

SEEING THE FOREST FOR THE TREES: STATUTORY INTERPRETATION AND THE NEW FOREST STEWARDSHIP COUNCIL (FSC) AUSTRALIA NATIONAL STANDARDS

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Human-induced transformations of the functioning of the earth and its ecological processes pose a real and immediate global challenge. This necessitates regulatory responses that collectively steer societies towards preventing, mitigating and adapting to local and global environmental change. This must be done within the normative concept of sustainable development.

Non-state, market-driven (NSMD) governance systems, such as the Forest Stewardship Council (FSC), have emerged in response to the perceived failure of nation states to secure meaningful global environmental governance.¹ These private multi-stakeholder initiatives provide constitutive and regulative rules that prescribe the behaviour of specific actors.² Their interactions and engagement with forests are shaped through market recognition of the value of the certification scheme, such that consumers of forest products may drive meaningful environmental change through the ability to discriminate and choose between products and brands that engender sustainable and ethical environmental management. The FSC represents an avenue through which civic participation can drive corporate social responsibility and achieve desirable environmental outcomes, from the local to the global.

But who are the individuals that determine, interpret and enforce NSMD parameters that constitute the responsible, ethical and sustainable use of a community's natural resources, such as forests? FSC Australia is likely to release its first national Forest Stewardship Standard before the end of 2017,³ after many years of development and consultation. This is significant for both Australia and for the FSC internationally. Australia is the only country in the world that is at once both a sovereign nation *and* an entire continent and, as such, it is uniquely placed to effect meaningful national, regional and, subsequently, global change with respect to forest management.

This article will examine the new set of challenges FSC Australia will inevitably face regarding the interpretation of its own national standard and explore the institutional arrangements that render its board of directors final arbiters of its own regulatory instrument. The words of the standard and their precise meanings will be crucial to its application and will be 'replete with words that are easy to state, fascinating to discuss, difficult to interpret but critical to apply'.⁴ Consequently, the article will consider interpretive challenges through the legal lens of statutory interpretation and the various techniques available to FSC Australia's board of directors in giving meaning to the standard, the decisions of which will

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affect many, as 'across the pool of sundry interest, the ripples of affection may widely extend'.⁵

Private global environmental governance

Private governance institutions exist in a range of contexts, but few have gained such prominence among activists and academics as the FSC.⁶ It has been 25 years since the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (Rio Conference), which was characterised by a failure of nation states to achieve meaningful consensus on the sustainable and responsible management of the world's forests.⁷ In response to this failure, several global NGOs, including Greenpeace, World Wildlife Fund, Friends of the Earth, retailers, trade unions and indigenous interest groups, established a certification scheme seeking to achieve what nation states could not. This development sought to sidestep the issue of state sovereignty by 'rejecting State-centred intergovernmental negotiations altogether, turning instead to the marketplace to address global forest deterioration by developing and demanding *global* standards with *prescriptive* requirements'.⁸ The result was the formation of the FSC — a multi-stakeholder NSMD certification scheme with a unique corporate governance structure.

FSC is often viewed as a model multi-stakeholder initiative and represents an avenue through which civic participation can drive corporate social responsibility and achieve desirable environmental outcomes. Before a product can be labelled as FSC certified, each step in the supply chain must be independently audited against the FSC standards to ensure that no uncertified materials have entered the supply chain. As FSC attempts to utilise market forces to drive coherent global action and change, it is imperative it maintains an ethical governance framework for global stewardship that facilitates responsible management of one of the world's key natural resources.

How such an organisation attempts to reconcile governance challenges across interrelated and integrated systems of formal and informal rules, rule-making systems and actor networks at all levels of human society (from local to global) within the normative context of sustainable development is a fascinating consideration. Consequently, the development of a national standard has been arduous. These standards seek to capture and develop the rights, duties and obligations of a diverse range of stakeholders. With a multitude of competing interests at play, interpreting and applying the provisions of the standards becomes a critical matter.

The Forest Stewardship Council: a unique governance structure

Forest certification systems were some of the first of what are now widespread global efforts to turn to the market to address key global challenges.⁹ Such challenges, and subsequent market responses, include fisheries depletion and management (Marine Stewardship Council), sweat shop labour (Social Accountability International and the Fair Labour Organisation), workers' rights, and the negative ecological and social effects of global coffee production (Fair Trade Coffee).¹⁰

In recent years, rise in NSMD governance systems whose purpose is to develop and implement environmentally and socially responsible management practices is becoming ever more prominent, in the favouring of non-traditional governance systems over government. These systems and their supporters turn to the market's supply chain to create incentives and force companies to comply with environmentally and socially responsible management practice.¹¹ Within a neo-liberal context, it is thought that market-based devices are one of the most effective and efficient ways to shift industry practices and regulate the negative environmental impacts of deforestation. FSC certification provides market incentives and is

designed to offer manufacturers a competitive advantage and thereby increase market access.

It is suggested that the real power of the FSC governance network, and related global governance networks, is in bringing private organisations, groups and companies together with civil society to foster non-hierarchical dialogue in addressing certain goals.¹² Through its tripartite chamber system, constitutional governance of FSC ensures checks and balances at the local, national and international level. As one commentator has remarked, 'on paper or in practice, no other forest certification scheme rivals the Forest Stewardship Council (FSC) for the sophistication and complexity of governing arrangements'.¹³

The governance structure of FSC Australia follows the standards set by FSC International, with members split into three distinct chambers and directors being drawn equally from each. Part of FSC's sophistication involves the international General Assembly (GA), which represents economic, environmental and social interests across its three chambers, governing the direction of the FSC globally. Each chamber has equal voting power and there is a 50 per cent quorum for global north and south representation. Additionally, there is the limitation that individual votes (as opposed to organisational votes) can constitute no more than 10 per cent of the vote of a respective chamber. The GA elects a global board of directors that mirrors this tripartite structure, with each director having tenure for three years.

The regulative rules of the FSC can be categorised into three different types or standards. First, global forest management standards, which form the basis for national and regional standard development; secondly, chain of custody standards prescribing detailed rules along the production chain; and, thirdly, standards for the accreditation of independent auditors and certifiers.¹⁴ The FSC has 'combined a complex global democratic architecture with a deep deliberative process to promote dialogue, equality and transparency' between members and stakeholders.¹⁵

An Australian Forest Stewardship Standard

After a deep deliberative process and considered engagement over three years, FSC Australia has seen significant progress in the development of its national standard. The standard will represent the centrepiece of FSC regulation in Australia, prescribing the requirements for FSC certification.

In December 2016, the Standards Development Group (SDG) agreed on a draft to be submitted to FSC International. While the group was unable to reach consensus on three important areas relating to workers' rights, riparian definitions and representative sample areas, their approval of the balance of the standard represents a substantial achievement. The standard was lodged with the FSC International's Policy and Standards Unit (PSU) in March 2017. PSU advised that it would not mediate or choose between options but would substitute the applicable International Generic Indicators (IGIs) where national SDGs are unable to reach accord. This position further underscores FSC's emphasis on garnering consensus to ensure legitimacy. Accordingly, in May 2017 the international PSU requested that FSC Australia's SDG further engage to reconsider these issues where no consensus was achieved. The earliest that the draft standard may be considered by the international PSU is October 2017. Thereafter, the FSC approval and implementation process for national Standards can take between 12 and 18 months.

Given the FSC, and similarly situated organisations, have eschewed traditional state-centred authority in favour of market-driven mechanisms, a question arises as to how these organisations ensure they operate in a way that safeguards members, stakeholders and broader community interests. Furthermore, how do the decision-makers within such

frameworks balance and reconcile competing interests, expectations and demands? Operating within the limits of its conferred power, any robust decision-making undertaken by a board will necessarily be guided by, and derive its legitimacy through, the principles of statutory interpretation.

Conflicting duties and constraints

FSC can make good claims to legitimacy in terms of its institutional arrangements, though such arrangements do result in potential competing duties and obligations both within and to the organisation. Such duties will inescapably come to exert influence on the way directors interpret the standard at the centre of the organisation.

Fiduciary duties

Directors have at once both an individual and a collective fiduciary duty to act in the best interests of the company. Under the *Corporations Act 2001* (Cth), directors are required to act in good faith and for a proper purpose;¹⁶ act with care and diligence;¹⁷ avoid improper use of information;¹⁸ avoid improper use of position;¹⁹ and disclose certain interests.²⁰

Although the FSC Australia board of directors seemingly operates autonomously, it is FSC International that permits FSC Australia the use of its trademark under contractual obligation and in compliance with the requirements of FSC International's network procedures and instruments. Therefore, it is conceivable that what the best interests of FSC Australia are may in certain circumstances default to the interests of FSC International, as it is certainly in the best interests of FSC Australia to retain the use of the very trademark at the core of the entire certification scheme. This is further overlaid at the local level by the fact that directors of the board are popularly elected from within their respective chambers, so there is a perceived representative mandate also to act in the best interests of the chamber from which one is elected. Chamber politics may not always accord with what is in the best interests of the company.

In short, directors' duties to FSC Australia are complicated, with competing interests and potential conflicts, and tensions may arise where one must individually and collectively take account of additional international and chamber obligations. Given its institutional arrangements, what is in the best interests of FSC Australia may or may not align with the interests of the respective chambers and of FSC International. This is an institution purposely conceived to embed conflict within its structure, to foster rigorous debate and dialogue and to ensure mutually beneficial outcomes across a diverse range of stakeholders. Herein lies the major source of FSC's legitimacy.

At first instance, it is the independent auditors who are empowered (and required) to apply the standards to the forest managers and the supply chain, from forest to product, and to ensure compliance. Any requests for clarification or appeals regarding this process, particularly where there is ambiguity in interpretation of the standard, must be considered by the board. In this way, the board of directors may be analogous to a Court of Appeal, reviewing the earlier decision of an auditor, applying the standards to the facts and proffering an outcome. The board will need to consider whether it only entertains disputes or appeals of process, or whether it is also a forum that renders advisory opinions. Furthermore, the board will need to consider whether the decisions or pronouncements it makes in this context are binding on all future interpretations or whether they are simply persuasive in character and only applicable to the interested party seeking resolution.

To such a process, theories of statutory interpretation will provide guidance to a board with a broad mandate, where it exercises decision-making power within the normative framework of sustainability, all the while navigating competing duties and obligations.

The key of statutory interpretation

'All meanings, we know, depend on the key of interpretation.'

– George Elliot.

The standard itself offers limited guidance with respect to its own interpretation. It considers the 'Language used in the Standard' and draws distinction between terms such as 'shall', 'should', 'may' and 'can'.²¹ In various indicators and annexures throughout the standard, the terms 'where applicable', 'where appropriate' and 'where possible' are used as variables.²² In such instances, the burden of proof falls to the organisation asserting compliance with the standard to 'provide sufficient rationale for any activities or measures deemed not to be relevant and that omission does not impinge on The Organisation's ability to fulfil the relevant Criterion'.²³

Beyond the limited guidance contained in the standard, the rules of statutory interpretation become instructive for the board. The modern approach to statutory interpretation in Australia was set out by McHugh JA,²⁴ stating that where the purpose of 'a statute and the means of its achievement is not stated, they can only be ascertained by examining the statute as a whole'.²⁵ The ordinary meaning of the words in the statute will indicate what the purpose and means of the Act are. Therefore, first the grammatical meaning should be adopted. However, where there is ambiguity, the 'mischief rule' allows a court to use a purposive approach to 'give effect to legislative intention ... which the legislature cannot always foresee but must have intended to deal with'.²⁶

Furthermore, the *Acts Interpretation Act 1901* (Cth) provides guidance with respect to statutory interpretation, and the board might deem it necessary to be guided by these or similar principles where there are disputes about construction or interpretation of the standard. This Act requires that, where such an ambiguity arises, the purposive approach should be employed.²⁷ Where it is necessary to confirm the interpretation or to resolve an ambiguity or absurdity, extrinsic material may be utilised.²⁸ The caveat regarding such extrinsic materials is that they should only be relied upon in confirming the ordinary meaning of the text conveyed by statute²⁹ or to remedy a manifestly absurd or unreasonable construction of those words taking an ordinary or purposive approach.³⁰

How the FSC Board chooses to interpret the standard where ambiguities arise will be instructive. As one former American jurist famously quipped: 'what is a moderate interpretation of the text? Halfway between what it really means and what you'd like it to mean?'³¹ The various techniques that frame certain interpretive exercises may provide guidance to those responsible with giving life to the provisions of the standard. Michael Kirby has stated that:

The basic principles governing statutory interpretation ... involve deriving meaning from close consideration of the text, context and purpose (policy) and any contested provisions. But the process is an art, not a science ...³²

And, as with all art, engagement is a subjective experience. Ascertaining meaning from the standard's text in light of its object and purpose will ensure a construction of the standard firmly rooted in the document. Nevertheless, FSC Australia will face inevitable and unavoidable interpretive challenges.

A living tree

Given the objects and purposes of FSC and of its standard, it would be remiss to not indulge this analogy. Commenting on the *Australian Constitution*, Kirby J stated that it 'is a living tree which continues to grow and provide shelter in new circumstances to people living under its protection'.³³ Sir Anthony Mason has pointed out that the living tree analogy is repeatedly referred to in Canada and 'can be guaranteed to bring a Cheshire cat-like grin to the face of any Canadian lawyer or law student whenever it is mentioned'.³⁴ Kirby J further suggests that such an instrument 'is constructed in ... a way that most of its concepts and purposes are stated at a sufficient level of abstraction or generality to enable it to be infused with the current understanding of those concepts and purposes'.³⁵ Similarly, given that the standard is situated within the normative framework of broad concepts such as sustainability and stewardship, current but also evolving developments in scientific knowledge and understanding will come to inform a proper and purposeful interpretation.

A somewhat similar justification permitting interpretive leniency is the distinction rendered between the connotation and the denotation of a word or phrase. Chief Justice Barwick succinctly captured the distinction when he held:

The connotation of words employed ... does not change though changing events and attitudes may in some circumstances extend the denotation or reach of those words.³⁶

This distinction is useful where scientific advances not contemplated when the standard is finalised will nonetheless come to affect the interpretation of a word or concept. The chief concern then may be whether an expanded interpretation, rendering a concept within the denotation of the word, accords with the overarching and prevailing considerations of sustainability and stewardship. Herein lies the distinction propounded by Dworkin between a concept and a conception.³⁷ Although one may be able to entertain various contested concepts or views, it is through attempting to reconcile those with broader conceptions and frameworks that we may elucidate which concept most coheres or, indeed, is the 'best fit'.³⁸ Such concepts must be subject to the developments of scientific advancement, such that words and phrases be given their denotation — lest they risk being ineffectual.

In recognising the need for certain instruments to 'contain propositions wide enough to be capable of flexible application during changing circumstances',³⁹ the High Court has upheld the validity of legislation under s 51(xviii) ('copyrights, patents of inventions and designs, and trade marks') as extending to recognise the patenting of certain plant varieties.⁴⁰ Of this justification, Callinan J said the validity of the legislation under s 51(xviii) concerned 'change, not so much in meaning as in scope'.⁴¹ So too, in this way, the FSC Australia board may recognise and seek to justify certain interpretive decisions by virtue of the distinction between connotation and denotation. This distinction will remain important the longer the national standard continues to operate in light of changing circumstances, scientific developments and changing community and stakeholder expectations.

The legs of a (FSC certified) chair

It is argued that certain interpretations are least contested when they are the clear product of established interpretive methods.⁴² Conversely, interpretation is most vulnerable to challenge when it is not the clear product of such methods or is inconsistent with one or other of them.⁴³ In a board environment characterised by conflict, directors would regard highly the need to detail and justify any interpretative rationale as well as the basis upon which a particular outcome is derived. It may be, too, that certain interpretations, such as those firmly rooted in text and doctrine, render certain decisions more impervious to challenge than arguments utilising other modes or interpretive rationale.

In addition, it may be that a combination of techniques is mutually reinforcing. To that end, philosopher John Wisdom employed the analogy of the legs of a chair, in that, 'although no single argument, taken by itself, might be either necessary or sufficient to support a conclusion, the arguments, in combination, could be taken to do so'.⁴⁴ The eminent legal scholar Julius Stone accepted that this combinatorial reasoning was equally applicable to the legal reasoning of courts, comparing such reasoning to 'the legs of a chair, not the links of a chain'.⁴⁵ In the same way, the board may be empowered by drawing upon perceptible comparisons of multiple interpretive justifications to support a particular construction and outcome.

Leeways of choice

Where interpretive construction yields more than one logically sound, coherent and justifiable outcome, how is the board to preference one valid outcome over another? Stone insisted that, in the judicial context at least, decisions of this type entail creative value choices. This is not, he contended, because judges are somehow seeking to subvert authoritative legal materials such as statutes but because that is precisely what such decisions require. The inevitability of choice arises from what Stone called 'categories of illusory reference'.⁴⁶ These categories of illusory reference include ambiguities, indeterminacies, logical circularities and contradictions, and alternative starting points when engaging in statutory interpretation.⁴⁷ Interpreting the provisions within the standard presents this challenge and, consequently, this inevitability necessitates a choice in value attribution by directors required to make a determinative interpretation. How the board will 'choose' to engage with and interpret the standards will be instructive. This rationale is evident through comments made by one of Stone's famous law students:

the notion that a word of the English language has a single, objective and scientific meaning that has only to be discovered has gradually given way to a more candid recognition of the choices that face those who interpret the written law and the way in which values and policy considerations can influence the making of those choices.⁴⁸

Chomsky proposes that, in fact, language itself is 'a process of free creation; its laws and principles are fixed, but the manner in which the principles of generation are used is free and infinitely varied. Even the interpretation and use of words involves a process of free creation'.⁴⁹ The fact that the standard is written in ordinary language provides no absolution to the difficulty of interpretation.

The bulk of the law is written in ordinary language, however, which is incurably open to indeterminacy. It gains meaning through⁵⁰ interpretation, but it cannot dictate which interpretation it will receive. So, and consequently, with law.

Stone insisted that, in appellate judgments on disputed points of law, legal conclusions were rarely compelled by legal premises. On the contrary: the materials systematically left open 'leeways of choice' within which judges had to decide, whether consciously or not, by 'advertence to factors of justice and social policy, transcending any mere syllogistic relation to or among rules of law formally enounced [sic] in the available case'.⁵¹ Similarly, the board will continue to be called upon to function as a somewhat quasi Court of Appeal, hearing disputes arising through the application of the standard by auditors and certifiers — those responsible for applying the standard at first instance. How its directors unconsciously or unknowingly exercise certain 'leeways of choice' will likely be guided by broader policy considerations.

Community impacts and the ripples of affection

The emergence of alternative models of global environmental governance, such as NSMD initiatives, necessitates consideration of the implications of 'governance without government' and to the accountability of key decision-makers. Outside the bounds of more traditional notions of deliberative democratic process, how such an organisation is properly to recognise and take account of its members, stakeholders and broader societal and community interests is an interesting challenge.

In remarking on the standing requirement that a person must have an interest that is affected by the decision, Brennan J said of the test of 'interests ... affected' under the enabling Act, that:

[A] decision which affects the interests of one person directly may affect the interests of others indirectly. Across the pool of sundry interests, the ripples of affection may widely extend. The problem which is inherent in the language of the statute is the determination of the point beyond which the affection of interests by a decision should be regarded as too remote for the purposes of 27(1).⁵²

Justice Brennan did not propose that any ripple of affection would be sufficient to support an 'interest ... affected'⁵³ and in the same way the FSC Australia board will need to turn its mind to the sundry interests of broader stakeholders and the wider community as potentially being affected by such determinations. Since interest is a matter of degree of intensity,⁵⁴ the real question is not just whether the plaintiff has an interest but inquiring into the 'extent' of the plaintiff's interest⁵⁵ to determine whether the interest is sufficient⁵⁶ and not 'too remote'.⁵⁷

More and more, these decisions will be made by decentralised, networked regulatory models playing an ever more prominent role in governing allocation, utilisation and management of resources. We are at the confluence of several societal and technological forces, including global interconnectivity, big data and decentralised decision-making combining to empower civic participation in new ways. Decentralised models respond effectively to these forces, 'connecting all producers and consumers to one another, allowing them to exchange information freely and make decisions independently'.⁵⁸ In an era of escalating big data, structures that can utilise these forces to capture the demands of a multiplicity of stakeholder interests, synthesise massive amounts of data and information and then meaningfully respond to these inputs will continue further to advance concepts of effective governance. In the domain of global environmental policy and regulation, such decentralised systems will outperform centralised systems where access to and synthesis of large data flows is imperative.

Conclusion

As a governance network, FSC members and stakeholders share information, knowledge, environmental goals and what those goals entail. This means they coordinate effectively, improving the processes and outcomes of the environmental policies they pursue. Moreover, knowledge sharing and collaboration enables the FSC network to deal with complex and interrelated issues.⁵⁹

Decisions made by the FSC board, and similarly mandated boards, will continue to guide the framework through which networked stakeholders and communities collaborate, inevitably bearing upon the management of natural resources and environmental outcomes.

However, in order for such organisations to have continuing relevance, organisational decision-makers must secure and retain the trust of stakeholders and the broader community. This will only be achieved through transparency of process as well as an explicit

consideration of the interpretive justifications rendered for a decision that is made, ensuring legitimacy and consistency of outcome.

Through the interpretation of the constitutive and regulatory instruments of such organisations, directors play an acute role in shaping the way communities interact and engage with natural resources, including forests. In a world being characterised more and more by decentralised, collaborative and networked governance processes, those actors (such as the FSC board) that retain important decision-making roles that shape global environmental policy are required, inevitably, to see the forest for the trees.

Endnotes

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