articles

Forestry Tasmania v Brown: Biodiversity Protection – An Empty Promise?

Shashi Sivayoganathan[1]

"Does that mean that the State's obligations are satisfied if, in fact, the CAR Reserve System or relevant management prescription do not protect the relevant species? I do not think so. If the CAR Reserve System does not deliver protection to the species, the agreement to protect is empty (in the absence of relevant management prescriptions performing that role). If the relevant management prescriptions do not perform that role, the State should ensure that it does, otherwise it is not complying with its obligations to protect the species. To construe cl 68 otherwise is to turn it into an empty promise."[2]

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"Extinction rates based on known extinctions of birds, mammals and amphibians over the past 100 years indicate that extinction rates are 50 to 100 times higher than extinction rates in fossil record. If possibly extinct species are included, this increases to 100 to 1000 times natural (background extinction) rates."[3]

The recent decision of the Full Court of the Federal Court in *Forestry Tasmania v Brown* [2007] FCAFC 186 ("Forestry Tasmania's Case")[4] involved an appeal by Forestry Tasmania from two declarations and an injunction granted by Marshall J ("the Primary Judge") in *Brown v Forestry Tasmania (No 4)* [2006] FCA 172 ("Brown's Case").

In the *Forestry Tasmania's Case* the Full Court considered the question of whether the *Tasmanian Regional Forest Agreement* ("the RFA"), entered into by the Commonwealth of Australia and the State of Tasmania, truly obligated the State of Tasmania to protect endangered species such as the broad toothed stag beetle, the swift parrot and the wedge tailed eagle ("the Species").

In their joint judgement, Sundberg, Finklestein and Dowsett JJ held that, in areas covered by the RFA, it is presumed that the protective mechanisms envisaged by the RFA protect the relevant species, even in circumstances where they do not. There is no requirement to actually protect the Species. The Full Court found that the RFA was a compromise between the forest industry and conservation with no assurance "that the environment, including the species, would not suffer as a result"[5] of the forest operations.

Borrowing the words of Marshall J, the Full Court's judgement clearly illustrates the "empty promise" of biodiversity protection in regions covered by the RFA and the highlights the inadequacies of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("the EPBC Act")[6].

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1 Shashi Sivayoganathan is an Assistant Lecturer in the Department of Business Law and Taxation at Monash University. He also works as a Senior Associate with BDO Kendalls Tax Lawyers, and was formerly a Manager in the Taxation Division of KPMG Australia and a Technical Leader in the Financial Services Industry Group at the Australian Taxation Office.

2 Marshall J in *Brown v Forestry Tasmania, Commonwealth of Australia, Commonwealth of Australia and State of Tasmania (No 4)* [2006] FCA 1729 at paragraph 241. The reasons for the judgement can be found at http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1729.rtf.

3 Baillie, J.E.M., Hilton-Taylor, C. and Stuart, S.N. (Editors) 2004. *2004 IUCN Red List of Threatened Species. A Global Species Assessment.* IUCN, Gland, Switzerland and Cambridge, UK reports at xxi.

4 The reasons for the judgment can be found at http://www.austlii.edu.au/au/cases/cth/FCAFC/2007/186.html.

5 *Forestry Tasmania v Brown* [2007] FCAFC 186 at para 64.

6 See generally Andrew MacInstosh, "Why the Environment Protection and Biodiversity Conservation Act's referral, assessment and approval process is failing to achieve its environmental objectives" (2004) 21 *Environmental and Planning Law Journal* 288; Ogle, Lisa, "The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): How workable is it?" (2000) 17 *Environmental and Planning Law Journal 468* and Holly Parks, "Fragments of Forest Practices Management, a Private Practice: An Assessment of the Implementation of the Regional Forest Agreements on Private Land in the Southern and the Eden Regions of NSW", (2006) 10(2) *The Australasian Journal of Natural Resources Law and Policy* 183.

I. BACKGROUND FACTS

The case concerned an application brought by Bob Brown to prevent the proposed forestry activities in coupes WT017E and WT019D in the Wielangta State Forest by Forestry Tasmania[7] and also the likely future forestry activities in this region[8].

The Wielangta Forest is an area of forest located in south east Tasmania between Orford and Copping. The Wielangta Forest straddles a number of alternate land tenures, including private land, reserved land and state forest. It has been subject to continuous forestry activities since 1900[9].

Importantly, the Wielangta Forest is also home to a number of endangered and threatened species, including the broad toothed stag beetle, the swift parrot and the wedge tailed eagle. The Species "are listed as being endangered species pursuant to the EPBC Act and the *Threatened Species Protection Act* 1995 *(Tas)* and are priority species listed in Attachment 2 (Part A) of the RFA"[10].

II. THE LEGISLATION

The EPBC Act is the key Commonwealth law relating to the conservation of biodiversity and the protection of the environment. Amongst others, it regulates actions which have, will have or likely to have a "significant impact" on the environment, including the protection and conservation of listed threatened species and ecological communities, listed migratory species, listed marine species and cetaceans[11]. A Department of Environment and Water Resource policy paper describes the EPBC Act as "Australia's premier environment and heritage legislation"[12].

Under section 18(3) of the EPBC Act:

> *"A person must not take an action that:*
>
> - *has or will have a significant impact on a listed threatened species included in the endangered category; and*
> - *is likely to have a significant impact on a listed threatened species included in the endangered category."*

Very broadly, where an action is prohibited, the person taking the action must refer the matter to the Minister for the Environment and Water Resources for approval.[13] Significant penalties apply if the action is taken without approval.

However, certain "actions" may be undertaken without approval. Pursuant to section 38 of the EPBC ACT, Part 9 (the approvals process) of the EPBC Act does not apply to an "RFA forestry operation that is undertaken in accordance with an RFA". According to the Explanatory Memorandum accompanying the Bill that became the EPBC Act:

> *"The objectives of the RFA scheme as a whole include the establishment of a comprehensive, adequate and representative reserve system and the implementation of ecologically sustainable forest management. These objectives*

7 Pursuant to *the Forestry Act* 1920 (Tas), the exclusive management and control of Tasmanian State Forests is granted to Forestry Tasmania. Forestry Tasmania had authorised Gunns Limited to undertake the forestry operations within Coupes WT017E and WT019D in the Wielangta State Forest.

8 In *Brown's Case,* Marshall J accepted that the classification of specific forest areas into "coupes" and the allocation of "provisional coupe" numbers to areas potentially available for harvesting akin to the sub-division and development of land. Marshal J, in the first instance, held that although the application related primarily to Coupes WT017E and WT019D, given the history of logging undertaken in the region on behalf of Forestry Tasmania, it is likely that areas allocated provisional coupe numbers would also be logged in the future.

9 See Forest Education Foundation at http://www.forest-education.com/index.php/educators/C31/.

10 See amended application of the respondent (as set out of *Forestry Tasmania v Brown* [2007] FCAFC 186 at para 2).

11 Greg Prutej, *Legal Briefing No 82,* 4 June 2007, Australian Government Solicitor at http://ags.gov.au/publications /agspubs/ legalpubs/legalbriefings/br82.htm.

12 Department of Environment and Water Resources, *Environment Protection and Biodiversity Conservation, Guide to the EPBC Act,* 2007, p3.

13 Section 68 of the EPBC Act.

> *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."*[14]

The RFA was entered into by the Commonwealth and the State of Tasmania on 8 November 1997.

III. THE DECISION

1. The Primary Judgement

In the first instance, Bob Brown sought an injunction against the Forestry Tasmania from undertaking any forestry operations, or any activities in connection with forestry operations, in the Wielangta State Forest pursuant to Section 475(2) of the EPBC Act[15]. The parties also requested that the Court deal with an agreed list of issues prior to making any order.

Marshall J made the following declarations in relation to the issues put before him[16].

Issue 1: the likely extent of forestry operations in the Wielangta area beyond August 2008. Marshall J determined, based on evidence presented before him that forestry operations would continue in the Wielangta State Forest beyond 2008 and, in likelihood, at least until 2013.

Issue 2: whether the relevant forestry operations (and proposed forestry operations) constitute "actions" for the purposes of the EPBC Act?
The Primary Judge held that the forestry operations constitute "actions" within the meaning provided under section 523 of the EPBC Act[17].

Issue 3: the extent to which beetle is present or likely to be present.

Issue 4: extent of eagles nest sites.

Issue 5: extent the parrot's presence.
The Primary Judge found, based on the evidence put before him, that the Species were present or likely present in the area.

Issue 6: extent of forest operations in next 15 years?
The Primary Judge determined that it was likely that fourteen listed coupes (listed and provisional) would be logged.

Issue 7: whether issue 2 operations likely to have a significant impact on the three species.
The Primary Judge considered that, although there existed more significant threats[18], he concluded that the likely future forestry operation will have a significant impact on the Species.

Issue 8: whether the RFA the Tasmanian RFA is a "regional forest agreement". The Primary Judge found that the RFA constitutes a regional forest agreement pursuant to the RFA Act.

Issue 9(a): whether the appellant was exempt from Part 9 of the EPBC Act if the forestry operations undertaken were "undertaken in accordance with an RFA"? The Primary Judge concluded that provided forestry operations are undertaken in accordance with the RFA, section 38 of the EPBC Act would apply to exempt Forestry Tasmania from Part 3 and / or Part 9 of the EPBC Act.

Issue 9(b): have the operations been carried out in accordance with an RFA?
The Primary Judge found that the term "in accordance with an RFA" should be interpreted

14 The Explanatory Memorandum to the *Environment Protection and Biodiversity Conservation Bill 1999* para 113.

15 Where there is a contravention of the EPBC Act, a minister or an interested person may apply to the Federal Court for an injunction restraining such activities pursuant to section 475(1) of the EPBC Act. Bob Brown was considered by the Primary Judge to be an interested person (pursuant to section 475(6) of the EPBC Act) on the basis that he has engaged in a series of activities for the protection of the environment in the 2 years before the making of application for the injunction.

16 The following summary is based on the Full Court's summary at para's 5 to 21 in *Forestry Tasmania v Brown* [2007] FCAFC 186

17 Pursuant to Section 523 of the EPBC Act, the term action includes a project, development, undertaking, an activity or series of activities, and an alteration of any of the things mentioned in the above paragraphs.

18 For example, in the case of the parrot, collision with man made objects.

to mean that the relevant forestry operations need to be conducted in accordance with the requirements as set out in the RFA[19].

The Primary Judge considered the requirements contained in the RFA and in particular clauses 68, 70 and 96 of the RFA.

Clause 68 of the RFA read[20]:

> *"the State agrees to protect the Priority Species...through the CAR Reserve system or by applying the relevant management prescriptions".*

Clause 70 of the RFA read[21]:

> *"the Parties agree that management prescriptions or actions identified in jointly agreed Recovery Plans or Threat Abatement Plans will be implemented as a matter of priority."*

Very broadly, clause 96 required (amongst others) new or altered management prescriptions developed over the term of the RFA to be adequate to maintain the species, be soundly based scientifically, be endorsed by the Tasmanian Threatened Species Scientific Advisory Committee (where relevant) and to take note of public comment.

In determining whether the State of Tasmania has satisfied its obligations in relation to the Species, the Primary Judge opined:

> *"An agreement to "protect" means exactly what it says. It is not an attempt to protect, or to consider the possibility of protecting, a threatened species. It is a word found in a document which provides an alternate method of delivering the objects of the Act in a forestry context..."*[22]

In relation to the word protect, the Primary Judge found that:

> *"protection is not delivered if one merely assists a species to survive. Protection is only effective if it not only helps a species survive, but aids in its recovery at a level at which it may no longer to be considered threatened."*[23]

The Primary Judge went on to find that, as a matter of fact, the CAR Reserve System did not and will not protect the relevant species, mainly due to the bulk of the Species habitat existing outside the dedicated reserve systems[24]. In addition, the Primary Judge also found that the State of Tasmania's failure to comply with clause 70 (i.e. the implementation of Recovery Plans or Threat Abatement Plans) meant that the management prescriptions were insufficient to protect the beetle, eagle and parrot.[25]

19 *Brown v Forestry Tasmania, Commonwealth of Australia, Commonwealth of Australia and State of Tasmania (No 4)* [2006] FCA 1729 at para 214

20 It is important to note that on 23 February 2007, in response to the judgement in Brown's Case, the RFA was amended The aim of the amendments was to read down the Primary Judge's interpretation of the relevant clauses in the RFA Clause 68 was replaced with the following
"The parties agree that the CAR Reserve System, established in accordance with this Agreement, and the application of management strategies and management strategies and management prescriptions developed under Tasmania's Forest Management Systems, protect rare and threatened fauna and flora species and Forest Communities "

21 Following the amendment, clause 70 now reads
"the Parties agree that where a Recovery Plan for a forest-related species in Tasmania or a Threat Abatement Plan concerning a Priority Species (Attachment 2 Part A) is in force, any recommended actions in the Recovery Plan"

22 *Brown v Forestry Tasmania, Commonwealth of Australia, Commonwealth of Australia and State of Tasmania (No 4)* [2006] FCA 1729 at paras 240-241

23 Ibid, para 246

24 Ibid, paras 260 – 270

25 Ibid, paras 283 and 284 The Primary Judge found that no Recovery Plans was ever implemented for the Beetle The Recovery Plan for the Eagle and the Parrot lapsed in 2003 and 2005 respectively and never properly implemented, even when in existence

2. The appeal

The Full Court refused to deal with the separate issues put before it[26]. Instead the Court turned to what it considered to be the critical legal issue, namely whether section 38 of the EPBC Act applied to exempt the activities of Forestry Tasmania, from the operation of Part 3 and / or Part 9 of the EPBC Act.[27]

3. Application of section 38 of the EPBC Act

The Full Court found the proposed forestry operations in the Wielangta State Forest exempt from the scope of the EPBC Act on the basis that the forestry operations will be undertaken in accordance with the requirements of the RFA[28].

Although the Full Court considered the same matters as the Primary Judge, the Full Court's conclusion in relation to the implications of clauses 68 and 70 of the RFA could not be more different. The Full Court found that clauses 68 and 70 of the RFA did **not** obligate the State of Tasmania to protect the Species. Instead, the Full Court concluded that clauses 68 and 70 should be interpreted as a confirmatory statement by the parties to the RFA, that the establishment and maintenance of the CAR Reserve System and relevant management prescriptions protects the Species. As the CAR Reserve System and management prescriptions do not automatically and, in themselves, ensure species protection, the Full Court's interpretation of Clauses 68 and 70, in effect, makes them redundant.

The Full Court held at paragraph 59:

> *"the respondent successfully contended before the Primary Judge that s 38 of the Act did not exempt the appellant from the requirement to obtain approval before taking action covered by s 18 of the Act, because cl 68 of the RFA required the State to in fact protect the three species and CAR does not in fact protect them. The question is whether clause 68 does require the State to protect the species in this way. In our view it does not. Clause 68 does not involve any inquiry into whether CAR effectively protects the species. Rather it is the establishment and maintenance of the CAR reserves that constitutes the protection."*

Further the Full Court held that the:

> *"The background to the RFA, constituted by the JANIS report and the RFA's recitals, confirms the view that the State was not by cl 68 giving the warranty referred to at [63]. The JANIS report and the RFA reflect a compromise between employment and the forest industries concerns on the one hand and the environment on the other. Neither concern could be entirely met.* ***There were some limits imposed on forest operations, but operations would continue, and to that extent there was no guarantee that the environment, including the species, would not suffer as a result. Why in those circumstances would the State give a warranty that it could see was unsustainable?" (Emphasis added)***

It could be argued, following the Full Court's judgement, a legal vacuum exists with regards to the protection of threatened species within regions covered by the RFA. For instance, if the CAR Reserve System or the relevant management prescriptions do not protect threatened species from forestry operations (or in circumstances where the forestry operations exacerbate or increase the likelihood of extinction), the EPBC Act cannot be relied on to protect the relevant specie.

26 *Forestry Tasmania v Brown* [2007] FCAFC 186 at para 103

27 In *the Forestry Tasmania's Case*, the appellant, Forestry Tasmania, appealed from the whole of the judgement except the answers to issue 8 and 9 (a) (see above) The respondent, Bob Brown, lodged a notice of contention in relation to issue 8

28 Accordingly, section 38 of the EPBC Act exempts these proposed forestry operations from the Part 3 and / or 9 of the EPBC Act

Furthermore as clauses 68 and 70 of the RFA are unenforceable against the State of Tasmania[29], the Commonwealth (or a third party) cannot legally force the State of Tasmania to make the required changes to ensure the protection of the threatened species[30]. It is important to note, however, that under clause 102 of the RFA, the Commonwealth can terminate the RFA provided that the failure to comply with the terms of clause 68 is more than a failure of a minor nature[31].

Where State laws or state agencies are incapable, unable or unwilling to protect species, no legally enforceable mechanisms exist to ensure biodiversity protection.

Finally, it is important to note that following *Brown's Case*, the Commonwealth and State of Tasmania made changes to the RFA on 28 February 2007 to defeat the "protective" interpretation provided to clauses 68 and 70 by the Primary Judge. However, in the *Forestry Tasmania's Case,* the Full Court felt that it was unnecessary to determine the effect of the changes to the RFA on the basis that it had arrived at the same conclusion without recourse to the changes[32]. In addition, the Full Court was also of the view that the changes did not invalidate the RFA.

4. Whether the RFA was a valid regional forest agreement?

A regional forest agreement, for the purposes of the RFA Act, is defined to mean[33]:

> *"An agreement that is in force between the Commonwealth and a State in respect of a region or regions, being an agreement that satisfies the following conditions:*
>
> ..
>
> *(c) the agreement provides for a comprehensive, adequate and representative reserve system;*
>
> *(d) the agreement provides for the ecologically sustainable management and use of forested regions."*

Bob Brown argued that the term "provides for" in the above definition requires that there be an enforceable regime. It was contended, that as the provisions in the RFA that dealt with the CAR Reserve System and Ecologically Sustainable Management and use of forested regions are not enforceable, the RFA does not "provide for" these matters. Hence the agreement is not a regional forest agreement.

The Full Federal Court disagreed with the above analysis and supported the conclusions of the Primary Judge that an enforceable regime is unnecessary. Furthermore, the Full Court held that as the RFA Act stipulated that the RFA is a regional forest agreement[34], this in itself was sufficient to determine its status[35].

5. Governmental Authorisation

The Full Court also considered the meaning of the term "government authorisation" for the purposes of section 524(1) of the EPBC Act. Section 524(1) of the EPBC Act provides that "a decision by a government body to grant a government authorisation" does not constitute an "action" for the purposes of the EPBC Act.

The Full Court also added, in passing, that in order for s 524(1) of the EPBC Act to apply, the government body's "authorisation must be of a governmental nature in order to be a governmental

29 Pursuant to clause 18 of the RFA, clauses 19 to 91 do not create legally enforceable relations between the Commonwealth and the State of Tasmania.

30 Although, it may be envisaged, in certain circumstances, political pressures may be applied to achieve the same ends.

31 Provided the required dispute resolution mechanisms contained in the RFA have been followed.

32 *Forestry Tasmania v Brown* [2007] FCAFC 186 at para 92 to 94.

33 Section 4 of the *RFA Act.*

34 Definition of RFA Forestry Operations in section 4 of the RFA Act states that *"RFA Forestry Operations means .. (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)."*

35 *Forestry Tasmania v Brown* [2007] FCAFC 186 at para 89.

authorisation", that is the authorisation being granted must in itself be something that only a government is capable of doing[36]. Although the court did not extrapolate on the above comments, it may be argued that following the Full Court's decision there the scope of this exception may be limited.

6. The meaning of "significant impact"

In order to trigger section 18 of the EBPC, the action must have, will have or is likely to have, a significant impact on the relevant specie. This phrase implies a certain level of causal connectivity between the action and the significant impact.

As the Full Court did not overturn the Primary Judge's conclusions with regard to the level of causal connectivity required, his findings may yet have relevance to the future interpretation of the EPBC Act.

Firstly, the Primary Judge found that the term "significant" does not mean that the activity must have the dominant or primary impact on the specie. The Primary Judge found that an impact can be a significant impact even where there are other more threatening factors[37]. The Primary Judge referred to the Full Court of the Federal Court's decision in *Minister for Environment and Heritage v Queensland Conservation Council Inc and Another* (2004) 139 FCR 24, which found that both direct and indirect effects of an action may have to be considered in determining whether it has a significant impact on a protected matter[38].

Secondly, the Primary Judge considered that the cumulative effect of an action is also relevant in determining whether there is a significant impact. That is, actions which don't directly or indirectly have a significant impact may nonetheless have a significant impact if the cumulative effect of all similar actions were to be taken into account[39]. By implication, where many actions conducted by one or more participants have a combined significant impact, any one of these actions could have a significant impact.

Environmentalists and environmental lawyers have long promoted and advocated the idea that environmental law should take into account not only matters that are directly and indirectly significant but also matters that are cumulatively significant[40].

Marshall J's views in relation to cumulative impacts can be contrasted with Dowsett J's obiter comments in *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage* [2006] FCA 736 ("Wildlife Preservation Case"). In the Wildlife Preservation Case, Dowsett J stated there must be an identified link between the action itself and the significant impact on the protected matter arising from the action – i.e. *"the relevant impacts must be the difference between the position if the action occurs and the position if the action does not"*. In the *Wildlife Preservation* case, Dowsett J rejected the argument that the effect of emitting greenhouse gases into the atmosphere may "cumulatively" have a significant impact on protected matters when considered in conjunction with all emitters of carbon dioxide[41], although the specific action in isolation may not have such an impact.

36 Ibid, para 102

37 *Brown v Forestry Tasmania, Commonwealth of Australia, Commonwealth of Australia and State of Tasmania (No 4)* [2006] FCA 1729 at paras 102 and 103

38 In *Minister for Environment and Heritage v Queensland Conservation Council Inc and Another* (2004) 139 FCR 24, the Full Court of the Federal Court held that both the direct and indirect impacts of an action need be considered in determining whether an impact is considered to be significant It is generally accepted that the test for "significant impact" is per Branson J's formulation in *Booth v Bosworth* (2001) 114 FCR 39 at 99 – 100, *Minister for the Environment and Heritage v Greentree (No 2)* [2004] FCA 741 at [192]-[193] to mean "important, notable or of consequence, having regard to its context and intensity"

39 *Brown v Forestry Tasmania, Commonwealth of Australia, Commonwealth of Australia and State of Tasmania (No 4)* [2006] FCA 1729 at paras 102 and 111

40 MacIntosh, above n3, p305 See also Jacqueline Peel and Lee Godden, "Australian Environmental Management A "Dams" Story", (2005) 28(3) *UNSW Law Journal* 668 at p684, Ralf Buckley, "Cumulative environmental impacts Problems, Policy and Planning Law" (1994) 11 *Environmental and Planning Law Journal* 344

41 *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage* [2006] FCA 736 at paras 72 and 55 The reasons for the judgment can be found at http //www austlii edu au/au/cases/cth/federal_ct/2006/736 txt/cgi-bin/download cgi/download/au/cases/cth/federal_ct/2006/736 rtf

IV CONCLUSION

The decision in the *Forestry Tasmania Case* clearly illustrates the "illusory" promise of species protection under the RFA and the EPBC Act. The inapplicability of the EPBC Act, the premier statutory mechanisms implementing Australia's international obligations under the Convention on Biological Diversity 1992 and Convention on Conservation of Nature in the South Pacific 1976, to forestry activities undertaken within RFA regions is clearly problematic. The empty and unenforceable promise of protection provided under the RFA mechanisms is even more concerning as it leaves threatened species in a desperate predicament where biodiversity conservation conflicts with State sponsored forestry.

In an age where species on earth are facing the sixth great extinction of life on earth[42], more than mere lip service is required in order to ensure that threatened flora and fauna are truly protected, that is the law "aids in the recovery at a level at which the species are no longer threatened". What the *Forestry Tasmania's Case* highlights is that the current legal mechanisms with regards to regions covered by the RFA are inadequate to do the job.

42 Baillie, above n2, at xxi.