



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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 INC 9894030
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

PART 1: ANALYSIS OF APPELLANT’S “PRIMARY CASE”

1. On the appellant’s “primary case” (Rep [3]), whether the respondent has a right (standing) to seek an injunctive or declaratory order from the LEC depends on “what, if anything the law vesting that jurisdiction” in the LEC “expressly or implicitly requires to be established”: *Hobart* (2022) 276 CLR 519 at [56] (**Vol 4, Tab 29**).
 - a. Provisions that vest jurisdiction in a court to grant injunctive or declaratory relief will ordinarily be construed to contain an implicit requirement that a person must have a “sufficient interest” in obtaining that relief (**sufficient interest requirement**): *Hobart* at [62]-[69].
 - b. Where the relief sought is directed towards enforcement of a statutory scheme, whether a person meets that requirement must be judged by reference to the content of that scheme: see, eg, *Onus* (1981) 149 CLR 27 at 73-74 (**Vol 4, Tab 33**); see also *Hobart* at [32]-[33], [90]-[96].
2. The parties agree (AS [22]; RS [69]), consistently with the Court of Appeal (CA [78]), that the respondent seeks injunctive and declaratory relief from the LEC in the exercise of the jurisdiction vested by **s 20(1)(e) of the LEC Act, read with s 20(2)(a) and (c)**: see also ss 20(3), 22-23; *Supreme Court Act 1970* (NSW), ss 23, 57, 75.
 - a. The provisions vesting that jurisdiction — not the jurisdiction vested by **s 20(1)(cga)** (cf Rep [1]) — do not expressly identify any standing requirement and are therefore to be construed to contain the sufficient interest requirement: RS [69]; see also CA [112].
 - b. The Court of Appeal held, and it is not the subject of the appeal, that the respondent satisfies that requirement, assessed by reference to Pt 5B of the Forestry Act. The respondent therefore has standing to bring the proceeding: CA [45]-[46], [176].
3. The appellant tends to conflate its analysis of the statute conferring jurisdiction on the court with its analysis of the statutory scheme being enforced: AS [6], [43], [44]; Rep [3].

PART 2: CONSTRUCTION OF PROVISIONS SAID TO ABROGATE STANDING

4. The appellant contends that ss 69SB(1) and 69ZA of the *Forestry Act* and s 13.14A of the *Biodiversity Conservation Act* (**BC Act**) constitute an “exhaustive measure of standing” or otherwise displace the sufficient interest requirement: AS [45]-[51].
5. The principle in *Anthony Hordern* (1932) 47 CLR 1 does not assist the appellant:
 - a. The jurisdiction vested by s 20(1)(e) is distinct from the jurisdiction vested by s 20(1)(cga) (“proceedings under Division 2 of Pt 13” of the BC Act). Section 13.14A is found in Div 2 of Pt 13. Any “limit” that s 13.14A might place on the jurisdiction vested by s 20(1)(cga) is irrelevant to the jurisdiction vested by s 20(1)(e): RS [71]; cf Rep [1].
 - b. Section 69B(1) of the *Forestry Act* is not directed to the jurisdiction of the LEC at all. It merely confers a ‘function’ on the EPA: CA [25].
6. There are strong reasons not to depart from the plain meaning of ss 69SB(1) and 13.14A: s 13.3(1) uses express language; the word ‘function’ is used in a non-exclusive sense in s 69SB(1); the EPA only has those functions conferred on it by statute; s 69ZA(3) negates an intention to confer exclusive authority on the EPA; other statutes use similar language for non-exclusive conferral of standing; intermediate appellate authority.

RS [23]-[32]; CA [25], [113]; BC Act s 13.3(1); *Protection of the Environment Administration Act*, s 7 (**Vol 3, Tab 18**); *Local Land Services Act*, s 60ZZB(1) (**Vol 3, Tab 17**); BC Act s 13.14(1); *VicForests v EEG* (2023) 74 VR 216 at [267] (**Vol 6, Tab 38**).
7. The express purpose of Part 5B as set out in s 69L supports a construction that does not displace the sufficient interest requirement, notwithstanding the Second Reading speech.
8. Section 69ZA(1) does no more than disapply “open-standing” provisions, being provisions that are expressed to confer a right on “any person” irrespective of any interest they may have in obtaining relief: CA [25], [30], [114]. That use of “any person” is a long-standing drafting technique, including in NSW environmental legislation: see, eg, *Oshlack* (1998) 193 CLR 72 at [86]; *Truth About Motorways* (2000) 200 CLR 591 at [133] (**Vol 5, Tab 35**); CA [38]. Section 20(1)(e) is not such a provision, because it impliedly confers standing only on persons with a sufficient interest, not “any person” irrespective of their interest: cf AS [51].

PART 3: IS THE PRINCIPLE OF LEGALITY ATTRACTED?

9. The principle of legality “extends to the protection of fundamental principles and systemic values”, being principles that are “important within our system of representative and responsible government under the rule of law”. The sufficient interest requirement is such a principle. It is also of longstanding, representing a refinement of the *Boyce* principle.

AS [35]; RS [87]; *Lee* (2013) 251 CLR 196 at [313] (**Vol 4, Tab 30**).

10. That explains why the sufficient interest requirement will ordinarily be implied into provisions vesting jurisdiction (analogously to, for example, procedural fairness requirements: *Saeed* (2010) 241 CLR 252 at [11]-[12]; S10 (2012) 246 CLR 636 at [97]). It also explains why the requirement should not be displaced in the absence of express words or necessary implication. None of the provisions relied upon by the appellant do so.

11. The sufficient interest requirement supports the rule of law. Specifically, it provides the means whereby those who exercise public power are held accountable to the courts if they do so unlawfully.

AS[40]; RS [41]-[50], [95] ; *Lee* at [313] (**Vol 4, Tab 30**).

12. The importance of the sufficient interest requirement does not derive from any associated rights, but from the fact that an injunction compels the defendant to act within the law.

AS [40]; RS [90]-[91].

13. The rule of law, in so far as it requires those who exercise public power to be accountable to the courts if they do so unlawfully, is not a ‘highly contested and abstract notion’.

Rep [4]; *Enfield* (2000) 199 CLR 135 at [56] (**Vol 4, Tab 28**).

14. The sufficient interest requirement ensures persons particularly affected by a breach of a public law have standing to enforce it when the executive cannot or will not do so.

Rep [4]; CA [45] (Basten AJA); *Bateman’s Bay* (1998) 194 CLR 247 at [38] (**Vol 4, Tab 27**); Heydon, “Injunctions and Declarations” p 54-55 (**Vol 7, Tab 45**); *Onus* at 35, 73 (**Vol 4, Tab 33**).

Dated: 12 February 2025



Jonathan Korman



Jeremy Farrell



Thomas Wood



Lauren Sims