

## THE COURT FINDS LOGGING OF THREATENED SPECIES HABITAT UNLAWFUL

A legal summary of *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729 (19 December 2006) by Vanessa Bleyer.<sup>1</sup>

### 1. What the Court was to determine

Section 475 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“**the EPBC Act**”) enables an interested person, among others, to apply for an injunction if another person “has engaged, engages or proposes to engage in conduct... that constitutes an offence or other contravention” of the EPBC Act. Senator Bob Brown relied on this provision to bring an unprecedented application in the Federal Court of Australia against Forestry Tasmania on 30 May 2005. The application was heard by His Honour Justice Marshall who handed down his reasons for judgement on 19 December 2006.<sup>2</sup>

Senator Brown’s application was based on his claim that Forestry Tasmania contravened Section 18(3) of the EPBC Act and so should be restrained from undertaking any forestry operations or connected activities in the Wielangta forest, which is State forest in south-east Tasmania.<sup>3</sup> Section 18(3) provides that a person must not take an “action” that:

- “(a) *has or will have a significant impact on a listed threatened species included in the endangered category; or*
- “(b) *is likely to have a significant impact on a listed threatened species included in the endangered category.*”

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<sup>2</sup> The reasons for judgement can be found at [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2006/1729.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1729.html).

<sup>3</sup> His Honour Justice Marshall explains that the Wielangta forest “*has a diverse mix of forests. There are patches of rainforest and much wet forest where blue gum and swamp gum trees flourish. It also has dry forest where peppermint, stringybark, black gum and white gum trees are found. Much of the area is ‘old growth forest’, containing trees of at least 110 years of age*” (at 18).

The Wielangta forest is home to listed threatened species including the Tasmanian wedge-tailed eagle, the broad-toothed stag beetle and the swift parrot.<sup>4</sup> The alleged “action” undertaken and to be further undertaken in the Wielangta forest is logging and its associated activities.<sup>5</sup> Forestry Tasmania has the exclusive management and control of all State forest in Tasmania and so is responsible for logging on its land.<sup>6</sup> The EPBC Act refers to logging and its associated activities as “forestry operations”.<sup>7</sup>

In addition to the injunction, Senator Brown sought declarations as follows:

1. that the Tasmanian Regional Forest Agreement 1997 (“**the RFA**”) is not a regional forest agreement within the meaning of the EPBC Act and the *Regional Forest Agreements Act 2002* (Cth) (“**the RFA Act**”);
2. that Forestry Tasmania’s forestry operations in the Wielangta forest are likely to have a significant impact on the broad-toothed stag beetle (“**the beetle**”), the wedge-tailed eagle (“**the eagle**”) and the swift parrot (“**the parrot**”);
3. that Forestry Tasmania’ forestry operations in the Wielangta forest have not been undertaken in accordance with the RFA; and
4. that Forestry Tasmania’s operations in the Wielangta forest will not, under the present forest practices system in Tasmania, be undertaken in accordance with the RFA.

The State of Tasmania and the Commonwealth of Australia were granted leave to intervene in the proceeding on the basis that they are parties to the RFA. The interventions were limited to a list of issues agreed by the parties on 15 September 2005 (“**the Issues**”), as follows:

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<sup>4</sup> His Honour notes that “*the Tasmanian subspecies* [of the wedge-tailed eagle] *is Australia’s largest bird of prey*” (at 10), a witness in the proceeding accepted that “*if the world did not have beetles it would be a ‘very different place’*” (at 14) and that the Swift Parrot “*only breeds in Tasmania*” (at 15).

<sup>5</sup> His Honour said “[L]ogging has occurred in the Wielangta area in varied forms (including clearfelling) until very recently and, but for this proceeding, further logging would have occurred” (at 21).

<sup>6</sup> The *Forestry Act 1920* (Tas) creates Forestry Tasmania and sets out its various functions (see Section 8(1)(c), which is also set out at paragraph 27 of His Honour’s reasons; see also paragraph 102). See also *Coote v Forestry Tasmania* (2006) 227 ALR 481 at 487 per Gummow J.

<sup>7</sup> Section 40(2) of the EPBC Act defines “forestry operations” as including the harvesting of “live or dead trees, ferns or shrubs, or part thereof” and “regeneration (including burning)”.

1. the likely extent of forestry operations in the Wielangta area beyond August 2008 (“**issue 1**”);
2. whether forestry operations in WT017E (“**17E**”) and WT019D<sup>8</sup> (“**19D**”) and proposed forestry operations in coupes other than 17E and 19D are “actions” for the purposes of the EPBC Act (“**issue 2**”);
3. the extent to which the beetle is present or likely to be present in the Wielangta forest area (“**issue 3**”);
4. the extent to which the eagle has nest sites in or adjacent to coupes within the Wielangta forest (“**issue 4**”);
5. the extent to which the parrot is present or likely to be present in the Wielangta forest area (“**issue 5**”);
6. what part of the Wielangta forest will be, or is likely to be, subject to forestry operations by the respondent in the next approximately 15 years (“**issue 6**”);
7. whether the forestry operations referred to in issue 2 are likely, having regard to the endangered status of the three species and all other threats to the three species, to have a significant impact on the three species (“**issue 7**”);
8. whether the RFA is an RFA within the terms of the RFA Act (“**issue 8**”);
9.
  - (a) whether Forestry Tasmania has an exemption from Part 9 of the EPBC Act by virtue of section 38 of the EPBC Act and section 6(4) of the RFA Act (“**issue 9(a)**”); and
  - (b) whether forestry operations in the Wielangta forest area will be or have been carried out in accordance with the RFA by reference to clause 68 (“**issue 9(b)**”).

The proceeding resulted in a 33-day hearing over about 21 months (from 30 May 2005 to 20 December 2006 on which date the orders were made).

## **2. Logging has occurred but will there be further logging in Wielangta?**

The Court proceeded to determine the case by working through the Issues. Addressing issue 1, Forestry Tasmania argued that it “is a matter of speculation” whether there will

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<sup>8</sup> His Honour explains that “Forestry Tasmania plans its harvesting operations by dividing State forest into coupes. These coupes are given designations, such as WT017E and WT019D...” (at 28).

be further “forestry operations” at Wielangta after August 2008 (at 28 and 39). In Tasmania, logging is determined through the listing of “provisional coupes”<sup>9</sup> intended for harvesting during the following 3 years in documents titled “Three Year Wood Production Plans”. Although the “Three Year Wood Production Plan” relating to Wielangta had not been completed for 2005/2006 at the time that Mr Thomas Kelley (a resource analyst employed by Forestry Tasmania) gave evidence, Forestry Tasmania conceded that there are areas in Wielangta potentially available for logging as there are unharvested areas referred to in Forestry Tasmania mapping as “provisional coupes” (at 32 to 35).

Senator Brown pointed to 17 coupes in Wielangta provisionally scheduled for harvesting from now to 2013 and relied on, among other things, the history of logging in Wielangta to show that “provisional coupes” will be logged (at 36 to 37).

His Honour found that “there is no reason to suggest... that Forestry Tasmania no longer desires that it be a source of wood products” (at 38) and that “[T]he best guide to future conduct is past conduct” which “makes it reasonable to predict that... forestry operations will occur in the Wielangta area beyond August 2008” (at 40), in answer to issue 1.

Issue 6 seeks an answer also relating to the future of logging in the Wielangta forest but in the “next approximately 15 years”. In answer to issue 6, His Honour refers to and repeats the Court’s findings in respect of issue 1. His Honour lists identifiers representing the “provisional coupes” and confirms them as being likely to be logged (at 83).

### **3. Is logging an “action” under the EPBC Act?**

Addressing Issue 2, His Honour found that “there is no doubt” that a “forestry operation” is an “action” as defined under Section 523 of the EPBC Act (at 46). Section 524 of the EPBC Act, however, defines things that are *not* actions. This includes a decision by the government to grant a “governmental authorisation (however described) for another person to take an action”.<sup>10</sup> Forestry Tasmania argued that it has granted a “governmental authorisation” to Gunns Limited to conduct the “forestry operations” and

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<sup>9</sup> Where land is divided up for logging.

<sup>10</sup> Section 524(2), EPBC Act.

on this basis alone Senator Brown's application must fail (at 50). It is noteworthy that the Commonwealth as intervener did not support Forestry Tasmania's position on this point (at 55).

Senator Brown argued that he is not concerned with the process by which Forestry Tasmania authorises logging to occur, but with the physical activity itself. Logging is an action under the EPBC Act and is not a "governmental authorisation". His Honour ruled in favour of Senator Brown. The leading case of *Save the Ridge Inc v Commonwealth & Anor*<sup>11</sup> (which found that there was no action as there was a "governmental authorisation") was distinguished as "the attack in that case was on the steps taken to amend a plan which would authorise the construction of a freeway extension", not on the freeway extension itself (at 53). Additionally, His Honour again referred to Section 8(1)(c)(i) of the Forestry Act, which vests exclusive management and control of State forest in Forestry Tasmania, not Gunns Limited (at 54).

#### **4. The impact of this case in other coupes**

Issue 2 not only requires His Honour to determine whether 17E and 19D are actions, but whether other scheduled coupes at Wielangta are actions as well. Forestry Tasmania argued that Senator Brown did not put any evidence before His Honour concerning forestry operations in other coupes at Wielangta and so His Honour should not make any findings relating to any coupes other than 17E and 19D (at 58). The Commonwealth and State of Tasmania took similar views to Forestry Tasmania (at 60).

Senator Brown referred to the impact of logging and activities associated with logging on the threatened species the subject of this case and argued that Forestry Tasmania has misunderstood his case (at 59). His Honour agreed with the applicant and ruled that "it is artificial to seek to break down the forestry operations of Forestry Tasmania in Wielangta into a series of individual actions and thereby avoid scrutiny under the EPBC Act" (at 63). His Honour referred to all the coupes scheduled for logging up to 2013 and found that the activities in total comprise a "project"<sup>12</sup> and/or an "undertaking"<sup>13</sup> and/or an

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<sup>11</sup> (2005) 147 FCR 97.

<sup>12</sup> Section 523(1)(a) of the EPBC Act.

<sup>13</sup> Section 523(1)(c) of the EPBC Act.

activity or series of activities<sup>14</sup> (at 65), and found that proposed forestry operations in coupes other than 17E and 19D constitute an “action” under the EPBC Act (at 66).

## **5. Presence of the species at Wielangta**

Not only are the eagle, beetle and parrot listed as threatened under the EPBC Act, they are also listed as endangered species under the *Threatened Species Protection Act 1995* (Tas) (at 43).

His Honour relied on the evidence of Dr Peter McQuillan, called by the applicant, and ruled that the beetle is present in the Wielangta forest area, resulting in a positive finding to issue 3 (at 69 and 72). Similarly, in answer to issue 4, His Honour found that there are 6 eagle nest sites in the Wielangta forest area and that it is possible that there are also undiscovered nests (at 76). Forestry Tasmania had conceded that there were nest sites and that it was possible that there were other nest sites (at 74), however it had (unsuccessfully) sought to dispute the presence of the beetle (at 69). Again, His Honour found that the parrot is likely to be present in the Wielangta Forest area (at 81), which answered issue 5. This finding was based on expert evidence called by Senator Brown. One of those experts, Mr Simon Kennedy, observed 2 swift parrots in 19D. Another of those experts, Mr Peter Brown, told His Honour that “Wielangta contains some of the finest swift parrot breeding habitat that he has seen” (at 80).

## **6. Does logging have a significant impact on threatened species?**

When considering issue 7, His Honour found that “impact” means “the influence or effect of an action”<sup>15</sup> rather than adopting the definition relied on by the Court’s appointed expert, Mr Nicholas Mooney, who said it embraced affects “significantly close to allow it to be said that they are the consequences of forestry operations” (at 93). His Honour said that “loss of habitat caused by forestry operations, while small when compared to other causes, has a significant impact on threatened species where ‘to protect’ is seen

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<sup>14</sup> Section 523(1)(d) of the EPBC Act.

<sup>15</sup> This is consistent with the position formed by the Full Court in *Minister for Environment and Heritage v Queensland Conservation Council Inc and Anor* (“*Queensland Conservation Council*”) (2004) 139 FCR 24.

as a duty not just to maintain population levels of threatened species but to restore the species” (at 94).

Mr Mooney gave evidence that it is likely that logging in 17E caused eagles to “abandon two inactive nests and build another nest in a less disturbed territory” (at 88) and that proposed further logging in 17E and proposed logging in 19D might disturb four of the known nests (at 90). In agreement with the applicant, His Honour found that “the present and likely future forestry operations of Forestry Tasmania in Wielangta will, in the context of the EPBC Act, have a significant impact on the eagle, notwithstanding the presence of other impacts which may be even more significant” (at 102) such as natural threats like starvation and wildfires and unnatural threats like electrocution and collision with human items (at 85).

There was extensive challenge to the applicant’s submissions on significant impact in respect of the beetle, including by Mr Meggs who is a consultant Biologist and a former employee of Forestry Tasmania. His Honour found that “under cross-examination, Mr Meggs was frequently evasive and appeared to... be much more of an advocate for the cause of Forestry Tasmania than an independent expert”. His Honour accepted the applicant’s submission that “Mr Meggs was a ‘partisan polemic’ and a ‘so-called independent expert’” (at 117).<sup>16</sup> His Honour also found that Mr Meggs gave false evidence and changed matters of substance arising from peer reviews of his draft affidavit to remove matters helpful to the Senator Brown and unhelpful to Forestry Tasmania (at 120).

His Honour summarised the applicant’s submissions on the beetle saying that:

*“as with the eagle, the impact of Forestry Tasmania’s forestry operations on the beetle is cumulative; as each coupe is harvested it is unlikely to provide suitable habitat thereafter. Loss of habitat is crucial to a species with very low population levels and densities and poor dispersal”* (at 111).

In agreement with the applicant, His Honour found that logging in 17E and 19D and logging elsewhere in Wielangta has and will have a significant impact on the beetle (at 137).

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<sup>16</sup> See *Universal Music Australia Pty Ltd v Sharman License Holdings* (2005) 220 ALR 1 at [26] per Wilcox J.

His Honour made the same finding in respect of the parrot and said that the significant impact is the reduction of part of its prime nesting habitat (being habitat used by it when suitable foraging conditions exist) by logging (at 162). Issue 7 was answered in the affirmative.

## **7. Is the Regional Forest Agreement a Regional Forest Agreement?**

The only issue Senator Brown was not entirely successful on was issue 8. This did not undermine any other aspect of his application but rather enabled the Court to find that “forestry operations” must be “in accordance with” an RFA. Senator Brown argued that the RFA is not an RFA within the meaning of the RFA Act because it does not meet the preconditions set out in subparagraphs (b) and (c) of the definition of “Regional Forest Agreement” in Section 4 of the RFA Act (at 192).

Section 4 provides that an RFA is an agreement that is “in force” between the Commonwealth and a State in respect of a region or regions and which satisfies the conditions referred to in the section including, in so far as is material, that:

*“(b) the agreement provides for a comprehensive, adequate and representative [(“CAR”)] reserve system; and*

*(c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions...” (at 163).*

The applicant argued that the phrase “provides for” should be found to mean “requires or establishes” rather than just “planning towards” (at 192). The Commonwealth and Forestry Tasmania contended that the phrase “provides for” means the making of arrangements and not the actual provision of something (at 196),<sup>17</sup> which His Honour agreed with (at 198). His Honour also found that the provision for a CAR reserve system does not mean that legally enforceable rights to the creation of such system must be available (at 201) and that the RFA meets the definition of subparagraph (c) (at 204). Accordingly, His Honour found that the RFA is an RFA within the terms of the RFA Act (at 205).

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<sup>17</sup> See *Stocks and Parkes Investments Pty Ltd v The Minister* [1971] 1 NSWLR 932 at 940.

**8. Is Forestry Tasmania exempt from getting federal government approval for an “action”?**

Given Senator Brown’s failure to convince the Court that an RFA is not an RFA, he needed to succeed with his contentions in respect of issue 9. Part 9 of the EPBC Act gives the Minister the power to approve certain “actions” in accordance with the process set out in that Part. Part 3 of the EPBC Act (in which Section 18(3) is found) sets out the requirements for environmental approvals for “actions”. Part 4 of the EPBC Act includes Section 38 which provides that:

*“(1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.”* Section 6(4) of the RFA Act mirrors Section 38 of the EPBC Act.

His Honour noted that the issue might have been “better expressed by referring to an exemption from Part 4 as well as, or in lieu of, the reference to Part 9” (at 206).

The applicant submitted that Section 38 of the EPBC Act and Section 6(4) of the RFA do not apply to Forestry Tasmania in Wielangta, because the forestry operations have not been undertaken “in accordance with” an RFA (at 212) as Forestry Tasmania has breached clauses 68<sup>18</sup>, 70<sup>19</sup> and 96<sup>20</sup> of the RFA (at 218 to 223).

Forestry Tasmania and the State of Tasmania argued that the State’s compliance with Clause 68 is a non-justiciable issue (at 224).<sup>21</sup> The Court rejected that contention (at 239). In the alternative, Forestry Tasmania submitted that the forestry operations are “in accordance with” the RFA (at 225).

His Honour ruled that the forestry operations needed to be “in accordance with” the RFA for the Section 38 exemption to apply (at 238) and that the logging had not been and would not be conducted in accordance with the RFA. This was because it had not been

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<sup>18</sup> Clause 68 provides that “The State agrees to protect the Priority Species... through the CAR Reserve System or by applying relevant management prescriptions”.

<sup>19</sup> Clause 70 requires ‘management prescriptions’ identified in recovery plans to be implemented as a matter of priority (at 250).

<sup>20</sup> Clause 96 requires new or altered management prescriptions developed over the term of the RFA to be adequate to maintain the species, be soundly based scientifically, be endorsed by the Tasmanian Threatened Species Scientific Advisory Committee (where relevant) and to take note of public comment (at 250).

<sup>21</sup> See *South Australia v The Commonwealth* (1961-62) 108 CLR 130.

and could not be carried out in accordance with Clause 68 as, among other things, the State has failed to protect the beetle (at 262 and 273), the parrot (at 267 and 275) and the eagle (at 270 and 281) through the CAR reserve system and by unsatisfactory management prescriptions and will not do so in the future based on previous behaviour (at 271 and 282 which is similar to the reasons given at 38 to 40). The Court also found that Clause 70 was breached because there has never been a recovery plan for the beetle and the plans for the eagle and the parrot had expired which, in any event, had never been fully implemented (at 284).

Consequently, the Court found that Section 38 of the EPBC Act does not exempt the subject “forestry operations” from Part 3 of the EPBC Act and the same applies with Section 6(4) of the RFA Act (at 293). His Honour found that the exemption only exists if the logging is undertaken in accordance with an RFA (at 213). This was the first time a Court had been asked to make this determination.

## **9. The Orders**

On 20 December 2006, the Court declared that:

1. The respondent’s forestry operations in coupes 17E and 19D and the likely future forestry operations within the coupes identified at paragraph 83 of the reasons for judgement in this proceeding dated 19 December 2006 (collectively “the Forest Operations”) in the State Forest within the Wielangta Forest Block (“the Wielangta Forest”) [as identified in a map attached to the orders which displays the 17 coupes referred to at 83]... are likely to have a significant impact on the Broad Toothed Stag Beetle.
2. The Forestry Operations in the Wielangta Forest are likely to have a significant impact on the Tasmanian Wedge-Tailed Eagle.
3. The Forestry Operations in the Wielangta Forest are likely to have a significant impact on the Swift Parrot.
4. The Forestry Operations in the Wielangta Forest have not been undertaken in accordance with the Tasmanian Regional Forest Agreement.

On the same day, the Court ordered that:

5. Pending the granting of any approval under Part 3 of the EPBC Act or further order, the respondent is restrained, whether by its servants, agents or howsoever

from undertaking in the Wielangta Forest any forestry operations as defined in Section 40(2) of the EPBC Act.

6. The respondent shall pay the applicant's costs of and incidental to the proceeding including all costs reserved by prior orders.
7. Pursuant to order 52 rule 15(1)(b) the time within which an appeal may be filed and served from the judgement of the court in this proceeding published 19 December 2006 and the orders made on 20 December 2006 be extended to expire at 4.00 p.m. on 9 February 2007.

#### **10. Conclusion: what will be the effect of this decision?**

The decision in this case has the effect of requiring logging to be in accordance with Regional Forest Agreements which are in place across Australia, otherwise the logging is unlawful. The RFA in this case requires Forestry Tasmania to actively protect and take steps to promote the recovery of the relevant threatened species during logging. The premise that logging can be conducted in threatened species habitat to promote its recovery is fundamentally flawed based on, among other things, the vast majority of expert evidence before the Court in this case – logging destroys the species' habitat and causes extinction.

Since the decision, Forestry Tasmania has indicated that amendments to the relevant legislation are being considered to defeat the decision in this case and to enable logging of endangered and threatened species habitat to continue without approval under the EPBC Act.<sup>22</sup> Forestry Tasmania and the federal government have conceded that this decision renders a lot of current logging unlawful.<sup>23</sup> Nevertheless, the logging of endangered and threatened species habitat continues.

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<sup>22</sup> The Weekend Australian, Edition 1, Saturday 6 January 2007, Page 10 , "Law to block ruling protecting species", By Matthew Denholm.

<sup>23</sup> The Weekend Australian, Edition 1, Saturday 13 January 2007, Page 9, "Logging may be illegal but trees still fall", By Matthew Denholm.