



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

FORESTRY CORPORATION OF NEW SOUTH WALES

Appellant

and

SOUTH EAST FOREST RESCUE INC9894030

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. ***There is a comprehensive, coherent and detailed framework for enforcement, with no necessity or room for third-party standing:*** Regardless of whether third-party standing to enforce public duties of the kind recognised in *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 (“ACF standing”) is an evaluative conclusion reached only after construing the relevant statutory scheme, or an exogenous common law or equitable principle subject to statutory displacement, no such standing exists here. Part 5B of the *Forestry Act 2012* (NSW) (**Forestry Act**) (**JBA Vol 1 Tab 4 p 336**) and Parts 11 to 13 of the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**) (**JBA Vol 1 Tab 3 p 156**) establish a comprehensive and detailed framework for enforcing integrated forestry operations approvals (**IFOAs**). The scheme evinces an intention that only a limited class including the EPA have standing to bring civil proceedings to enforce IFOAs, and is incompatible with any conferral of standing on third parties such as the Respondent: AS [7]-[18], [45]-[51]; Reply [1]-[2].

- (a) Part 5B of the *Forestry Act* seeks to achieve an “integrated” regulatory regime for forestry operations wherein the objective of public participation is achieved through public consultation rather than by conferring standing on third parties: ss 69L(1)(b), (2)(b), 69N, 69NA, 69R, 69RA (**JBA Vol 1 Tab 4 pp 337-40**): AS [8], [47].

(b) The civil duty to comply with an IFOA is sourced from one or more of s 69SA (the offence provision for contravening a requirement of an approval) and ss 69M(2) and 69P(2) (providing that the carrying out of forestry operations to which an IFOA applies is “subject to” the terms of the IFOA) (**JBA Vol 1 Tab 4 pp 338-42**).

(c) Section 69SB in Pt 5B of the Forestry Act vests “*the* function of enforcing compliance” with an IFOA, including by “instituting criminal or civil proceedings”, in the EPA (**JBA Vol 1 Tab 4 pp 342-43**): AS [15], [18], [46]. Section 69ZA disapples open standing provisions for any proceedings relating to breach of an IFOA, but clarifies that the disapplication does *not* apply to proceedings brought by the EPA (**JBA Vol 1 Tab 4 p 344-45**): AS [46]-[47], [51].

(d) Parts 11 to 13 of the BC Act confer various monitoring and enforcement tools on the EPA, including stop work orders, remediation orders, enforceable undertakings, and the ability to institute civil and criminal proceedings: ss 11.2, 13.3, 13.27, 14.7A(1); Divs 2 and 4 of Pt 11; Divs 3, 4 and 5 of Pt 12; Divs 1 and 2 of Pt 13 (**JBA Vol 1 Tab 3**): Reply [2].

(e) Division 2 within Pt 13 of the BC Act (**JBA Vol 1 Tab 3 p 188**) is highly prescriptive in conferring standing on specified parties to commence various kinds of proceedings, and s 13.14A expressly identifies the EPA as the party able to bring proceedings for orders to remedy or restrain a breach of Pt 5B of the Forestry Act (dealing with IFOAs): AS [18], [46].

2. ***The legislative history confirms the intention to remove third-party standing:*** Since the introduction of IFOAs in 1999, Parliament has had a sustained policy of removing third-party standing in respect of IFOAs, culminating in the present statutory scheme: AS [7]-[17].

(a) Prior to 1999, forestry operations were subject to the environmental impact statement process under the *Environmental Planning and Assessment Act 1979* (NSW) (**JBA Vol 3 Tab 9 p 562**). Open standing was available: AS [7]. Part 4 of the *Forestry and National Park Estate Act 1998* (NSW) (**FNPE Act**) (**JBA Vol 3 Tab 14 p 602**) introduced IFOAs, excluded them from the environmental impact statement process, empowered the Minister to enforce IFOAs in court, and disapples open standing in respect of proceedings relating to IFOAs: ss 32, 34, 35, 36, 40 (**JBA Vol 3 Tab 14 pp 604-608**); AS [8]-[12].

(b) The Second Reading Speech for the FNPE Bill (**JBA Vol 7 Tab 41 p 1750**) confirmed Parliament’s expectation that s 40 of the FNPE Act (now s 69ZA of the Forestry Act) would “remove the rights of third parties to bring proceedings relating to the integrated approval”. The intention was to remove *all* third-party standing in respect of IFOAs: AS [13]; Reply [9].

(c) In 2013, Pt 4 of the FNPE Act was moved to Pt 5B of the Forestry Act: Sch 4.11, item 16 (**JBA Vol 3 Tab 13 p 599**); AS [14]. In 2018, the *Forestry Legislation Amendment Act 2018* (NSW) amended Pt 5B of the Forestry Act and Pt 11 of the BC Act, including by introducing s 13.14A (**JBA Vol 3 Tab 15 p 611**): AS [15]-[17]. These amendments were consistent with Parliament's long-standing policy of excluding third-party standing to enforce IFOAs.

3. **General principles:** The starting point for determining whether the respondent has *ACF* standing is not the existence of a special interest, but whether the occasion for equity's intervention arises. Equity will intervene to ensure the public interest in the observance of public duties, as where an effective or considered enforcement procedure for the public duty is absent. The occasion does not arise where the Forestry Act and BC Act, taken as a whole, provide adequate remedies for enforcing the obligation to comply with an IFOA: *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at 628-29 [98] (Gummow J) (**JBA Vol 5 Tab 35 pp 1294-95**); AS [25], [42]-[44]. The existence of "an effective procedure for curial enforcement" has the result that the scheme provides an exhaustive measure of standing at the instance of the EPA: *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 266 [46], [48] (Gaudron, Gummow and Kirby JJ) (**JBA Vol 4 Tab 27 p 865**); AS [33], [44].

4. **The principle of legality does not apply:** *ACF* standing is not a fundamental right that attracts the principle of legality. The purported "right" is of relatively recent origin, exists for an instrumental purpose, and has an application that varies depending on the circumstances, including the existence of effective mechanisms to ensure due observance of the law. The only fundamental principle that arises is the aspect of the rule of law that seeks to achieve consistency between conduct and the law. However, limiting standing to enforce IFOAs to the EPA does not involve any impairment of the rule of law: Reply [4]. Alternatively, if *ACF* standing is a fundamental right, it is one of a lower order, including because it exists only as a means to the end of vindicating other rights. The degree of clarity required to abrogate the right is therefore less than for higher-order rights and is present here. In the further alternative, if *ACF* standing is a higher-order fundamental right, it can be (and has in this instance been) curtailed by express words or necessary intendment.

Dated: 12 February 2025


N Hutley


D Hume


J Taylor


C Beshara