HIGH COURT OF AUSTRALIA

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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 INCORPORATED INC9894030

RESPONDENT

APPELLANT'S SUBMISSIONS IN REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: SUBMISSIONS[1]

1. **The role of the EPA**. Contrary to the Respondent's Submissions as amended (**RS**), the Appellant's case does not involve reading the word "only" into s 69SB(1) of the *Forestry Act* (or s 13.14A of the *Biodiversity Conservation Act*): cf RS [12]. There is no difficulty with the propositions, first, that Parliament may, by affirmative words, also exclude and, secondly, that a general grant of jurisdiction (such as that conferred by s 20(1)(cga) of the *Land and Environment Court Act*) should generally be read as subject to specific limits on that jurisdiction (such as those imposed by ss 69SB and 13.14A): cf RS [71]. Those propositions underpin the well-established principles recognised in *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1, and reflect broader principles of harmony and coherence.

2. Here, s 69SB must be read as a whole and in context. Section 69SB(1) says that it is the EPA which has the function of "monitoring" forestry operations and "enforcing compliance with" IFOAs. The function of "enforcing" Pt 5B includes the function of "instituting criminal or civil proceedings" (s 69B(3)), and thus includes the very thing the Respondent seeks to do. Section 69SB(2) then says that it is the *Biodiversity Conservation Act* which "contains provisions relating to … enforcement", and expressly disapplies Pts 6 and 7 of the *Forestry Act*. That is a statutory indicator that it is the *Biodiversity Conservation Act* to which one turns to identify the mechanisms for enforcement of Pt 5B of the *Forestry Act*. Part 11 of the *Biodiversity Conservation Act* is entitled "Regulatory compliance mechanisms". It sets out a range of mechanisms which the EPA,[2] but not a private party, can take to enforce Pt 5B, including stop work orders (Pt 11, Div 2) and remediation orders (Pt 11, Div 4). Those powers are available where there is an actual or apprehended contravention of Pt 5B: see, eg, ss 11.3, 11.15. Parliament must therefore have intended that court proceedings not be the sole mechanism for enforcing Pt 5B. The EPA is also given investigation powers, including compulsory production, entry, and search and seizure powers: Pt 12. Together, the

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1 These submissions adopt the same citations and abbreviations as the Appellant's Submissions (**AS**).

2 Which is covered by the expression "Environment Agency Head": s 14.7A(1)(a). See also s 1.6 (definition of "native vegetation legislation").

Forestry Act and *Biodiversity Conservation Act* prescribe a comprehensive and carefully delineated scheme for the monitoring and enforcement of Pt 5B of the *Forestry Act*. The necessary corollary of the Respondent's case is that Parliament, having prescribed that comprehensive scheme, nevertheless intended that an unspecified class of persons, lacking the suite of monitoring and enforcement powers given to the EPA, should possess a fraction of those enforcement powers. That is a most unlikely intention to attribute to Parliament, particularly where the Second Reading Speech underscored the need for certainty and disapplied open standing provisions for that purpose.

3. **The straw man**. The Respondent's Submissions are pervaded by a straw man, to the effect that the Appellant contends that there should be a new principle of the common law that "common law" standing applies only when a statute is silent as to standing: see, eg, RS [37]. This misunderstands the Appellant's case. The Appellant's case (or, relevantly, its primary case) is that the question of which classes of persons have standing turns on the construction of the statute (or instrument) conferring jurisdiction on a court. The *Boyce* principle is a contextual consideration in that constructional task. A statute with express standing provisions may or may not also by implication vest standing in those with a special interest. Whether it does so is a question of construction. Once the straw man is identified, large parts of the Respondent's Submissions fall away, including RS [37]-[40], [53]-[60] and [61]-[71].

4. **The rule of law**. Invocations of the rule of law also pervade the Respondent's case: see, eg, RS [47]-[52]. Caution is appropriate whenever the "rule of law" is applied as a major premise in reasoning, not least because it is a "highly contested and abstract notion".[3] As an initial matter, that access to the courts to enforce *one's own rights* or *excess of public power* may be "a fundamental common law right" does not necessarily mean that access to the courts to enforce *public rights* is similarly fundamental: cf RS [42], [47]. The aspect of the rule of law which seems to underpin the Respondent's Submissions is the eighth principle recognised by Fuller, namely, congruence between official action and declared rule.[4] Access to the courts can no doubt advance Fuller's congruence principle because judicial enforcement of the declared rule is one means of ensuring congruence between rule and action. But access to the courts is not the *only*

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3 *Palmer v Western Australia* (2021) 274 CLR 286 at [21] (Edelman J). See also at [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

4 Fuller, *The Morality of Law* (1969, rev ed) at 39.

means of achieving congruence: non-judicial measures – such as the promulgation of policy, the acceptance of enforceable undertakings in accordance with s 13.27 of the *Biodiversity Conservation Act*, the taking of the kinds of steps set out in Pt 11 of the Act, or even the *threat* of judicial enforcement – are also means of achieving congruence. Even if one focuses on judicial enforcement, the rule of law (and the congruence principle) does not operate at such a level of specificity as to require the recognition of special interest standing, not least where there is otherwise a suitable, independent and expert body that can bring enforcement proceedings with a view to achieving congruence. The rule of law does not require that anyone with a grievance have the right to initiate proceedings.[5] Nor still does the rule of law require that litigation, rather than the kinds of measures set out in Pt 11 of the *Biodiversity Conservation Act*, be the mechanism for ensuring compliance with public duties. The rule of law does not pursue the purpose of litigation at all costs, but a proposition broadly to that effect underpins much of the Respondent's case.

5. **Misplaced reliance on the concept of *res communis*: RS [9]-[11A]**. The Respondent's assertion that the Appellant holds State forests "in trust for present and future generations" is irreconcilable with the *Forestry Act*'s express contemplation of the carrying out of forestry operations: see, eg, ss 11(1), 59(2). It overlooks the Ministers' role in issuing IFOAs under Pt 5B, without which the Appellant cannot carry out forestry operations on Crown-timber land. Nor does the Respondent explain how the Appellant can "hold in trust" Crown-timber lands, not in State forests and in some cases privately owned, subject to IFOAs: s 69K(1). A priori assumptions about the role of *res communis* – to the extent they are relevant to standing at all – cannot override statutory provisions that speak specifically to who has standing to enforce IFOAs.[6] The sole case on which the Respondent relies, *Stannards Marine Pty Ltd v North Sydney Council* [2022] NSWLEC 99, invoked the concept not as support for any party's standing, but for the proposition that public assets "cannot be appropriated to private ownership": at [164]-[165]. No principle about standing can sensibly be derived from that proposition.

6. ***Hobart International Airport*: RS [61]-[71]**. *Hobart*'s key point is that what a person must establish to have standing "depends on what, if anything, the Commonwealth law

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5 *Kuczborski v Queensland* (2014) 254 CLR 51 at [185] (Crennan, Kiefel, Gageler and Keane JJ).
6 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26] (French CJ and Hayne J).

vesting … jurisdiction in [a] court expressly or implicitly requires to be established": at [56]. It is accepted that, in *Hobart*, the Court was dealing with a case in federal jurisdiction and, in federal jurisdiction, questions of standing are subsumed within the requirement that there be a matter. But it is difficult to see a reason in principle why the requirements for standing should, in federal jurisdiction, derive from the instrument conferring jurisdiction but, outside federal jurisdiction, derive from some other source. This is so not least because a single proceeding may, at different times, be in State jurisdiction and then federal jurisdiction. It would be productive of uncertainty if fundamentally different principles governed the determination of standing over the course of a particular proceeding. The analysis in *Hobart* was consistent with the reasoning in *Wentworth* and *Allan*, and the Respondent's criticisms of the Appellant's reference to those authorities at RS [72]-[75] are difficult to understand. Equally difficult to understand is the Respondent's complaint (RS [69]-[71]) that the Appellant failed to locate the LEC's jurisdiction in the *Land and Environment Court Act*. The Appellant specifically identified the *Land and Environment Court Act* as a source of jurisdiction at AS [21]-[22]. As explained at AS [44], the Appellant's point is that "common law standing" is an aspect of the context in which those provisions are construed, but the essential issue remains one of statutory construction.

7. **The principle of legality: RS [90]-[97]**. The Respondent's case that the principle of legality is attracted involves two propositions: first, the rule of law is a fundamental value which attracts the principle and, secondly, the standing of those with a special interest must attract the principle. It is the second step which is in issue. That step should be rejected for the reasons given above. The Appellant has not misinterpreted the line of authority referred to at RS [97]. The point of that line of authority is, as Gummow J explained in *Truth About Motorways* at [97], that a statute might impose a duty but "provide no means, or inadequate means, for enforcement of the obligation". Equity stepped in, reflecting the maxim that equity will not suffer a wrong without a remedy. The "technicalities hedging the prerogative remedies", to which reference was made in *Bateman's Bay* at [25], may be one reason why there may be no or inadequate means of enforcing the obligation, but that does not exhaust the principle.

8. **Displacement of common law standing**. The Respondent argues that "the relevant open standing provision merely removes the need to rely upon common law standing" by reference to Street CJ's observation in *F Hannan Pty Ltd v Electricity Commission*

(NSW) (No 3) (1985) 66 LGRA 306 at 313 that s 123 of the EP&A Act (now s 9.45) "totally removes the conventional requirement that relief is normally only granted at the wish of a person having a sufficient interest in the matters sought to be litigated": RS [34] fn 49. That statement is consistent with open standing displacing common law standing. The Respondent's reliance on various statutes (RS [35] fn 52) to refute that open standing has always been a defining feature of the LEC's civil enforcement jurisdiction is unavailing. Since the LEC's inception, "[a]ny person" has been able to bring proceedings "for an order to remedy or restrain a breach of" the EP&A Act – a provision which enabled any person to challenge approvals of forestry operations under the then Pt 5 of that Act: see AS [7]. And s 253 of the *Protection of the Environment Operations Act 1997* (NSW) has always entitled "[a]ny person" to bring LEC proceedings "to restrain a breach (or a threatened or apprehended breach) of any other Act" where the breach "is causing or is likely to cause harm to the environment".

9. **Other matters**. The Respondent relies on Gibbs CJ's reasoning in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 that "enforcement of the *Arch[a]eological and Aboriginal Relics Preservation Act 1972* (Vic) was 'entrusted to the ordinary agencies of government, assisted by inspectors and wardens'": RS [38]. In fact, *Onus v Alcoa* supports the Appellant's argument, as "inspectors and wardens" were *specifically identified in that Act* as persons "given powers to enable them to assist in the administration and enforcement of the Act": at 34. At RS [18]-[19], the Respondent misstates the significance of the Explanatory Note to cl 38 of the Bill that became the FNPE Act (s 40 in the Act). The Respondent reads the words "certain … proceedings" in that sentence as referring to third parties being precluded from bringing proceedings "under open standing provisions" as opposed to by way of "common law standing": RS [19]. The more natural (and correct) reading of that sentence is that Parliament intended to exclude third parties from bringing "certain proceedings" of the *type* specified in s 40 of the FNPE Act – including proceedings to enforce IFOAs (s 40(2)(d)) – regardless of the basis of standing on which they sought to rely.

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ANNEXURE TO APPELLANT'S SUBMISSIONS IN REPLY

Pursuant to Practice Direction No. 1 of 2019, the Appellant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions in reply, in addition to those which are referred to in the Appellant's Submissions filed 24 October 2024

Description	Provision(s)	Version
A. Statutes		
Biodiversity Conservation Act 2016 (NSW)	Pts 11, 12, ss 1.6, 11.3, 11.15, 13.27, 14.7A	Version for 15 December 2023 to 4 April 2024
Forestry Act 2012 (NSW)	ss 11(1), 59(2)	Version for 30 October 2023 to 21 November 2024