

HIGH COURT OF AUSTRALIA

GAGELER CJ,
EDELMAN, STEWARD, JAGOT AND BEECH-JONES JJ

FORESTRY CORPORATION OF NEW SOUTH
WALES

APPELLANT

AND

SOUTH EAST FOREST RESCUE INCORPORATED

RESPONDENT

*Forestry Corporation of New South Wales v South East Forest Rescue
Incorporated*
[2025] HCA 15
Date of Hearing: 12 February 2025
Date of Judgment: 9 April 2025
S120/2024

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

N C Hutley SC with D P Hume, J E Taylor and C J Beshara for the appellant
(instructed by Norton Rose Fulbright Australia)

J G Korman with J P Farrell, T M Wood and L F Sims for the respondent
(instructed by Blair Arthur & Associates)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Forestry Corporation of New South Wales v South East Forest Rescue Incorporated

Practice and procedure – Standing – Where appellant conducts forestry operations pursuant to integrated forestry operations approval ("IFOA") – Where respondent brought civil enforcement proceedings seeking injunctive and declaratory relief – Where primary judge found respondent lacked standing because no "special interest" in subject matter of proceedings – Where Court of Appeal of Supreme Court of New South Wales set aside primary judge's finding that respondent had no special interest – Where s 69ZA of *Forestry Act 2012* (NSW) limited certain actions in respect of provisions of Act that give any person a right to institute proceedings to remedy or restrain a breach, whether or not any right of the person has been or may be infringed by or as a consequence of that breach – Whether Court of Appeal erred in concluding on proper construction of Pt 5B of *Forestry Act* and cognate provisions of *Biodiversity Conservation Act 2016* (NSW) private persons or entities with special interest in subject matter of proceedings have standing to bring proceedings to enforce duties and obligations imposed by IFOA.

Words and phrases – "any person", "auxiliary jurisdiction", "Class 4 jurisdiction", "clear and unmistakeable intention", "commence and maintain proceedings", "common law standing", "declaratory or injunctive relief", "duties and obligations", "equitable jurisdiction", "injunction", "integrated forestry operations approval", "liberty of access", "matter", "private rights affected or interfered with", "public rights, duties or obligations", "special interest", "standing", "subject matter", "third-parties".

Biodiversity Conservation Act 2016 (NSW), ss 13.3, 13.14, 13.14A, 13.15.

Forestry Act 2012 (NSW), Pt 5B.

Land and Environment Court Act 1979 (NSW), s 20.

1 GAGELER CJ, EDELMAN, STEWARD, JAGOT AND BEECH-JONES JJ. The appellant, the Forestry Corporation of New South Wales, conducts "forestry operations" in certain State forests pursuant to an integrated forestry operations approval ("IFOA") granted under Pt 5B of the *Forestry Act 2012* (NSW).¹ Section 69ZA(2) of the *Forestry Act* precludes the bringing of proceedings under the statutory provisions referenced in s 69ZA(1) to, inter alia, enforce the duties and obligations imposed by an IFOA and Pt 5B. The provisions referred to in s 69ZA(1) enable "[a]ny person" to either bring proceedings, or seek leave to bring proceedings,² for breaches of environmental legislation whether or not any right of the person has been or may be infringed by or as a consequence of that breach. Section 69ZA(2) does not apply to proceedings brought under those provisions by the government entities referred to in s 69ZA(3).

2 The issue raised by this appeal is whether proceedings in the Land and Environment Court of New South Wales ("the LEC") to enforce duties and obligations imposed by an IFOA and Pt 5B can be commenced and maintained by persons with a "special interest" in the subject matter of the proceedings, or can only be commenced and maintained by the government entities identified in s 69ZA(3). For the reasons that follow, the Court of Appeal of the Supreme Court of New South Wales (Adamson JA, Basten and Griffiths A-JJA) was correct to find that such proceedings can be commenced and maintained by persons such as the respondent with a special interest in the subject matter of the proceedings. Accordingly, the appeal must be dismissed.

The proceedings below

3 In January 2024, the respondent filed a summons in the LEC which invoked the Court's "Class 4 jurisdiction" ("the LEC proceedings"). The summons sought declaratory and injunctive relief to enforce what the respondent contended were obligations imposed on the appellant's conduct of forestry operations under an IFOA and Pt 5B of the *Forestry Act*.

4 On 7 February 2024, the primary judge (Pritchard J) dismissed the respondent's application for an interlocutory injunction to restrain the appellant from conducting any forestry operations in compartments of six State forests unless the appellant complied with what the respondent contended was required

1 The Coastal Integrated Forestry Operations Approval dated 16 November 2018.

2 *Forestry Act 2012* (NSW), s 69ZA(1)(c); *Protection of the Environment Operations Act 1997* (NSW), s 219 ("POEO Act"). See below at [26].

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by the conditions of the IFOA.³ In dismissing the application, the primary judge rejected the appellant's contention that s 69ZA of the *Forestry Act* precludes a party that meets the "common law test for standing" from commencing proceedings to enforce compliance with the duties and obligations imposed by the IFOA and Pt 5B.⁴ However, her Honour found that the respondent did not establish, "even on a *prima facie* basis, that it ha[d] a sufficient special interest" in the subject matter of the proceedings to give it standing at common law to enforce the conditions of the IFOA.⁵ Her Honour also found that, even if the respondent had established a sufficient special interest, it had not established a serious question to be tried or an arguable case for relief.⁶ Consistent with her Honour's finding about the respondent's lack of standing, the primary judge dismissed the entirety of the LEC proceedings.

5 The respondent appealed the primary judge's dismissal to the Court of Appeal. By a notice of contention, the appellant repeated its submission that s 69ZA of the *Forestry Act* excluded common law standing. The Court of Appeal agreed with the primary judge that persons who satisfied the common law test for standing, including those with a special interest in the subject matter of the proceedings, could enforce the duties and obligations imposed by an IFOA and Pt 5B.⁷ However, the Court of Appeal upheld the respondent's contention that it had such a special interest and set aside the primary judge's order dismissing the LEC proceedings.⁸

3 *South East Forest Rescue Incorporated INC9894030 v Forestry Corporation of New South Wales* [2024] NSWLEC 7 at [16]-[24].

4 *South East Forest Rescue Incorporated INC9894030 v Forestry Corporation of New South Wales* [2024] NSWLEC 7 at [109], [128], [175].

5 *South East Forest Rescue Incorporated INC9894030 v Forestry Corporation of New South Wales* [2024] NSWLEC 7 at [140].

6 *South East Forest Rescue Incorporated INC9894030 v Forestry Corporation of New South Wales* [2024] NSWLEC 7 at [177].

7 *South East Forest Rescue Inc v Forestry Corporation of New South Wales [No 2]* (2024) 259 LGERA 293 at 299 [1], 306 [30], 325 [111].

8 *South East Forest Rescue Inc v Forestry Corporation of New South Wales [No 2]* (2024) 259 LGERA 293 at 299 [1], 310 [46], 339 [176].

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6 On 5 September 2024, the appellant was granted special leave to appeal. The sole ground of appeal was that the Court of Appeal erred in concluding that private persons or entities can bring proceedings to enforce the duties and obligations imposed by an IFOA. There was no challenge to the Court of Appeal's finding that the respondent had a special interest in the subject matter of the proceedings.

The Land and Environment Court

7 The LEC is described in its constituent statute as a superior court of record⁹ and is conferred the power to grant all remedies in respect of a legal or equitable claim properly before it.¹⁰ Relevantly, the *Land and Environment Court Act 1979* (NSW) ("the LEC Act") confers the LEC with "Class 4" jurisdiction, which includes the "same civil jurisdiction as the Supreme Court [of New South Wales] would, but for [s] 71,^[11] have to hear and dispose of" proceedings to "enforce any right, obligation or duty conferred or imposed by a planning or environmental law".¹² Although the Supreme Court's jurisdiction to entertain such proceedings is otherwise excluded,¹³ the "civil jurisdiction" that it would have had, but for that exclusion, includes jurisdiction to enforce any right, obligation or duty conferred or imposed by any planning or environmental law.¹⁴ In particular, the Supreme Court's equitable jurisdiction extends to enable the observance of public rights, duties or obligations at the suit of the Attorney-General, with or without a relator, or at the suit of any other person with standing to do so.¹⁵ Each of the *Biodiversity*

9 *Land and Environment Court Act 1979* (NSW), s 5(1) ("LEC Act").

10 LEC Act, s 22.

11 LEC Act, s 71(1) provides that "proceedings of the kind referred to in [s] 20(1)(e) may not be commenced or entertained in the Supreme Court".

12 LEC Act, s 20(1)(e), (2)(a).

13 LEC Act, s 71.

14 See *Supreme Court Act 1970* (NSW), ss 22, 23, 65, 66, 69.

15 See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 394 [28]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 628-629 [97]-[98]. Note: a "relator" is a person otherwise competent to bring and maintain a proceeding.

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Conservation Act 2016 (NSW) ("the Biodiversity Act") and Pt 5B of the *Forestry Act* is a planning or environmental law.¹⁶

Standing, the vesting of jurisdiction and injunctive relief

8 In *Boyce v Paddington Borough Council* Buckley J held that, without a relator proceeding, a person could bring proceedings regarding an interference with a public right or to enforce a public duty where either their private rights are interfered with ("the first limb") or they suffer some special damage peculiar to themselves ("the second limb").¹⁷ Through a series of cases this Court has reformulated the second limb of that test so that it is satisfied where the person has a "special", "sufficient" or "real" interest in the subject matter of the proceedings¹⁸ such as to warrant the grant of the relief sought.¹⁹

9 In *Hobart International Airport Pty Ltd v Clarence City Council* Gageler and Gleeson JJ described standing as an aspect of the "positive law that defines the jurisdiction of the court to hear and determine the proceeding in which the order is sought" so that "[w]hat, if anything, a person must establish to have a right to seek a particular order from a particular court in the exercise of a jurisdiction vested in it by a Commonwealth law depends on what, if anything, the Commonwealth law vesting that jurisdiction in that court expressly or implicitly requires to be established".²⁰ Whether or not standing is best conceptualised as a dimension of jurisdiction concerning the persons who are amenable to the exercise of the court's

16 LEC Act, s 20(3)(a).

17 [1903] 1 Ch 109 at 114.

18 See, eg, *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs* (SA) (1995) 183 CLR 552 at 558; *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519 at 538 [32], 550 [65], 560 [91].

19 See, eg, *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 266 [47]; *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 174 [15].

20 (2022) 276 CLR 519 at 546 [56].

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power,²¹ or as a plaintiff's power to invoke jurisdiction,²² standing provides a "liberty of access to the court".²³

10 The same approach should be adopted to a State law vesting jurisdiction in, and providing access to, a court of a State (such as the LEC). At least so far as public duties and obligations are concerned, ordinarily the vesting in a court of equitable jurisdiction,²⁴ or the conferring upon a court of equitable powers,²⁵ means that the court may grant declaratory or injunctive relief to persons who meet the test for standing derived from *Boyce v Paddington Borough Council*.

11 The treatment of standing to enforce public rights, duties or obligations as an aspect of the jurisdiction or the power to invoke the jurisdiction vested in the relevant court is consistent with standing being subsumed within the concept of a "matter" in Ch III of the *Constitution*.²⁶ However, leaving aside any constitutional restraints, whether satisfaction of the first limb of *Boyce v Paddington Borough Council* or the second limb as reformulated by this Court is either sufficient or necessary for a litigant to have standing to commence and maintain proceedings to enforce public rights, duties or obligations is subject to a consideration of the statutory scheme creating and regulating those rights, duties or obligations.

12 A statutory scheme that creates and regulates public rights, duties or obligations may abolish or relax the common law requirements of standing²⁷ or it may restrict or exhaustively identify the persons or class of persons who may

21 *Zurich Insurance Co Ltd v Koper* (2023) 277 CLR 164 at 182 [48].

22 *Hobart Airport* (2022) 276 CLR 519 at 555 [79]. See also Liao, *Standing in Private Law: Powers of Enforcement in the Law of Obligations and Trusts* (2023) at 40, 56-58.

23 *Hobart Airport* (2022) 276 CLR 519 at 555 [79].

24 *Hobart Airport* (2022) 276 CLR 519 at 546 [58], 549 [63], 550 [65], 552 [69].

25 LEC Act, s 22.

26 Compare *Hobart Airport* (2022) 276 CLR 519 at 550-551 [67] with 557-563 [84]-[99].

27 See, eg, *Truth About Motorways* (2000) 200 CLR 591.

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commence proceedings to enforce those rights, duties or obligations.²⁸ In determining whether a statutory scheme excludes persons who satisfy either limb of *Boyce v Paddington Borough Council* from commencing and maintaining a proceeding to enforce a public right, duty or obligation in a court vested with equitable jurisdiction, the operative principle is that, like other laws that are said to withdraw or limit a conferral of jurisdiction on a court,²⁹ or otherwise restrict the liberty of access to a court,³⁰ no implication to that effect will be recognised unless it appears clearly and unmistakeably.

13 As the LEC is vested with an equitable jurisdiction in relation to the enforcement of any right, duty or obligation imposed by Pt 5B of the *Forestry Act*, it follows that, absent a clear and unmistakeable statutory intention to the contrary, proceedings for the enforcement of such a right, duty or obligation can be commenced and maintained by a person who satisfies either limb of *Boyce v Paddington Borough Council*. The appellant contended, however, that if not excluded by s 69ZA or Pt 5B generally, equity's auxiliary jurisdiction to permit the private enforcement of statutory rights, duties or obligations could only be invoked if the statutory scheme for enforcement was "inadequate". That contention should not be accepted.

14 The appellant effectively relied upon the general principle that "[t]he foundation of much equitable jurisdiction must often be sought in the inadequacy of the remedy at law"³¹ so that an injunction in equity is not available if other remedies are adequate.³² But there was no suggestion in this case that any other remedy, apart from an injunction, would be adequate as a response to the breaches alleged to have been committed by the appellant. The appellant's submission thus did not draw from this traditional limit upon the remedy of an injunction but became, instead, an appeal to treat injunctions in support of public rights in the

28 See *Bateman's Bay* (1998) 194 CLR 247 at 266 [48].

29 *Shergold v Tanner* (2002) 209 CLR 126 at 136 [34].

30 *Jamieson v The Queen* (1993) 177 CLR 574 at 596; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633.

31 Hanbury, *Essays in Equity* (1934) at 112.

32 *Wood v Sutcliffe* (1851) 2 Sim (NS) 163 [61 ER 303]; *Imperial Gas Light and Coke Co v Broadbent* (1859) 7 HLC 600 at 612 [11 ER 239 at 244]; *Director of Public Prosecutions v Jones* [1999] 2 AC 240.

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way that historically the writ of mandamus was treated at common law. Historically it had been the case that "[w]herever ... an express remedy is afforded by statute, plain and specific in its nature, and fully adequate to redress the grievance complained of, mandamus will not lie".³³

15 The appellant relied on the statement of Gummow J in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* that the enforcement of statutory rights or obligations of a public nature by persons who satisfy the "modern concept of 'standing'" involved the "use of the auxiliary jurisdiction in equity to fill what otherwise were inadequate provisions to secure the compliance by others with particular statutory regimes or obligations of a public nature".³⁴ Gummow J's statement referred to the earlier joint judgment of Gaudron, Gummow and Kirby JJ in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*, which traced the historical development of equity's involvement in matters of public law up to the current position in which equity permits intervention by a person with sufficient material interest in the subject matter of the proceeding.³⁵ Part of the historical explanation for that development was the perceived "inadequacy" of the legal remedies otherwise available to vindicate the public interest,³⁶ including the difficulties that arose from relying on the Attorney-General to pursue actions to restrain ultra vires activities of public bodies,³⁷ especially given the differences between the role of the Attorney-General in England and that of the Attorney-General in this country.³⁸

16 However, this historical explanation for the expansion of equitable remedies to enforce public rights, duties or obligations does not translate into a requirement for a court to examine the adequacy of the statutory or other remedies available to restrain a breach of a public obligation or to enforce a public right on

33 High, *A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto, and Prohibition* (1874) at 18.

34 (2000) 200 CLR 591 at 628-629 [98].

35 (1998) 194 CLR 247 at 257-267 [24]-[50]; see also *Truth About Motorways* (2000) 200 CLR 591 at 628 [97].

36 *Bateman's Bay* (1998) 194 CLR 247 at 257-258 [25]-[26].

37 *Bateman's Bay* (1998) 194 CLR 247 at 260-261 [33]-[34].

38 *Bateman's Bay* (1998) 194 CLR 247 at 262-263 [38]; see also *Truth About Motorways* (2000) 200 CLR 591 at 608-610 [37]-[41].

each occasion that it must consider whether a person with a special interest in that subject matter can commence and maintain proceedings. No such inquiry was undertaken in *Australian Conservation Foundation Inc v The Commonwealth*,³⁹ *Onus v Alcoa of Australia Ltd*⁴⁰ or *Bateman's Bay*. No such factor was identified as relevant in *Hobart Airport*.⁴¹ In this case, no criteria were suggested by which this Court would make such an assessment.

Part 5B of the *Forestry Act* and the Biodiversity Act

17 The balance of the appellant's submissions were that either s 69ZA of the *Forestry Act* in particular, or the statutory scheme of Pt 5B generally, excluded the capacity of anyone, other than the government entities identified in s 69ZA(3), to commence and maintain proceedings to enforce the duties or obligations that Pt 5B imposed.

18 Part 5B of the *Forestry Act* is entitled "[i]ntegrated forestry operations approvals" and applies to forestry operations in State forests or other Crown-timber lands.⁴² The purpose of Pt 5B is to "provide a framework for forestry operations".⁴³ That framework authorises the carrying out of forestry operations in accordance with principles of ecologically sustainable forest management and integrates the regulatory regimes for environmental planning and assessment, protection of the environment and threatened species conservation.⁴⁴

19 Division 2 of Pt 5B addresses the procedure for and effect of granting an IFOA for forestry operations the subject of Pt 5B. The carrying out of such activities is subject to the terms of an IFOA,⁴⁵ including relevantly any conditions imposed on the conduct of forestry operations by a biodiversity conservation licence under the Biodiversity Act or an environment protection licence under the

39 (1980) 146 CLR 493.

40 (1981) 149 CLR 27.

41 See (2022) 276 CLR 519 at 552 [69].

42 *Forestry Act*, s 69K(1).

43 *Forestry Act*, s 69L(1).

44 *Forestry Act*, s 69L(1).

45 *Forestry Act*, s 69M(2).

Protection of the Environment Operations Act 1997 (NSW) ("the POEO Act").⁴⁶ It is an offence to contravene a requirement imposed by an IFOA.⁴⁷

Compliance and enforcement of Pt 5B

20 The Environment Protection Authority ("the EPA") is responsible for monitoring the carrying out of forestry operations under Pt 5B and for enforcing compliance with the requirements of IFOAs,⁴⁸ including instituting criminal or civil proceedings.⁴⁹ To that end, each of Pt 11 (except Div 3),⁵⁰ Pt 12 and Pt 13 of the Biodiversity Act is applicable to the enforcement of Pt 5B of the *Forestry Act*.⁵¹ The applicable provisions of Pt 11 of the Biodiversity Act enable the EPA,⁵² among other things, to: exercise compliance powers such as making a stop work order if any action is likely to result in a contravention of, relevantly, Pt 5B;⁵³ or order a person to carry out specified remediation work if it is satisfied that, relevantly, any native vegetation, threatened species or threatened ecological community has been damaged in or as a result of the commission of an offence against the Biodiversity Act or Pt 5B.⁵⁴ Part 12 of the Biodiversity Act confers a range of investigative powers on authorised officers, such as the power to: require

46 *Forestry Act*, s 69P(2).

47 *Forestry Act*, s 69SA(1).

48 *Forestry Act*, s 69SB(1).

49 *Forestry Act*, s 69SB(3).

50 *Forestry Act*, s 69X.

51 *Forestry Act*, s 69SB(2); *Biodiversity Conservation Act 2016* (NSW), s 14.7A ("Biodiversity Act"). Part 5B of the *Forestry Act* is defined as "native vegetation legislation" for the purposes of the Biodiversity Act: see Biodiversity Act, s 1.6(1).

52 See Biodiversity Act, s 14.7A(1)(a)-(b).

53 Biodiversity Act, s 11.3.

54 Biodiversity Act, s 11.15(1)(b), (e).

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the production of information and records;⁵⁵ enter premises;⁵⁶ and compel answers to questions.⁵⁷

21 Within Div 1 of Pt 13 of the Biodiversity Act, s 13.3 provides that proceedings for a "native vegetation offence", which includes an offence under Pt 5B,⁵⁸ "may *only* be taken" by a police officer, the EPA or a person duly authorised by the EPA (emphasis added). Within Div 2 of Pt 13, s 13.14A provides that the EPA "may bring proceedings in the [LEC] for an order to remedy or restrain a breach of [Pt] 5B of the *Forestry Act*". Section 13.14A(3) confers power on the LEC in those proceedings to make such orders as the Court thinks fit to remedy or restrain a breach.

22 In addition, within Div 2 of Pt 13 of the Biodiversity Act, s 13.14(1) provides that "[a]ny person" may bring proceedings in the LEC for an order to remedy or restrain a breach of the Biodiversity Act or the *Biodiversity Conservation Regulation 2017* (NSW). Similarly, s 13.15(1) provides that "[a]ny person" may bring proceedings in the LEC for an order to remedy or restrain a breach of a "biodiversity stewardship agreement". In respect of all proceedings brought under Div 2 of Pt 13, s 13.17(1) provides that such proceedings may be brought "whether or not any right of the person has been or may be infringed by or as a consequence of the breach concerned".

Section 69ZA

23 Within Div 4 of Pt 5B of the *Forestry Act*, ss 69W to 69ZA exclude or limit the application of provisions of environmental legislation, such as Pt 5 of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPAA Act"),⁵⁹ during any period that an IFOA applies to the carrying out or granting approval of forestry operations.

55 Biodiversity Act, s 12.8(2).

56 Biodiversity Act, s 12.11(1).

57 Biodiversity Act, s 12.19(1).

58 Biodiversity Act, s 1.6(1).

59 *Forestry Act*, s 69W(1).

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Section 69ZA provides:

- "(1) This section applies to the following statutory provisions –
- (a) section 252 or 253 of the *Protection of the Environment Operations Act 1997*,
 - (b) *a provision of an Act that gives any person a right to institute proceedings in a court to remedy or restrain a breach (or a threatened or apprehended breach) of the Act or an instrument made under the Act, whether or not any right of the person has been or may be infringed by or as a consequence of that breach,*
 - (c) section 219 of the *Protection of the Environment Operations Act 1997*.
- (2) Proceedings may not be brought under a statutory provision to which this section applies if the breach (or threatened or apprehended breach) to which the proceedings relate is as follows –
- (a) a breach of this Part (including a breach of any forest agreement),
 - (b) a breach of an integrated forestry operations approval,
 - (c) a breach of an Act or law that arises because any defence provided by an integrated forestry operations approval is not available as a result of a breach of the approval,
 - (d) a breach of the Act that includes the statutory provision (including a breach of an instrument made under that Act) if the breach relates to forestry operations to which an integrated forestry operations approval applies.
- (3) This section does not apply to any proceedings brought by –
- (a) a Minister, or
 - (b) the Environment Protection Authority or a member of the staff of the Authority, or

- (c) in the case of the provision of an Act referred to in subsection (1)(b) – a government agency or any government official engaged in the execution or administration of the Act." (emphasis added)

25 Section 69ZA(2) precludes the bringing of proceedings "under" the statutory provisions referred to in s 69ZA(1) other than by the persons and entities specified in s 69ZA(3). It was not in dispute that the proceedings brought by the respondent fell within s 69ZA(2) in that they either related to a breach of Pt 5B,⁶⁰ or related to a breach of an IFOA.⁶¹ However, that does not exhaust the type of proceedings that fall within s 69ZA(2). They include proceedings alleging a breach of another "Act", such as the Biodiversity Act, where the breach is not justified or excused because of any defence provided by an IFOA.⁶² Section 69ZA(2) may also apply to proceedings alleging a breach of a norm arising under or derived from the "common law" (such as trespass or nuisance) that is not justified or excused because of any defence provided by an IFOA.⁶³

26 Section 69ZA(1)(a) and (c) identify three provisions of the POEO Act upon which s 69ZA(2) operates, namely ss 252, 253 and 219. The relevance of the POEO Act to an IFOA has already been noted.⁶⁴ Each of ss 252 and 253 provides that "[a]ny person" may bring proceedings in the LEC, for a breach of the POEO Act in the case of s 252, and for a breach of any other Act that is causing or is likely to cause harm to the environment in the case of s 253.⁶⁵ Those provisions expressly enable "[a]ny person" to bring proceedings "whether or not any right of the person has been or may be infringed by or as a consequence of the breach".⁶⁶ Similarly, s 219 of the POEO Act enables "[a]ny person", granted leave by the LEC, to institute proceedings in that Court for an offence against the POEO Act or

60 *Forestry Act*, s 69ZA(2)(a).

61 *Forestry Act*, s 69ZA(2)(b).

62 *Forestry Act*, s 69ZA(2)(c).

63 *Forestry Act*, s 69ZA(2)(c).

64 See above at [19].

65 POEO Act, ss 252(1), 253(1).

66 See POEO Act, ss 252(3), 253(2).

the regulations made under it.⁶⁷ A person may seek that leave whether or not any right of that person has been or may be infringed.⁶⁸

27 Section 69ZA(1)(b) refers to other statutory provisions that have a similar effect to ss 219, 252 and 253, ie, provisions which, in terms, confer a right to institute proceedings on "[a]ny person" whether or not any right of the person has been or may be infringed. Sections 13.14 and 13.15 of the Biodiversity Act are examples of such provisions. Other provisions which confer standing on "[a]ny person" whether or not any right of the person has been or may be infringed are also found in environmental legislation in respect of which the LEC has Class 4 jurisdiction.⁶⁹

Section 69ZA did not preclude the respondent from commencing the LEC proceedings

28 As noted, the appellant contended that the effect of s 69ZA(2) is to preclude "[a]ny person" (ie, all persons), other than those identified in s 69ZA(3), from bringing proceedings of the kind referred to in s 69ZA(2). The appellant contended that the phrase "whether or not any right of the person has been or may be infringed" excludes any person who satisfies the first limb of *Boyce v Paddington Borough Council* from bringing such proceedings. According to the appellant, in those circumstances, it would be incongruous if persons who satisfied the second limb of the test derived from *Boyce v Paddington Borough Council* could nevertheless enforce the duties and obligations imposed by Pt 5B.

29 The appellant's submission overstates the effect of the text of s 69ZA(1)(b) and (2). Those provisions are not directed to the topic of standing per se but instead are directed only to certain statutory provisions that abolish the common law rules of standing. The relevant question that arises under s 69ZA(1) is whether the statutory provision confers a right to institute proceedings on "[a]ny person" in terms that expressly or impliedly apply "whether or not any right of the person has

67 POEO Act, s 219(1).

68 See POEO Act, s 219(1B).

69 See, eg, *National Parks and Wildlife Act 1974* (NSW), s 193(1); *Heritage Act 1977* (NSW), s 153(1); *Environmental Planning and Assessment Act 1979* (NSW), s 9.45(1) ("EPAA Act"); *Biological Control Act 1985* (NSW), s 54(1); *Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986* (NSW), s 10(1); *Rural Fires Act 1997* (NSW), s 100H(1).

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been or may be infringed". Thus, if a statutory provision confers a right to institute proceedings for a breach of Pt 5B on any person whose rights have been or may be infringed by such a breach, then that provision would not fall within s 69ZA(1)(b). Such a provision would not confer a right to institute proceedings on "[a]ny person" whether or not any right of the person has been or may be infringed.

30 Even if it is correct to treat the statutory provisions of the LEC Act conferring Class 4 jurisdiction on the Court (ie, s 20(1)-(5)) as giving rise to a "right" on the part of persons to institute proceedings, those provisions do not confer that right on "[a]ny person", much less confer the right to bring proceedings "whether or not" any right of that person has been or may be infringed. Those provisions of the LEC Act pre-suppose that some of the statutory provisions and instruments to which they refer confer such rights and are to be otherwise understood as, at most, conferring a right to institute proceedings on those persons who satisfy either limb of *Boyce v Paddington Borough Council*.

Part 5B did not preclude the respondent from commencing the LEC proceedings

31 As noted, the appellant contended that, even if s 69ZA does not preclude persons such as the respondent from commencing the LEC proceedings, an implication to that effect should nevertheless be drawn from Pt 5B and the cognate provisions of the Biodiversity Act. The difficulty with that contention is that, while s 69ZA is to be read in its statutory context,⁷⁰ it is the only provision within Pt 5B that expressly deals with the topic of who has standing to commence civil enforcement proceedings and, as explained, its scope is limited. If s 69ZA does not expressly achieve what the appellant contended it does (which it does not), it is difficult to see how an implication to that effect could be drawn from the remainder of the provisions in Pt 5B and the Biodiversity Act.

32 In any event, a consideration of the balance of the provisions of Pt 5B and the cognate provisions of the Biodiversity Act does not assist the appellant. In contrast to s 13.3(1) of the Biodiversity Act, which specifies that criminal proceedings may "only" be taken by certain designated persons (including the EPA), s 13.14A of the Biodiversity Act does not purport to confer exclusive authority on the EPA to bring civil enforcement proceedings in respect of breaches of Pt 5B. The appellant contended that the inclusion of the word "only" in s 13.3(1)

70 See *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39], quoting *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47].

was necessary to exclude the authority of the Director of Public Prosecutions to commence such proceedings⁷¹ and also possibly to exclude the application of the common informer provision of the *Criminal Procedure Act 1986* (NSW).⁷² That may be so, but it does not address why s 13.14A is not similarly expressed. As noted by the Court of Appeal, if s 13.14A is read facultatively it sits comfortably with the above construction of s 69ZA(1)(b) as excluding the bringing of proceedings under a statutory provision which, in terms, permits "[a]ny person" to do so whether or not any rights of the person have been or may be infringed by or as a consequence of the breach.

33 The appellant also contended that the scheme of regulation and enforcement by the EPA would be undermined if civil enforcement proceedings could be commenced by a person who only has a special interest in the subject matter of those proceedings. However, that contention is inconsistent with s 69ZA(3)(a), which confers authority on "a Minister", and not just the Minister administering the *Forestry Act*,⁷³ to bring proceedings under the statutory provisions referred to in s 69ZA(1). None of the Ministers of the Crown can exercise the compliance and enforcement powers of the EPA, but they can invoke the open standing provisions referred to in s 69ZA(1) to enforce compliance with the duties and obligations imposed by an IFOA and Pt 5B.

Legislative history and extrinsic materials

34 The appellant sought to derive support from the legislative history of s 69ZA and Pt 5B. Part 5B has its origins in Pt 4 of the *Forestry and National Park Estate Act 1998* (NSW) ("the FNPE Act").⁷⁴ In the second reading speech for the *Forestry and National Park Estate Bill 1998* (NSW), the Minister noted that forestry operations in State forests had previously been "governed by a plethora of regulations, approvals and licences" and that Pt 4 established a "co-ordinated approach" through the use of IFOAs, which would provide a "framework for

71 See *Director of Public Prosecutions Act 1986* (NSW), s 8(1).

72 See *Criminal Procedure Act 1986* (NSW), s 14.

73 See *Interpretation Act 1987* (NSW), s 15(1)-(2).

74 See *Forestry and National Park Estate Act 1998* (NSW), s 2(3) ("FNPE Act"). With effect from 1 January 2013, Pt 4 of the FNPE Act became Pt 5B of the *Forestry Act*: see *Forestry Act*, Sch 4, item 4.11 [16].

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forestry operations, [with] an approval which is up front, [and] clearly defined".⁷⁵ Prior to the enactment of Pt 4 of the FNPE Act, the conduct of forestry operations was regulated by Pt 5 of the EPAA Act, in respect of which the open standing provision in former s 123 of the EPAA Act operated. The second reading speech noted that it was the government's intention that Pt 5 of the EPAA Act would not apply in respect of the carrying out of forestry operations during any period that an IFOA applies to those operations.⁷⁶ Thus, s 36(1) of the FNPE Act excluded IFOAs from the assessment process under Pt 5 of the EPAA Act.

35 Part 4 of the FNPE Act as originally enacted included a provision enabling the "relevant Minister" to bring civil enforcement proceedings in the LEC for an order to remedy or restrain a breach of the conditions of an IFOA⁷⁷ and s 40 of the FNPE Act was not relevantly different from s 69ZA of the *Forestry Act*. As noted, when Pt 4 of the FNPE Act was enacted, Pt 6 of the EPAA Act included s 123. Section 123 enabled "[a]ny person" to bring proceedings in the LEC for an order to remedy or restrain a breach of that Act "whether or not any right of that person has been or may be infringed by or as a consequence of that breach".⁷⁸ Thus, former s 40 of the FNPE Act limited the scope of s 123 of the EPAA Act so that where the breach or threatened breach to which the proceedings related had the requisite connection to Pt 4 of the FNPE Act or an IFOA, only three designated persons that (broadly) corresponded to those identified in s 69ZA(3) could invoke that provision.

36 The appellant emphasised part of the second reading speech which described the clause of the *Forestry and National Park Estate Bill* that became s 40⁷⁹ as "remov[ing] the rights of *third parties* to bring proceedings relating to the [IFOA]" (emphasis added).⁸⁰ The explanatory note also described the effect of the

75 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1998 at 9923.

76 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1998 at 9924.

77 See FNPE Act, s 32(2).

78 EPAA Act, s 123(1).

79 *Forestry and National Park Estate Bill 1998* (NSW), cl 38.

80 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1998 at 9924.

clause as "exclud[ing] certain civil and criminal enforcement proceedings by *third-parties* under environment protection and other legislation for breaches of the proposed Act or related to the proposed Act" (emphasis added).⁸¹

37 To the extent that the legislative origins of Pt 5B reveal that at the time of the enactment of its predecessor there were open standing provisions such as the former s 123 of the EPAA Act that were intended to be partially disapplied, then that history is consistent with the above construction. However, the appellant contended that the extrinsic materials reveal a legislative intention to exclude all persons from bringing civil enforcement proceedings other than those identified in the predecessor to s 69ZA(3), ie, a Minister, the EPA and a government agency or government official.

38 The appellant's contention reads too much into the use of the phrase "third-parties" in the extrinsic materials at the expense of the text of s 69ZA. It is at the very least contestable whether a party who falls within the first limb of *Boyce v Paddington Borough Council*, ie, whose private rights are interfered with by a breach of an obligation or duty imposed by Pt 5B, could properly be characterised as a "third-part[y]" when compared with someone whose rights are unaffected by that breach. The position is no different with the second limb.

39 Legislative history and extrinsic materials cannot displace the meaning of the statutory text. The phrase "third-parties" as used in those materials only has utility if and in so far as it assists in fixing the meaning of the statutory text,⁸² specifically the text of s 40 of the FNPE Act (and s 69ZA). The contestable meaning of the phrase "third-parties" does not assist in construing what is otherwise the clear effect of s 40 of the FNPE Act and its successor provisions. Those provisions were clearly directed to partial disapplying of the open standing provisions of the EPAA Act and other environmental legislation. Those open standing provisions were its target and that target was hit.⁸³ However, the text, legislative history and extrinsic materials do not reveal any advertence on the part of the legislature to whether or not persons whose private rights were affected by a breach of an obligation imposed by Pt 5B, or persons who had a special interest

81 New South Wales, *Forestry and National Park Estate Bill 1998*, Explanatory Note at 5.

82 See *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

83 See *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 146.

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in the subject matter of proceedings to enforce such an obligation, were also intended to be excluded by s 69ZA. No clear and unmistakeable intention or implication to that effect is apparent from s 69ZA or the balance of Pt 5B and the cognate provisions of the Biodiversity Act.

Conclusion

40 The applicable rule of construction in this case is that any inference or conclusion that the LEC's jurisdiction, or the liberty of access to the LEC, was withdrawn or limited by Pt 5B of the *Forestry Act* and the cognate provisions of the Biodiversity Act should not be drawn unless such an inference or conclusion is clear and unmistakeable. The appeal fails because a clear and unmistakeable intention to that effect is not demonstrated.

41 The appeal should be dismissed with costs.

