OF LEADBEATER'S POSSUM INC

Applicant

and

VICFORESTS

Respondent

COMMONWEALTH OF AUSTRALIA

First Intervener

STATE OF VICTORIA

Second Intervener

OUTLINE OF SUBMISSIONS OF THE SECOND INTERVENER

A. INTRODUCTION AND SUMMARY

1. The present case concerns orthodox matters of the construction of the Central Highlands Regional Forest Agreement (the **CH RFA**) in the context of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**) and the *Regional Forest Agreements Act 2002* (Cth) (the **RFA Act**). A preliminary question¹ has been stated with a view to testing the premise of the case put by the Applicant – that the fact that certain reviews have not been undertaken in a particular way by the State and the Commonwealth operates to prevent the Respondent's reliance upon s 38 of the EPBC Act and s 6(4) of the RFA Act.
2. The Applicant's case falls at the first hurdle: established authority makes clear that, where an RFA exists, the "forestry operations" that take place in RFA regions are predominantly regulated by that RFA, and Part 3 of the EPBC Act does not apply to those operations.

¹ Ordered pursuant to r 30.01 of the Federal Court Rules 2011 (the **Rules**).

3. Even if that were not the case, the non-observance of the CH RFA that is alleged by the Applicant is not directed to the “forestry operations”² that are authorised by the CH RFA. No other basis is advanced for the proposition that the “forestry operations” are not “in accordance with” those provisions of the CH RFA which concern the way in which forestry operations must be carried out under the CH RFA.
4. In these submissions, the State identifies the relevant statutory framework³ and the CH RFA in operation⁴ before analysing the separate question⁵. This analysis leads to the conclusion that the proper answer to the preliminary question is “yes”.

B. THE STATUTORY FRAMEWORK

5. It is well settled that the text, context and purpose of legislative provisions govern their meaning.⁶ The EPBC Act was enacted, among other reasons, to consolidate and clarify the Commonwealth’s responsibilities for environmental protection within the Australian Federation. It and the RFA Act are intended to be read together.⁷ They form a coherent “RFA regime.”⁸ That regime is the result of a decades-long legal, policy and political process that sought to balance environmental protection and commercial forestry. It is within that context that the specific legislative provisions are considered.

² Pleaded as being the logging or proposed logging of the scheduled coupes: Statement of Claim, [110] – [111].

³ Section B.

⁴ Section C.

⁵ Section D.

⁶ *Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at 519, [39]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, [69].

⁷ *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources (The Wilderness Society)* (2007) 166 FCR 154 at 166, [50] per Branson and Finn JJ.

⁸ *The Wilderness Society*, at 166, [52] per Branson and Finn JJ.

B-1 THE EPBC ACT

Introduction and scope

6. Chapter 1 of the EPBC Act sets out its objects and principles. Legislation can pursue multiple purposes⁹ and it is clear that the legislation in the present case does not pursue a single purpose. Its many purposes include the protection of the environment,¹⁰ as well as the promotion of ecologically sustainable development through the conservation and ecologically sustainable use of natural resources.¹¹ These objects are facilitated by, among other things, a focus on intergovernmental co-operation that minimises duplication through bilateral agreements¹², and promotes a “partnership approach to environmental protection”.¹³
7. Unless a contrary intention appears, the EPBC Act does not exclude or limit the concurrent operation of State law.¹⁴ The Central Highlands region is regulated by relevant State legislation¹⁵, as well as by the terms of the CH RFA itself.
8. Chapter 2 of the EPBC Act identifies matters of environmental significance¹⁶ to which regulatory consequences may attach. This includes “actions” having a “significant impact” on listed threatened species or endangered community.¹⁷ The relevant prohibition in this case is alleged to be s 18(1) and 19, which each provide that “*A person must not take an action that...*”
9. An action is relevantly defined in s 523 to include:

⁹ *Taylor v The Owners – Strata Plan No 11564 & Ors* (2014) 253 CLR 531 at 548, [37] – [38].

¹⁰ EPBC Act s 3(1)(a).

¹¹ EPBC Act s 3(1)(b).

¹² EPBC Act s 3(2)(b).

¹³ EPBC Act s 3(2)(g).

¹⁴ EPBC Act s 10.

¹⁵ For example *Sustainable Forests (Timber) Act* 2004 (Vic) (including providing a timber allocation to VicForests); *Forests Act* 1958 (Vic) (regulating State forests) (including Forest Management Plans made under that Act); *Flora and Fauna Guarantee Act* 1988 (Vic) (including Action Statements for threatened species and communities made under that Act); *Wildlife Act* 1975 (Vic); *National Park Act* 1975 (Vic); *Conservation, Forests and Lands Act* 1987 (Vic); the *Code of Practice for Timber Production* 2014 (made under the *Conservation, Forests and Lands Act* 1987, and with which compliance is required on public land under the *Forests Act* 1958 and the *Sustainable Forests (Timber) Act* 2004); *Management Standards and Procedures for timber harvesting operations in Victoria's State forests* 2014 (made under and incorporated into the Code of Practice).

¹⁶ Chapter 2, Part 3, Subdivisions A – G.

- (a) a project; and
 - (b) a development; and
 - (c) an undertaking; and
 - (d) an activity or series of activities; and
 - (e) an alteration of any of the things mentioned in paragraph (a).
10. In this case, the Applicant alleges that the identification of coupes proposed for logging in the CH RFA Area by preparation of the Timber Release Plan constitutes an action for the purposes of the EPBC Act.¹⁸ However, it is the logging of the coupes that is alleged to be “not exempt” from the application of Part 3 of the EPBC Act because of an alleged failure to undertake five yearly reviews in the CH RFA.¹⁹
11. Actions that would significantly impact upon areas of environmental significance (as that term is used in Part 3 of Chapter 2) are permitted where:
- (1) the person has an approval for the taking of the action under Part 9 or Part 10 for the purposes of the relevant provision of Part 3;²⁰ or
 - (2) the person does not require approval because:
 - (a) the action is declared (by agreement or otherwise) not to require approval;²¹
 - (b) the action is taken under a zoning plan;²²
 - (c) the person has prior authorisation within the meaning of s 43A; or
 - (d) there is in place a bilateral agreement of a kind referred to in s 46.
12. Section 38 stands in a slightly separate category. It is the only provision which excludes the operation of Part 3 entirely, rather than simply providing that approval is not required. The difference suggests that the exclusion of actions under an RFA is intended to be broadly effective.

¹⁷ EPBC Act s 18.

¹⁸ Statement of Claim, [8].

¹⁹ See the Statement of Claim, [113], [114] – [119].

²⁰ EPBC Act s 67A.

²¹ EPBC Act s 29 – 33, or 37A.

²² EPBC Act s 43.

13. The EPBC Act therefore provides for five separate means by which an “action” can be undertaken by a person without attracting a penalty or injunction. Each means by which an “action” can be taken reflects a legislative intention to permit actions in those particular circumstances.
14. In the context of s 38, the RFA process provides for the satisfaction of the objects of the EPBC Act.²³ There is a clear legislative intent that Part 3 of the EPBC Act “...is not to apply to an RFA forestry operation undertaken in accordance with an RFA save in the three specifically excepted instances contained in s 42.”²⁴
15. Section 38 and its scope is considered in further detail, below.

Section 38 of the EPBC Act

16. Section 38 excludes from the operation of the EPBC Act those “RFA forestry operations” that are undertaken in accordance with the relevant RFA. Section 38 provides:

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 Agreement 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. The explanatory memorandum for the EPBC Act makes clear that “*The objects of [the EPBC] Act will be met through the RFA process for each region and, accordingly, this Act does not apply to forestry operations in RFA regions.*”²⁵

²³ See *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 31, [211].

²⁴ *The Wilderness Society*, [49] per Branson and Finn JJ.

²⁵ *Environment Protection and Biodiversity Conservation Bill*, Explanatory Memorandum, [113].

In this respect, s 38 represents a legislative choice made by Parliament that the EPBC Act does not apply to forestry operations in the RFA regions²⁶.

18. This is reinforced by the express statutory objective in s 39. Section 39 makes clear that approval under Part 9 is not required for forestry operations taking place in a particular region, where that region is one

...for which a process (involving the conduct of a comprehensive regional assessment, assessment under the *Environment Protection (Impact of Proposals) Act 1974* and protection of the environment through agreements between the Commonwealth and the relevant State and conditions on licences for the export of wood chips) of developing and negotiating a regional forest agreement is being, or has been, carried on.

19. The “clear legislative purpose” therefore is that, save in the three excepted instances specified in s 42, Part 3 of the EPBC Act is *not* to apply to an RFA forestry operation.²⁷
20. Once the Court is satisfied that the agreement *is* an RFA for the particular region, the forestry operations taking place within its geographic bounds are not subject to any regulation under Part 3 of the EPBC Act.
21. Separately, it is relevant that s 38 applies to “RFA forestry operations.” The EPBC Act takes its definition from the RFA Act²⁸ which, in turn, incorporates the definition of “Forestry Operations” included in the CH RFA. The CH RFA defines “Forestry Operations” to mean:

- (a) the planting of trees; or
- (b) the managing of trees before they are harvested; or
- (c) the harvesting of Forest Products

for commercial purposes and includes any related land clearing, land preparation and regeneration (including burning), and transport operations;

22. The Forestry Operations at issue in the present proceedings are the logging and the proposed logging of coupes.²⁹ It is these operations that must be “*in accordance with*” the RFA. The case as put by the Applicant appears to suggest

²⁶ *Forestry Tasmania v Brown (Brown)* (2007) 167 FCR 34 at 50-51, [61].

²⁷ *The Wilderness Society*, at 162, [32] per Branson and Finn JJ; see also Explanatory Memorandum, *Environment Protection and Biodiversity Conservation Bill 1998* (Cth), clauses 38-9 (although specifically referring in that instance to clause 39).

²⁸ Section 4.

²⁹ Agreed Statement of Facts [16], [21], [22].

that *any* non-compliance with the RFA would nullify the s 38 exception. That is not the case. If mere non-compliance (to any extent) were to be sufficient, the exemption would be expressed in very different terms.

23. The Applicant has not identified any obligations in the CH RFA that are connected to the “forestry operations” that it has identified.
24. This difficulty in the Applicant’s case is exacerbated by the terms of the RFA Act, considered in detail, below.

B-2 THE RFA ACT

Introduction and scope

25. The RFA Act post-dates the commencement of the EPBC Act. It is intended to give effect to certain obligations of the Commonwealth under regional agreements³⁰ and to:

...provid[e] 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.³¹

26. It follows that the RFA Act places a particular legal framework around RFAs. That framework effectively gives a particular status to the outcome of a negotiation between two parties.
27. The RFA Act was intended to give effect to three obligations to which the Commonwealth had committed under each RFA³². Relevant, for present purposes, is s 6 which, under the heading “Certain Commonwealth Acts do not apply in relation to ... RFA forestry operations”, provides:

...

³⁰ RFA Act, s 3(a); *Brown*, at 49, [53].

³¹ Revised Explanatory Memorandum to the Bill that became the RFA Act; see also *Brown*, at 51, [62].

³² *Brown*, at 49, [53].

- (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.
28. The RFA Act does not prevent the inclusion in any RFA of other terms beyond what is related to the RFA forestry operations. The inclusion of any such terms does not impact on the scope of s 6(4) of the RFA Act and s 38 of the EPBC Act.
29. An RFA or “Regional Forest Agreement” has the meaning set out in s 4 of the RFA Act. To be an RFA, an agreement must provide for assessment and consideration of environmental values, indigenous heritage, and other matters that would otherwise substantially overlap with the regulatory scope of the EPBC Act. Section 4 provides:
- 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;
 - (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.
30. It is not in dispute that the CH RFA is an RFA within the meaning of s 38 of the EPBC Act and s 6(4) of the RFA Act. It therefore encompasses each of the elements of an RFA included in s 4.

RFA forestry operations “in accordance with”

31. Section 6(4) echoes s 38 of the EPBC Act.³³ Both refer to an “RFA forestry operation” that is “undertaken in accordance with an RFA.”

³³ The current form of s 38 was inserted by the RFA Act: see s 12 and item 1 of Schedule 1.

32. In both the RFA Act and the EPBC Act, the words “in accordance with” immediately follow the words “RFA forestry operation”. The connection between the two phrases is important: it is the obligations relevant to the RFA forestry operation that must be undertaken in accordance with the RFA. In contrast, in this proceeding, the only conduct said to invalidate the protection offered by s 38 is the delayed five-year reviews³⁴.
33. The phrase “*in accordance with*” has been considered in a range of situations. In the context of employment law, Deane, Dawson, Toohey and McHugh JJ said that the words “*in accordance with...*” ought to be construed as meaning “*in conformity with*” or “*consistently with*”.³⁵
34. In *Ramsay v Sunbuild Pty Ltd*³⁶, Reeves J considered the meaning of the phrase “*in accordance with*” as found in s 500 of the *Fair Work Act*. His Honour determined that it meant “in conformity with”. His Honour said:

In various, albeit context-specific situations, that expression has been held to mean: “in conformity with”, or “consistently with”: see *Re La* (1993) 41 FCR 151 at 158; *Walker v Wilson* (1991) 172 CLR 195 at 208; *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 at [251]; *HJ Heinz Company Australia Ltd v Kotzman* (2009) 31 VAR 206 at [44]; *Gamble v Emerald Hill Electrical Pty Ltd* [2012] VSCA 322 at [52]. This is to be contrasted with an expression such as “under this Part”, which has been held to mean (in the context of administrative law): “in pursuance of”, or “under the authority of”: see *Evans v Friemann* (1981) 53 FLR 229 at 238; 35 ALR 428 at 436; *Australian National University v Burns* (1982) 64 FLR 166 at 173; 43 ALR 25 at 31; *Sellars v Woods* (1982) 69 FLR 105 at 112; 45 ALR 113 at 121; and *Chittick v Ackland* (1984) 1 FCR 254 at 263.³⁷

35. Each of these cases considers the concept of “in accordance with” in the context in which it appears. In this case, the State submits that the effect of the words “in accordance with” is informed by two matters:
- (1) **First:** it is the “forestry operation” that must be undertaken “in accordance with” the CH RFA. It follows that only those parts of the CH RFA that are actually connected with forestry operations are relevant; and

³⁴ Statement of Claim, [113] – [119].

³⁵ *Walker v Wilson* (1991) 172 CLR 195 at 208.

³⁶ (2014) 221 FCR 315.

³⁷ At 341, [95].

- (2) *Second*: actions that are “in accordance with” the CH RFA are those that are “in conformity with” or “consistent with” the obligations imposed by that agreement as distinct from strictly complying with its terms.
36. In the case of *Ex parte Hestelow; Re Claye*³⁸, the Court considered whether a failure to strictly comply with time requirements in *the Coal Mines Regulation Act* meant that the furnishing of a plan was not “in accordance” with that Act for the purposes of a provision of the *Mining Act*. His Honour found that “in accordance with” in the context of the *Mining Act* did not convert what was a statutory requirement under the *Coal Mines Regulation Act* into a condition precedent to the validity of the action³⁹. Further, Jacobs JA held that, in the context of the *Mining Act*, the words "in accordance with" were more akin to "pursuant to" than "in strict compliance with".⁴⁰
37. In the present circumstance, it is relevant that the clauses of the CH RFA relied upon by the Applicant⁴¹:
- (1) do not create legally binding obligations;
 - (2) do not relate to any conduct undertaken by the Respondent; and
 - (3) do not relate to the specific pleaded forestry operations, i.e. the logging operations.
38. The State submits that, when construed having regard to all of these matters, it is clear that any alleged delay concerning the conduct of reviews is not relevant to the question whether or not the forestry operations have been carried out in accordance with the CH RFA.

B-3 LEGISLATIVE SCHEME – CONCLUSION

39. Both Acts operate to exempt from Part 3 forestry operations where those forestry operations take place in accordance with the relevant RFA.

³⁸ (1967) 87 WN (Pt 1) (NSW) 184.

³⁹ At 197.

⁴⁰ At 198.

⁴¹ These appear to be clauses 36 – 38 of the CH RFA.

40. Because the legislative scheme is in part informed by the CH RFA itself, it is necessary to examine its terms, below.

C. THE CH RFA

41. The CH RFA is an agreement entered into between two parties, the State and the Commonwealth. The purpose of the CH RFA is to establish the framework for the management of the forests of the Central Highlands.⁴²

42. It is divided into parts:

(1) **Part 1** applies to the whole agreement, and sets out the agreements, definitions and general provisions that operate throughout the agreement. It includes provision for the amendment of the agreement⁴³ and for dispute resolution procedures.⁴⁴

(2) **Part 2** is expressed to be non-binding. It includes a range of provisions that provide for further development of agreements or frameworks. It is strongly aspirational in its tone. It includes:

(a) a range of provisions which explain or clarify the relationship between various interlocking statutory obligations.⁴⁵ By the ongoing reference to the regulatory scheme created by the State's suite of legislation, policies and codes, it is clear that forestry operations are to be carried out in accordance with those statutory obligations;

(b) a statement of the intention of the parties to the agreement as to the means by which five yearly reviews would be carried out⁴⁶; those

⁴² CH RFA, Recital A.

⁴³ CH RFA cl 8; such an amendment must be tabled in the Parliament within 15 days: RFA Act s 10(3).

⁴⁴ CH RFA cl 9.

⁴⁵ CH RFA cl 18 – 34.

⁴⁶ CH RFA cl 35 – 38.

intentions are expressly subject to specific consideration and agreement about the mechanism by which they will be carried out.⁴⁷

- (c) an expression of common understandings about sustainable management, transparency and accreditation;⁴⁸
 - (d) identification of ways that the forest management system could be further enhanced;⁴⁹
 - (e) provisions relating to the CAR reserve system⁵⁰ and industry development;⁵¹
 - (f) undertakings to develop measures for indigenous heritage;⁵²
 - (g) a commitment to transparency, research, and the sharing of data.⁵³
- (3) **Part 3** is intended to bind the parties. So much is clear both from its mandatory terms, but also from the terms which provide for a clear consequence for breach by the Commonwealth.⁵⁴ The CH RFA also provides a means by which it may be terminated by either the Commonwealth⁵⁵ or the State.⁵⁶ The specific obligations that have binding effect include:
- (a) **Clause 88:** imposing obligations upon the State to complete and publish regional prescriptions for timber production, implement the integrated Forest Planning system, publish future reports of audits of compliance with the Code of Forest Practices for Timber Production, and to review legislation and policies relevant to the allocation and pricing of hardwood logs;

⁴⁷ CH RFA cl 38.

⁴⁸ CH RFA cl 39 – 47.

⁴⁹ CH RFA cl 48 – 50.

⁵⁰ CH RFA cl 60 – 66.

⁵¹ CH RFA cl 67 – 73.

⁵² CH RFA cl 74 – 75.

⁵³ CH RFA 82 – 86.

⁵⁴ CH RFA cl 90.

⁵⁵ CH RFA cl 92.

⁵⁶ CH RFA cl 93.

- (b) **Clause 89** imposing obligations upon the Commonwealth to maintain accreditation of Victoria’s management system for the Central Highlands, and not prevent enterprises obtaining, using or exporting timber, woodchips or unprocessed wood products sourced from the Central Highlands region in accordance with this agreement.
- (4) **The Attachments** do not create legally binding consequences, save to the extent necessary to give effect to Part 3 of the CH RFA.⁵⁷
43. The CH RFA therefore creates legally enforceable obligations *only* in Part 3. It specifically does *not* do so in the rest of the CH RFA. There is no allegation that there has been any non-compliance with any of the binding aspects of the CH RFA.
44. Moreover, clauses 36 to 38 do not have the effect contended for by the Applicants. In particular:
- (1) Clause 36 provides only that a review will be undertaken within a five year period. There is no requirement in clause 36 that the review be completed in that time. Moreover, the timing of the review will be concurrent with the review of the East Gippsland RFA. Given that each of the CH RFA and the East Gippsland RFA are private contracts that can be amended by the parties, the identification of a non-binding intention to undertake (but not complete) a review cannot be said to have a binding or mandatory effect.
- (2) Clause 38 includes an agreement to agree the mechanism for the review. It is envisaged that the mechanism for the review would be determined “*before the end of the five year period*”. This creates a direct inconsistency between the timing requirements in clause 36 and 38 which militates against any suggestion that a binding effect is intended or possible.

⁵⁷ CH RFA, Recital C.

- (3) Finally, to the extent that clause 38 requires that a review be completed “*within three months*” of the determination of the appropriate mechanism, the process of determining that mechanism can be completed anytime within the five years.
45. The inconsistency between the provisions, in combination with the non-binding nature of Part 2, leads to the conclusion that the five year review is not an obligation at all. This, in turn, fortifies the conclusion that the provisions of clause 36 – 38 are not relevant to the question whether or not the “forestry operations” are undertaken “in accordance with” the CH RFA.
46. This Court has noted the need for ongoing flexibility in the context of environmental matters, recognising that it can be appropriate that a delegate has some authority as to the manner in which environmental decisions (for example) are managed or implemented.⁵⁸ The framework created by the RFA regime follows the terms of the CH RFA as agreed by the parties to it: the State and the Commonwealth.

D. THE PRELIMINARY QUESTION

47. The Court ordered that the matter proceed by way of a preliminary question.⁵⁹ The stated question is:

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 [EPBC Act] pursuant to either s 38(1) of the EPBC Act or s 6(4) of the [RFA Act]?

D-1 INITIAL OBSERVATIONS

48. At the outset, the State notes that the preliminary question has proceeded by way of agreed facts. The State sought, and was denied, the opportunity to make

⁵⁸ *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111, [179], per Gilmour, Foster and Barker JJ, considering the validity of conditions under the EPBC Act.

⁵⁹ Pursuant to r 30.01 of the Rules.

submissions in relation to the appropriate process by which the matter would proceed⁶⁰. That has the effect that the Court is called upon to consider the answer to the question without the benefit of input from the parties to the CH RFA itself, particularly in relation to the factual substratum.

49. For the reasons explained below, the State's primary submission is that the construction proffered by the Applicant is inconsistent with the RFA regime established by the EPBC Act, the RFA Act and the CH RFA. On no view of the State's alleged non-compliance with clauses 36 – 38 of the CH RFA could the Applicant overcome the difficulties with its case. However, if the State is incorrect in that submission, and the nature and extent of compliance with the identified clauses of the CH RFA *could* be relevant, the matter may be unsuitable to proceed by way of agreed facts. That is so because the parties with first hand-knowledge of the matters in issue:
- (1) have not been heard in relation to the matters the subject of the agreed facts;
 - (2) do not agree that the characterisation of the agreed facts is complete or accurate; and
 - (3) submit that there is therefore a real risk that the Court will proceed under a misapprehension of the true facts.
50. Under cover of these observations, the State contends that the exemption created by s 38 of the EPBC Act and s 6(4) of RFA Act is a matter that has not been and cannot be established by the Applicants on their case as pleaded. That conclusion arises for the reasons explained below.

D-2 THE RELEVANCE OF *FORESTRY TASMANIA V BROWN*

51. In this proceeding, the Court is called upon to consider matters that have been the subject of authoritative disposition in the past. In *Brown*, the Full Court of the Federal Court (Sundberg, Finkelstein and Dowsett JJ) considered an appeal

⁶⁰ VID 1228 of 2017, email dated 30 November 2017.

from two declarations and an injunction granted under the EPBC Act. In that case, it was argued that Forestry Tasmania could not undertake the forestry operations without an approval under Part 9 because either:

- (1) the RFA was not an RFA because it did not provide for two of the conditions that must be satisfied to qualify as such under the RFA Act.⁶¹ No analogous claim is advanced in this case;
- (2) by its alternative argument, the Respondent in the appeal argued that the forestry operations required Part 9 approval because Forestry Tasmania's operations were not being undertaken in accordance with the RFA, and so did not have the protection of s 38(1). It was argued that the forestry operations were not in accordance with the RFA, because that agreement included an obligation to protect the priority species listed in Attachment 2 in circumstances where (it was argued) no such protection was forthcoming as a matter of fact.⁶²

52. It is the latter argument that has been effectively adopted by the Applicant in this case. The "central issue"⁶³ in *Brown* was whether s 38 of the EPBC Act exempts the forestry operations from the provisions of Part 3 of that Act where, it was said, clause 68 of the RFA had not been complied with. Clause 68 was found within Part 2 of the RFA in circumstances where cl 18 provided that Part 2 was not intended to create legally binding relations.⁶⁴ It said that:

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.

53. The Court considered the argument that the forestry operations were not in accordance with the RFA because the State had failed, as a matter of fact, to protect the priority species listed in Attachment 2 (by way of the CAR Reserve System or otherwise). In rejecting that construction, the Court found that the EPBC Act simply did not apply to forestry operations in RFA regions, and that

⁶¹ *Brown*, at 37, [2](i).

⁶² *Brown*, at 37, [2](j).

⁶³ *Brown*, at 42, [23].

⁶⁴ *Brown*, at 44, [31].

the regime applicable in each region is found in the relevant RFA itself.⁶⁵ A similar point was made by the majority in *The Wilderness Society*:

...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.⁶⁶

54. In *Brown*, like the present, the fact that the State's obligations under Part 2 of the RFA were expressed to be unenforceable pointed against the view that clause 68 constituted a warranty as to a particular outcome for the species listed in the RFA.⁶⁷ The Court found that:

...satisfactory performance of the State's obligations can only be measured by the parties, the sanction for inadequate performance by the State (in the Commonwealth's opinion) being termination of the agreement under cl 102.

55. In the present case, there is no dispute that the CH RFA is an RFA for the purposes of the EPBC Act and the RFA Act.⁶⁸ It is the regime set out in that agreement that applies in the Central Highlands.
56. The extent of satisfactory compliance with any obligations imposed by an RFA can only be measured by the parties, with the sanction for non-compliance being termination.⁶⁹ To the extent it is suggested that there has been non-compliance with the terms of clauses 36 – 38 of the CH RFA, that is a matter for the parties to the CH RFA.

D-3 ANSWER TO THE PRELIMINARY QUESTION

57. There are three reasons that the Applicant's case is unsustainable:
- (1) **First**, where there is an RFA in place, the EPBC Act does not apply to forestry operations in that region. Instead, the RFA itself establishes the relevant regime. Any failure to comply with the terms of the RFA is a matter for the parties to the Agreement to respond to, in accordance with the terms of the RFA.

⁶⁵ *Brown*, at 51, [62].

⁶⁶ *The Wilderness Society*, at 162, [32] per Branson and Finn JJ.

⁶⁷ *Brown*, at 51, [63].

⁶⁸ Agreed facts [20].

⁶⁹ As per *Brown*, at 51, [63].

- (2) *Second*, it is “forestry operations” that are exempted from the operation of the EPBC Act. To the extent that the obligation to undertake those operations “in accordance with” the relevant RFA is imposed, it is limited to obligations actually imposed by the RFA that relate to “forestry operations”. The Applicant in this case has not identified any such obligation.
- (3) *Third*, the non-binding nature of the matters set out in clause 36 – 38 of the CH RFA indicate that there was no intention that the reviews were a relevant precondition to carrying out “forestry operations” in accordance with the CH RFA.
58. Taken together, these matters compel the conclusion that the alleged non-compliance with clauses 36 – 38 of the CH RFA does not operate to remove the exemption given by s 38 of the EPBC Act, or s 6(4) of the RFA Act. As a result, the preliminary question must be answered “yes”.

E. CONCLUSION

59. The State submits that the answer to the question is “yes”. A necessary effect of that answer must be that the Application is dismissed.

Dated: 11 December 2017

C M CALEO
Owen Dixon Chambers West

E A BENNETT
Owen Dixon Chambers West