Fauna v Forestry: The Wielangta Forest Litigation

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Introduction

This case note examines Senator Bob Brown's application for an injunction preventing Forestry Tasmania, the statutory body with responsibility for the management of Tasmanian forests, from undertaking further forestry operations in the Wielangta forest.[1] The basis for the application was that proposed forestry operations would have a significant impact on three listed threatened species – the broad-toothed stag beetle, the wedge-tailed eagle and the swift parrot – and were thus prohibited by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (hereafter *EPBC Act*). At first instance in the Federal Court, Justice Marshall granted the injunction.[2] This decision was then overturned by the Full Court of the Federal Court in a unanimous decision of Justices Sundberg, Finkelstein and Dowsett.[3] On 23 May 2008, a majority of the High Court[4] refused to grant Senator Brown special leave to appeal the Full Court's decision.

This case note proceeds as follows: the relevant legislative framework in the case is firstly examined; while the following sections deal with the first instance judgment, appeal and special leave hearing; comments on the significance of the case are then provided; and finally concludes that the law as it presently stands cannot ensure protection for threatened species in Tasmania's forests.

Legislative Framework

The *EPBC Act* is Australia's principal environmental legislation. Part 3 of the *EPBC Act* prohibits actions that have, will have, or are likely to

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1 The Wielangta forest is an area near the south-east coast of Tasmania, between the town of Orford and the town of Copping near the Tasman Peninsula.

2 *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729.

3 *Forestry Tasmania v Brown* [2007] FCAFC 186.

4 High Court of Australia, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008). Accessible at http://www.austlii.edu.au/au/other/HCATrans/2008/202.html.

have a significant impact on specifically enumerated matters of national environmental significance,[5] unless approval from the Federal Minister is sought and obtained pursuant to Part 9 of the *EPBC Act*.[6] Relevant in this case is section 18 regarding listed threatened species.

If a person or group has undertaken, is undertaking or is proposing to undertake an activity that would constitute a contravention of any section of the *EPBC Act*, section 475(1)(b) provides that a person may apply to the Court for an injunction against the continuance of that activity.[7]

Section 38 of the *EPBC Act*[8] and s 6(4) of the *Regional Forest Agreements Act 2002* (Cth) (hereafter *RFA Act*) provide an exception to the prohibitions in Part 3. Section 38 of the *EPBC Act* provides that Part 3 does not apply to [a Regional Forestry Agreement] forestry operation that is undertaken in accordance with a [Regional Forestry Agreement].[9] A Regional Forestry Agreement (hereafter the RFA) is an agreement between the Commonwealth Government and the relevant State Government governing the management and use of forests in the regions covered by the RFA. The purpose of an RFA is to ensure 'long-term stability of forests and forestry industries.'[10] An RFA forestry operation means any forestry operation conducted in relation to land governed by the RFA.[11]

In particular, an RFA must provide a Comprehensive, Adequate and Representative Reserve System (CAR Reserve System) and must provide

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5 Essentially, matters of national environmental significance reflect Australia's international environmental treaty obligations – eg world heritage, Ramsar wetlands, threatened species.

6 The Federal Minister may give approval for the action under Part 9 of the *EPBC Act*.

7 A person who applies for an injunction must be an 'interested person' within the meaning of s 475(6) – a person who has engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the two years immediately before the conduct, or in respect of proposed conduct, two years before the making of the application for the injunction.

8 Part 4 of the *EPBC Act*, in which s 38 is a section, gives a number of scenarios where ministerial approval for actions that would otherwise contravene Part 3 is not needed.

9 The same exception is found in section 6(4) of the *RFA Act*: Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

10 *Regional Forest Agreements Act 2002* (Cth), section 4 (definition of *Regional Forest Agreement)*.

11 *Regional Forest Agreements Act 2002* (Cth), section 4 (definition of *RFA forestry operations)*.

for the ecologically sustainable management use of forested areas.[12] The CAR Reserve System, developed from the 1997 Nationally Agreed Criteria for the Establishment of a Comprehensive, Adequate and Representative Reserve System for Forests in Australia report (the JANIS report), provides for the setting aside of certain forest areas as reserve areas and protected from forestry operations. The System is to be governed by the principles of comprehensiveness – that the reserve system includes the full range of forest communities across the State; adequacy – that the level of reservation is broad enough to maintain viability of forest populations, species and communities; and representativeness – that the level of reservation is broad enough to ensure diversity within each forest community. The RFA must also provide for the ecologically sustainable management and use of forests in the region.[13]

The Regional Forest Agreement between the Commonwealth and Tasmanian State Government was concluded in November 1997. It governs the management and use of Tasmanian forests with a view to, *inter alia*, ensuring conservation of environment and heritage values through the establishment of a CAR Reserve System, providing for the ecologically sustainable management and use of Tasmanian forests and provide certainty of access to resources for the forest and mining industries.[14]

The key dispute in the litigation revolved around clause 68 of the RFA.[15] At the beginning of the dispute, clause 68 read: '[t]he State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System or by applying relevant management prescriptions'.[16] After the first instance of decision of Marshall J granting the injunction sought by Bob Brown, clause 68 was amended by the

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[12] *Regional Forest Agreements Act 2002* (Cth), section 4 (definition of *Regional Forest Agreement)*. In so doing, the RFA must take into consideration assessments of any relevant environmental values, Indigenous heritage values, economic values of forested areas and forest industries, social values and principles of ecologically sustainable management.

[13] *Regional Forest Agreements Act 2002* (Cth), section 4 (definition of *Regional Forest Agreement)*.

[14] *Regional Forest Agreement*, Recital A.

[15] Clauses 30-38 prescribe various obligations relating to threatened species and communities, but these clauses were not in issue in the litigation.

[16] Attachment 2 (Part A) provides a list of all species listed under either or both the *Endangered Species Protection Act 1995* (Cth) or the *Threatened Species Protection Act 1995* (Tas). The three species in question in the litigation – the broad-toothed stag beetle, the wedge-tailed eagle and the swift parrot – are all listed here.

agreement of the Tasmanian State Government and the Federal Government to read:

> The Parties agree that the CAR Reserve System, established in accordance with this Agreement, and the application of management strategies and management prescriptions developed under Tasmania's Forest Management Systems, protect rare and threatened fauna and flora species and Forest Communities.

The implications of this amendment are highly relevant to the ultimate outcome of this dispute and to the overall adequacy of Tasmania's forestry laws. These ramifications are discussed below in the examination of the three judgments and the significance of the case.

It must be noted that clause 68 of the RFA is not strictly enforceable at law – clause 18 states that Part 2 of the agreement, comprising clauses 18-91, does not create legally binding relations. The Commonwealth has the power to terminate the RFA under clause 102 should the Tasmanian Government fail to comply with clause 68[17] or fundamentally fail to comply with the spirit of the RFA, after the observance of the dispute resolution procedures in clauses 11-15.

To summarise, Forestry Tasmania will be exempt from Part 3 of the *EPBC Act* if their operations are undertaken in accordance with the RFA. Therefore, the main issues in the litigation were: (i) the meaning of 'in accordance with'; and (ii) exactly what obligations the RFA, in particular clause 68, imposed. The answers to these issues given at trial and on appeal are examined in detail in the following sections.

The Trial Judgment[18]

At trial, Marshall J granted the injunction sought. He held that Forestry Tasmania's forestry operations both now and in the future would have a significant impact on each of the broad-toothed stag beetle, the wedge-tailed eagle and the swift parrot, and were therefore prohibited by s 18 in Part 3 of the *EPBC Act* unless the exemption in s 38 of the *EPBC Act* and s 6(4) of the *RFA Act* applied. To this end, he held that the operations were not being carried out in accordance with the RFA and therefore Forestry Tasmania was not entitled to the exemption.

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[17] Such failure does not include a failure of a minor nature which is not one or a part of a series of deliberate or reckless failures of a minor nature: clause 102(b)(v).

[18] *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729.

In summary, the case involved determining four main issues: (i) whether Forestry Tasmania would continue forestry operations in the Wielangta Forest into the future; (ii) whether each of the three species in question was or was not likely to be present in the Wielangta Forest area; (iii) if the first two issues were answered in the affirmative, whether those forestry operations would be likely to have a significant impact on one or more of the species; and (iv) whether Forestry Tasmania's forest operations were being carried out in accordance with the RFA (in particular clause 68) which would therefore give them an exemption from the prohibition in Part 3 of the *EPBC Act*.[19]

Marshall J held that Forestry Tasmania would continue forestry operations in the Wielangta Forest into the future. There was evidence that Forestry Tasmania was proposing to implement a new 5- to 10-year plan for forestry operations in the Forest, and Marshall J further noted that '[t]he best guide to future conduct is past conduct'.[20] This meant that as Forestry Tasmania had undertaken forestry operations in the area for a number of years, this was likely to continue into the future.

Marshall J preferred the evidence of witnesses called by Senator Brown to those of Forestry Tasmania in relation to the presence of each of the species in the areas of the Wielangta Forest that were to be subject to forestry operations. He found Forestry Tasmania's witnesses to be either unhelpful to Forestry Tasmania in disproving the evidence adduced by Senator Brown, or as being inherently biased towards Forestry Tasmania. Marshall J described one of Forestry Tasmania's expert witnesses on the beetle as 'more of an advocate for the cause of Forestry Tasmania than an independent expert.'[21]

Likewise, in finding that the forestry operations would be likely to have a significant impact on each of the three species, Marshall J preferred the evidence adduced by Senator Brown. He placed heavy reliance on the cumulative effects of the forestry operations, rather than the effects of operations in any one coupe at any one time. The court-appointed expert on the eagle gave evidence that he did not believe that any individual forestry operations would have a significant impact on the eagle, but

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[19] The full list of issues is given at [8] of Marshall J's judgment.

[20] *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729, [40]. He makes the same statement at [271] in considering whether the CAR Reserve System will protect the species in the future.

[21] *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729, [117]. Similar findings are seen at [132] and [161].

Marshall J nevertheless held that the total effect of the operations could have a significant impact, if the cumulative effects of all of the operations were seen as the relevant action. This was the approach taken in *Booth v Bosworth*,[22] where the cumulative effect on the particular matter of national environmental significance was held to constitute the relevant impact. In that case, Branson J of the Federal Court defined the relevant action not as the number of flying foxes killed by an electrical grid each night, but as the total number of flying foxes killed over the annual 6-8 week period over which the grids were in operation. She found that the killing of that many flying foxes would have a significant impact on the world heritage values of the Queensland Wet Tropics area.

Marshall J also rejected arguments by Forestry Tasmania, and the Commonwealth and State as interveners, that the applicant needed to precisely detail each individual act in the present and future forestry operations that constituted actions likely to have a significant impact on the species. Instead, Marshall J counted the whole of the forestry operations as the relevant action for the purposes of s 18, rather than breaking down the operations into a series of individual operations.[23] Although he did not refer to it in his judgment, Marshall J's conclusion on this point seems to be analogous to that reached in *Mees v Kemp*,[24] where although individual stages of building a highway could not in and of themselves be said to have a significant impact on certain threatened migratory species, Weinberg J classified the entire project of building a highway as the relevant action and concluded that the project in its entirety would likely have a significant impact on the species.

Marshall J held that Forestry Tasmania was not entitled to the exemption from Part 3 of the *EPBC Act* granted by s 38, because the forestry operations were not being and were not likely to be undertaken in accordance with the RFA. He found that undertaking forestry operations *in accordance with* the RFA meant complying with the obligations imposed by the RFA. At the time of trial, clause 68 required the State to '*protect* the Priority Species ... through the CAR Reserve System or by applying relevant management principles' (original emphasis). Marshall J held that for threatened species, this obligation imposed not only an obligation to assist a species to survive, but also to aid the recovery of the species to a level at which it would no longer be

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[22] *Booth v Bosworth* (2001) 114 FCR 39.

[23] *Forestry Tasmania v Brown* [2007] FCAFC 186, [63] and [65].

[24] *Mees v Kemp* [2004] FCA 366.

considered threatened.[25] He held that, on the evidence, this requirement was not fulfilled for any of the species. Thus, the forestry operations were not being carried out in accordance with clause 68, and therefore not in accordance with the RFA, so Forestry Tasmania was not entitled to the s 38 exemption.

The Appeal Judgment[26]

Sundberg, Finkelstein and Dowsett JJ unanimously upheld Forestry Tasmania's appeal against Marshall J's judgment and quashed the injunction. They found that Forestry Tasmania was entitled to the exemption from the provisions of the *EPBC Act*.

The turning point on appeal was the interpretation of clause 68 of the RFA (in its original form). Marshall J held at trial that this clause imposed an obligation on Forestry Tasmania and the State of Tasmania to *in fact* protect threatened species, which would be done by the implementation and management of the CAR Reserve System or by applying relevant management prescriptions. The Full Court found that clause 68 imposed no such obligation. They held at [59] that clause 68 imposed only an obligation to establish and maintain the CAR Reserve System or relevant management prescriptions, which in itself would constitute the protection of threatened species, and it was not to the point whether the System or prescriptions would in fact effectively protect the species.

Their Honours said that this interpretation was supported by the wording of the clause, in which the State promised to protect the species through the CAR Reserve System, and gave no promise to protect the species through any means necessary.[27] Moreover, the Explanatory Memorandum accompanying the Bill that became the *EPBC Act*, the Revised Explanatory Memorandum accompanying the Bill that became the *RFA Act* and the background to and development of the RFA emphasised that the regimes providing for the management of processes in forests and the protection of species therein would be those found in the RFA and not the *EPBC Act*.[28] The Full Court noted that the RFA was designed as a compromise between competing and contradictory industry and environmental concerns, and as such the RFA, in allowing forestry operations to continue subject to some limitations, gave 'no guarantee

[25] *Forestry Tasmania v Brown* [2007] FCAFC 186, [264].

[26] *Forestry v Brown* [2007] FCAFC 186.

[27] Ibid [60].

[28] Ibid [61]-[62].

that the environment, including the species, would not suffer as a result.'[29] The Full Court also took the fact that clause 68, nor any other clause in Part 2 of the RFA, is not legally enforceable as another point counting against reading clause 68 as providing an obligation that the CAR Reserve System would in fact protect the species.

The Full Court further held that the new clause 68, as amended by the State and Commonwealth Governments after the trial judgment of Marshall J, reinforced their conclusion. As noted above, clause 68 as amended now provides that the State and Commonwealth Governments agree that the CAR Reserve System and relevant management prescriptions do in fact adequately protect threatened species. The Full Court held that:

> The amendment to cl 68 of the RFA, insofar as it relates to CAR, simply puts in clearer language what we regard as the true meaning of the original clause. There are different ways in which this clarification could have been achieved. The way we have put it is to say that CAR affords protection to the Priority Species.[30]

For the reasons described above, the Full Court concluded that Forestry Tasmania's forestry operations in the Wielangta Forest had been and would continue to be undertaken in accordance with the RFA and therefore that Forestry Tasmania was entitled to the exemption to the provisions of Part 3 of the *EPBC Act* granted by s 38 of the *EPBC Act* and s 6(4) of the *RFA Act*. This conclusion alone was enough to overturn Marshall J's trial judgment, as even if the three species were present in the Wielangta Forest, and even if the forestry operations would likely have a significant impact on any or all of the species, Forestry Tasmania could still claim the exemption. As a result, the Full Court did not consider any of the other grounds considered and determined at trial.[31]

High Court special leave application[32]

By a 2:1 majority (Hayne and Crennan JJ in majority; Kirby J dissenting in part), Senator Brown's application for special leave to appeal the

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[29] Ibid [64].

[30] Ibid [92].

[31] Ibid [99] and [103].

[32] *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008). The transcript of the hearing for special leave can be found via a search of the database of High Court transcripts, found at http://www.hcourt.gov.au/publications.html; or can be accessed at http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2008/202.html?query=Brown%20v%20Forestry%20Tasmania (viewed 25 July 2008).

matter to the High Court was refused. In delivering the reasons and orders of the Court, Hayne J held that under the amended version of clause 68, Senator Brown's case for the injunction to be overturned did not enjoy sufficient prospects of success to warrant a grant of special leave. Hayne J did not expand on the exact reasons for this holding in delivering the Court's judgment, but it appears from the transcript that the majority accepted Forestry Tasmania's submission that while there may possibly have been grounds for appeal under the old clause 68, the amended version could not provide any basis for Senator Brown's submissions. In other words, because the new clause 68 expressly stated that the forest reserve and management systems did protect threatened species, there was no room left to argue that these systems did not provide adequate protection.

The Court unanimously held that, as the amended version of clause 68 superseded the original clause, the Full Court of the Federal Court acted within its power in considering the amended form of clause 68 on appeal, despite the fact that only the original form of clause 68 had had existed at trial. This being the case, it was unnecessary for the High Court to consider whether there might have been grounds of appeal available under the original clause 68.

Given that clause 68 of the Tasmanian RFA was amended between the first instance judgment being handed down and the appeal being heard, and because the matters being litigated were public interest matters, the High Court exercised its discretion to refuse to give an award of costs against Senator Brown for his unsuccessful application for special leave.

Significance of the case

The Wielangta Forest litigation has provided a major test of the relationship between the *EPBC Act* and the Tasmanian Regional Forest Agreement, and the extent to which both these instruments can and do in fact provide protection of endangered species in Tasmanian forests. The conclusion reached is that the legislation affords scant protection to threatened species in Tasmania's forests. According to the Full Court, the RFA imposes an obligation to protect threatened species, but this obligation is, on the face of it, not legally enforceable; and in any case, this obligation imposes no more on Forestry Tasmania and the State Government than to provide a system designed to protect threatened species, regardless of whether the system is actually effective.

This interpretation is remarkable. Read literally, the original clause 68 obliged Forestry Tasmania and the State to protect threatened species through the CAR Reserve System. Surely if the CAR Reserve System was not effective, Forestry Tasmania and the State would not be protecting the species.

The High Court has in recent years emphasised that legislation is to be interpreted adopting a purposive approach; that is, legislative provisions should, as far as the text allows, be interpreted in such a way so as to further the purpose of the instrument in which it is found. In 1982, section 15AA was added to the *Acts Interpretation Act 1902* (Cth), providing:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.[33]

An approach to statutory interpretation reflecting s 15AA was seen in the frequently cited High Court decision of *Project Blue Sky v Australian Broadcasting Authority*, in which the joint judgment of McHugh, Gummow, Kirby and Hayne JJ stated that: '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute'.[34]

Previously, courts bound themselves to accepting a literal interpretation of a provision, regardless of whether the resulting conclusion was consistent with the overall purpose of the legislation. Today, it may be that the purpose of the legislation may be considered from the outset in the interpretation of a particular provision. In *CIC Insurance Ltd v Bankstown Football Club Ltd*, the High Court stated that:[35]

> ... [T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the

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[33] Similar provisions were subsequently added to similar State and Territory legislation: *Interpretation Act* 1987 (NSW) s 33; *Interpretation of Legislation Act* 1984 (Vic) s 35(a); *Acts Interpretation Act* 1954 (Qld) s 14A; *Acts Interpretation Act* 1915 (SA) s 22; *Interpretation Act* 1984 (WA) s 18; *Acts Interpretation Act* 1931 (Tas) s 8A; *Legislation Act* 2001 (ACT) s 139; *Interpretation Act* (NT) s 62A.

[34] 153 ALR 490, [69] (McHugh, Gummow, Kirby and Hayne JJ).

[35] (1997) 141 ALR 618, 634-5 (Brennan CJ, Dawson, Toohey and Gummow JJ).

> mischief which, by legitimate means ... one may discern the statute was intended to remedy.

The High Court has not yet had an opportunity to consider the *EPBC Act*, but there is precedent for the purposive approach being applied to environmental legislation. In *Weston Aluminium Pty Ltd v Environment Protection Authority*, the High Court rejected an interpretation of the *Protection of the Environment Operations Act* 1997 (NSW) that would have been "entirely subversive of the legislative policy underlying the scheme", and instead held that the primary purpose of the legislation was to provide environmental protection. [36]

Marshall J found that clause 68 imposed an obligation to not only assist a species to survive, but to restore the species population to a level at which it would no longer be considered threatened. Whether such a substantial burden is justified on an ordinary reading of the legislation, let alone whether the Commonwealth and State Governments intended such an onerous obligation in establishing the RFA, is questionable. In this regard, the Full Court rhetorically asked the question: '[w]hy ... would the State give a warranty that it could see was unsustainable?'.[37] However, even if Marshall J's construction of the obligation went too far, surely the construction placed upon it by the Full Court goes too far towards the opposite extreme. The judges unanimously agreed that simply establishing the CAR Reserve System was sufficient to fulfil any obligation to protect threatened species, and that whether the System was in fact effective in protecting the species was irrelevant. Such a construction effectively allows the RFA to fully exempt States and statutory bodies carrying on forestry operations from prohibitions on taking actions that are likely to have significant impacts on threatened species, which seems to run completely against the objectives of the *EPBC Act*, Australia's principal environmental protection legislation. The objectives of the *EPBC Act*, as listed in section 3, include:

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[36] (2007) 239 ALR 641, [35] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). In that case, the issue was whether the Act in question required development consent for variations of existing development licenses, as well as for new licenses. The High Court held that a conclusion that development consent was required for new licenses but not for variations of existing licenses would run completely contrary to the purpose of the legislative scheme.

[37] Ibid [64]; This statement was cited with approval by Kirby J in *Australian Finance Direct Ltd v Director of Consumer Affairs*, [39] and [40]; footnote 38 of that judgment gives numerous examples of judgments taking this approach.

> (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance;[38]
>
> ...
>
> (c) to promote the conservation of biodiversity;
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> ...
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> Per section 3(2)(e), achieving the objective of promoting the conservation of biodiversity involves including provisions to:
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> (i) protect native species (*and in particular prevent the extinction, and promote the recovery of, threatened species*) ...
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> ...
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> (Emphasis added)

As noted above, the major purposes of the Tasmanian RFA include ensuring certainty for forestry industries while providing effective protection for the environment.[39]

While it is acknowledged that it is difficult to strike a balance between satisfying environmental obligations and industry interests, it would seem that the construction placed on clause 68 and the RFA in general by the Full Court, while possibly acceptable on a literal reading of the provisions, fails to take into account the purposes of the *EPBC Act* by failing to ensure with any certainty any protection whatsoever for threatened species in Tasmanian forests. This was the view taken by Marshall J at trial, who said that construing clause 68 as requiring no more than the implementation of a System designed to protect threatened species, despite the fact that the System itself could not provide adequate protection, would be to reduce clause 68 to an 'empty promise'.[40] It is difficult to dispute this conclusion.

It could be argued that the State of Tasmania and Forestry Tasmania are under an obligation to ensure the protection of threatened species, despite the literal reading of clause and the Full Court's interpretation of it, because of the Commonwealth Government's ability to terminate the RFA should Tasmania fundamentally fail to meet its obligations under the RFA. However, it must be remembered that this can only happen after the compulsory dispute resolution procedures have been carried

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[38] Protection of threatened species is a matter of national environmental significance, as per the prohibition on actions likely to have a significant impact on threatened species in s 19 in Part 3.

[39] *Regional Forest Agreement*, Recital A.

[40] *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729, [241].

through, and after 90 days notice is given to the Tasmanian Government.[41] More fundamentally, the unrealistic possibility of a Federal Government terminating a Regional Forest Agreement counters any argument that these provisions provide any adequate protection of threatened species.

The Wielangta Forest case was given attention in two separate inquiries into the EPBC Act completed in 2009: the Senate Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999*[42] and the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* undertaken by Dr Allan Hawke.[43] While a comprehensive examination of these two inquiries is beyond the scope of this paper, a few comments are made here. Both inquiries concluded that the law as it currently stands cannot guarantee adequate protection for threatened species from forestry activities. The inquiries noted that a forestry body and State Government are able to meet their legal obligations by establishing a CAR Reserve System, regardless of whether that System actually protects threatened species adequately.[44] Both inquiries found that improvements to the RFA system were needed to ensure that forests are used sustainably and threatened species are effectively protected. The Independent Review in particular suggested that more transparent and accountable forest management systems could be achieved by the Commonwealth playing a greater oversight and enforcement role to ensure that CAR Reserve Systems are effective and by regular reviews of RFAs being undertaken.[45]

Somewhat ironically, while the ultimate outcome of the litigation seems to have resulted in there being scant protection for endangered species in Tasmanian forests, the litigation may have aided in the expansion of the general interpretation of the prohibitions in Part 3 of the *EPBC Act*. Marshall J's findings that it is the whole of the forestry operations that constituted the relevant action, and that cumulative impacts should be included within the meaning of 'significant impact' in Part 3 were not overturned either on appeal to the Full Court or in the special leave hearing. This therefore may add to the existing judicial authority

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[41] *Regional Forest Agreement*, clause 102.

[42] The internet homepage for the relevant Senate Inquiry can be accessed at: http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/index.htm (viewed 14 October 2009)

[43] Accessible at http://www.environment.gov.au/epbc/review/index.html (viewed 14 October 2009)

[44] Senate Inquiry, above n 42, [1.81]; Independent Review, ibid [6.49]-[6.50] and [6.69].

[45] Independent Review, above n 43, [6.114]-[6.118].

broadening the interpretation of Part 3, as in *Mees v Kemp* and *Booth v Bosworth*.[46]

Conclusion

It appears that in cases of conflict between environmental and forestry industry interests in Tasmania, industry wins out. The decision of the Full Court of the Federal Court means that Forestry Tasmania and the Tasmanian Government have fulfilled their obligation to protect threatened species merely by establishing a System designed to protect threatened species that was found at trial to be incapable of providing adequate protection. If any good for environmental protection is to emerge from this saga, increased scrutiny will be given to ensuring that the CAR Reserve System does indeed provide the protection that the RFA says it does. This is the only protection for threatened species that can be expected.

Should the populations of the broad-toothed stag beetle, the wedge-tailed eagle and the swift parrot in the Wielangta Forest deteriorate further, serious questions will need to be asked of the Regional Forest Agreement (and its development) that allows the viability of three threatened species to potentially rest upon Forestry Tasmania and the Tasmanian State Government's willingness to fulfil a practically unenforceable, possibly non-existent and ultimately empty promise.

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[46] These arguments were discussed in more depth above. The interpretation of Part 3 had been previously expanded to include indirect impacts within the meaning of "impact" in *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 ("the Nathan Dam Case").