FEDERAL COURT OF AUSTRALIA

Friends of Leadbeater’s Possum Inc v VicForests [2018] FCA 178

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| File number: | VID 1228 of 2017 |
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| Judge: | **MORTIMER J** |
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| Date of judgment: | 2 March 2018 |
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| Catchwords: | **ENVIRONMENT LAW** – statutory interpretation of regulatory scheme established under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and related legislation –non-compliance with a certain clause of a regional forest agreement – whether exemption in s 38(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) engaged – nature of the compliance with regional forest agreement required to engage exemption – applicant’s construction rejected |
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| Legislation: | *Acts Interpretation Act 1901* (Cth), s 15AB  *Australia Heritage Commissions Act 1975* (Cth)  *Endangered Species Protection Act 1992* (Cth), s 4  *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 3, 18, 19, 25, 29, 32, 33, 34, 34A, 34D, 37, 37B, 37G, 37M, 38, 39, 40, 41, 42, 43, 46, 39, 53, 70, 73, 74, 74A, 74AA, 139, 176, 178, 179, 184, 188, 189, 194, 196, 197, 304, 305, 475, 487, 502, 517A, 523, 524, 525  *Environmental Protection (Impact of Proposals) Act 1974* (Cth)  *Environmental Reform (Consequential Provisions) Act 1999* (Cth)  *Evidence Act* *1995* (Cth), s 191  *Export Control Act 1982* (Cth)  *Fair Work Act 2009* (Cth), ss 501, 502  *Federal Court Rules 2011* (Cth), rr 9.12, 30.01  *Great Barrier Reef Marine Park Act 1975* (Cth)  *Regional Forest Agreements Act 1999* (Cth), ss 3, 4, 6, 7, 10, Schedule 1  *Regional Forest Agreements Bill 2002* (Cth), cl 6  *Regional Forest Agreements Bill 1998* (Cth), cl 3  *Industrial Relations Regulations 1989* (Cth), reg 98  *Associations Incorporation Reform Act 2012* (Vic)  *Conservation, Forests and Lands Act 1987* (Vic)  *Flora and Fauna Guarantee Act 1988* (Vic)  *Forests Act 1958* (Vic)  *State Owned Enterprises Act* *1992* (Vic), s 14 |
|  |  |
| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; 239 CLR 27  *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89; 268 IR 113  *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; 177 CLR 485  *Bass v Permanent Trustee* [1999] HCA 9; 198 CLR 334  *Carr v Western Australia* [2007] HCA 47; 232 CLR 138  *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; 248 CLR 378  *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503  *Commonwealth v Baume* [1905] HCA 11; 2 CLR 405  *Connect East Management v Federal Commissioner of Taxation* [2009] FCAFC 22; 175 FCR 110  *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; 147 CLR 297  *Esso Australia Pty Ltd v The Australian Workers’ Union* [2017] HCA 54; 92 ALJR 106  *Esso Australia Resources Ltd v Federal Commissioner for Taxation* [1998] FCA 1655; 83 FCR 511  *Ex parte Hestelow; Re Claye* (1967) 87 WN (Pt 1) (NSW) 184  *Farah Constructions Pty Ltd and others v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89  *Forestry Tasmania v* *Brown* [2007] FCAFC 186; 167 FCR 34  *Lacey v Attorney-General of Queensland* [2011] HCA 10; 242 CLR 573  *MyEnvironment* *Inc v VicForests* [2013] VSCA 356; 42 VR 456  *Ramsay v Sunbuild Pty Ltd* [2014] FCA 54; 221 FCR 315  *Re LA* (1993) 41 FCR 151  *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252  *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* [2016] FCAFC 129; 244 FCR 21  *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 347 ALR 405  *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* [2016] FCA 168; 337 ALR 96  *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9; 253 CLR 531  *Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664  *Walker v Wilson* [1991] HCA 8; 172 CLR 195  *Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources* (2007) FCAFC 175; 166 FCR 154 |
|  |  |
| Date of hearing: | 14 - 15 December 2017 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| **Table of Corrections** |  |
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| 20 April 2018 | In the first sentence of paragraph 1, the words “north west” have been replaced with “east”. |
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| 20 April 2018 | In paragraph 27, the word “auditory” has been replaced with the word “hortatory”. |
|  |  |
| 20 April 2018 | In paragraphs 164 and 165, the spelling of the word “phytophthora” has been corrected. |

ORDERS

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|  | | VID 1228 of 2017 |
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| BETWEEN: | FRIENDS OF LEADBEATER'S POSSUM INC  Applicant | |
| AND: | VICFORESTS  Respondent | |
|  | COMMONWEALTH OF AUSTRALIA  First Intervener  STATE OF VICTORIA  Second Intervener | |

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| JUDGE: | MORTIMER J |
| DATE OF ORDER: | 2 MARCH 2018 |

THE COURT ORDERS THAT:

1. On or before 16 March 2018, the parties and interveners are to file an agreed proposed form of answer to the separate question, taking into account the Court’s reasons for judgment, together with any further or other orders the parties and interveners submit the Court should make, including as to costs.
2. In the absence of any agreement pursuant to paragraph 1 of these Orders, on or before 30 March 2018, the parties and interveners are to file submissions, each limited to five pages, concerning their respective proposed form of answer to the separate question, taking into account the Court’s reasons for judgment, together with submissions on any further or other orders the parties and interveners submit the Court should make, including as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

MORTIMER J:

# Introduction and summary

1. This proceeding concerns forestry operations in the Central Highlands State Forest, in the east of Victoria. The respondent, VicForests, carries out forestry operations (as they are described in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)) in that forest. VicForests is an entity established under s 14 of the *State Owned Enterprises Act* *1992* (Vic). The applicant contends that forestry operations which have been carried out, and which VicForests proposes to carry out in the foreseeable future, in a number of specifically identified coupes in the Central Highlands State Forest have had, will have, or are likely to have, a significant impact on two threatened species: namely, the Leadbeater's Possum (*Gymnobelideus leadbeateri*) and the Greater Glider (*Petauroides Volans*). Each of these species is listed as a threatened species pursuant to s 178 of the EPBC Act. The applicant seeks orders restraining VicForests from undertaking any further forestry operations in the identified coupes, as well as mitigation orders pursuant to s 475(3) of the EPBC Act, in relation to past forestry operations.
2. The applicant is an entity incorporated under the *Associations Incorporation Reform Act 2012* (Vic). Its name is indicative of its concerns. There was no submission from the respondent or the interveners that the applicant does not meet the standing requirements in s 487 of the EPBC Act. I accept the applicant has standing to seek the relief it does.
3. When this proceeding was filed, the applicant also sought interlocutory relief restraining the respondent from conducting forestry operations in two coupes (identified as coupes 298-502-0003 and 462-504-0009) pending the hearing and determination of the substantive application. That interlocutory relief was sought because the applicant apprehended forestry operations in those two couples were imminent. The applicant and the respondent ultimately agreed to propose a course to the Court involving the stating of a separate question. On the Court agreeing to that course, VicForests gave the following undertakings:

The respondent by its counsel undertakes that it will not, whether by itself, its servants, agents, contractors or howsoever otherwise, conduct timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* (Vic), save for the removal of any harvested timber from the Coupe landings, within the Scheduled Coupes pending the hearing and determination of the separate question.

1. The “Scheduled Coupes” which were the subject of the undertaking were defined as all the coupes referred to in paragraph 10 of the applicant’s statement of claim. This enabled the proposed hearing and determination of the separate question to occur in a timely manner, and the parties are to be commended for agreeing to this approach.
2. In summary, I have concluded the stated question should be answered unfavourably to the applicant, but that the answer needs qualification. I have concluded that on a proper construction of s 38(1) of the EPBC Act and s 6(4) of the *Regional Forests Agreements Act 2002* (Cth), the operation of those exemptions is not affected by the failure to carry out reviews of the performance of the Central Highlands Regional Forest Agreement, as contemplated by cl 36 of the Central Highlands RFA. In substance, I have accepted the Commonwealth’s submissions, supported by the State of Victoria, about the proper construction and operation of these two exemptions. The consequence of adopting that approach is that, despite a conclusion unfavourable to the applicant, the separate question cannot be answered affirmatively in an unqualified way. A qualified answer is required to reflect the failure of the applicant’s particular contentions concerning cl 36 of the Central Highlands RFA, rather than an answer reflecting some broader conclusion about the application of the exemptions to all of VicForests’ forestry operations in the identified coupes.
3. The need to qualify the answer to the separate question is unlikely to affect the relief which I consider appropriate. The answer to the separate question must, it seems to me, still inevitably result in the dismissal of the application, because the basis for the applicant’s allegations cannot succeed.

# The separate question

1. On 17 November 2017, I ordered pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth), that the following question be heard separately from any other questions in the proceeding:

Was the logging of the Logged coupes, and will the proposed logging of the Scheduled Coupes be, RFA forestry operations undertaken in accordance with the Central Highlands Regional Forest Agreement such that those forestry operations are exempt from the application of Part 3 of the *Environment Protection Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**), pursuant to either s 38(1) of the EPBC Act or s 6(4) of the *Regional Forest Agreements Act 2002* (Cth)?

1. In its statement of claim, the applicant put forward a specific basis on which it alleged that the exemptions s 38(1) and s 6(4) did not operate or apply to the identified past or future forestry operations by VicForests. The basis was that the failure of the Commonwealth and the State of Victoria to carry out each of the first, second and third five-yearly performance reviews of the Regional Forest Agreement, as required by cl 36 of the Central Highlands RFA, meant that past and future forestry operations in the identified coupes were not being undertaken “in accordance with” the Central Highlands RFA, so that the benefit of the exemptions in s 38(1) and s 6(4) could not be claimed by VicForests.
2. The parties submitted, and I accepted, that on the basis of facts agreed between the parties for the purposes of s 191 of the *Evidence Act* *1995* (Cth), if the question were answered in the affirmative, that answer would require the application to be dismissed. If the question were answered in the negative, the parties submitted, and I accepted, there would need to be a trial on the applicant’s allegations concerning the impact of past and future forestry operations in the identified coupes on each of the two listed threatened species. The possibility that a more nuanced answer might be required was not apprehended at the time the question was formulated.

## The process adopted to determine the separate question

1. On 17 November 2017, I also made orders that the parties confer on the appropriate method for establishing the necessary facts for the determination of the separate question. The parties were initially unable to agree on a set of agreed facts, however on 8 December 2017 the parties did file an agreed statement of facts.
2. On 22 November 2017, the Commonwealth made an application for leave to intervene in the proceeding pursuant to rule 9.12 of the *Federal Court Rules 2011* (Cth). The basis on which the Commonwealth brought its application was that it had a particular interest in the proper construction of the provisions of the EPBC and RFA Acts and sought to assist the Court in its task of construing these provisions.
3. On 23 November 2017, the State of Victoria also applied for leave to intervene. The basis on which leave was sought by the State was that it was a party to the Central Highlands RFA and the statement of claim filed by the applicants, amongst other things, alleged that the State has breached this agreement. The State submitted it had an interest in any allegation of fact concerning compliance with the Central Highlands RFA (about which it could lead evidence) and the legal consequences of alleged non-compliance. The State submitted that VicForests was not a party to the Central Highlands RFA and had no legal or administrative responsibility within the State for administering, and complying with clause 36 of the Central Highlands RFA.
4. On 29 November 2017, I granted leave for the Commonwealth and the State of Victoria to intervene in the proceeding.
5. Although this was a matter which occupied some time during case management, the parties submitted that they did not consider it necessary or appropriate for there to be any agreed facts about whether or not the forestry operations set out in the statement of claim had, or were likely to have, a significant impact on other or both of the Leadbeater’s Possum or the Greater Glider. It was enough, the parties submitted, for there to be an agreement on the nature of the applicant’s allegations and the fact of the absence of an approval under Pt 9 of the EPBC Act: see [16]–[18] of the agreed statement of facts. I ultimately accepted the parties’ position, although I retained some concern about this matter.
6. As it has turned out, the absence of agreement on facts concerning significant impact on the two species has a different consequence, given the conclusions I have reached. So too does the absence of any agreed facts about other aspects of VicForests’ forestry operations, past and proposed. I discuss this at [273]-[279] below, in the context of explaining why in my opinion there needs to be a qualified answer to the separate question.

## The agreed facts and documents

1. The facts as agreed between the parties covered the following categories, and closely followed most of the non-contentious allegations in the applicant’s statement of claim:

* the applicant’s standing and VicForests’ relevant functions, including the preparation and publication of timber release plans for the Central Highlands RFA area;
* a list of coupes identified by the applicant that have already been clear felled by VicForests between 2004 and 2017;
* a list of coupes identified by the applicant that are proposed to be clear felled by VicForests between 2017 and 2018;
* a list of coupes identified by the applicant that are proposed to be harvested by the “seed tree retention method” by VicForests between 2017 and 2018;
* some agreed facts about the status of the two species and their likely presence in the impugned coupes;
* some agreed facts about what is involved in clear felling and seed tree retention methods of timber harvesting; and
* a series of agreed facts about the status of the Central Highlands RFA, that the forestry operations were “RFA forestry operations”, and the failure to undertake reviews of the performance of the Central Highlands RFA as contemplated by cl 36 of the Central Highlands RFA.

1. A number of documents were attached to the agreed statement of facts, to which I refer in these reasons as necessary.
2. The agreed facts concerning each of the two species, and their likely presence in the impugned coupes, should be set out:

12. The CH RFA Area is the home to, among other species of fauna, populations of Leadbeater's Possum *(Gymnobelideus leadbeateri)* and Greater Glider *(Petauroides Volans)*.

**Particulars**

(a) Sightings of the Leadbeater’s Possum in the CH RFA Area are recorded in a Geographic Information System (**GIS**) file maintained by the Victorian Government Department of Environment, Land, Water and Planning carrying the filename “LBPAG\_SITES\_CHRFA” and which can be viewed on the internet at the Victorian Government website titled “Leadbeater’s Possum Interactive Map” located at lbp.cerdi.eq.u.au/possum\_map.php.

(b) Sightings of the Greater Glider in the CH RFA Area have been recorded by observers in video footage, still photographs and by the recording of sighting locations of Greater Gliders on handheld Global Positioning System (**GPS**) devices, creating a point location GIS file.

Records of the sightings of the Greater Glider in the CH RFA Area may be inspected at the office of the Applicant' s solicitor during standard business hours.

(c) Some sightings of the Greater Glider in the CH RF A Area are recorded in two GIS files maintained by the Victorian Government Department of Environment, Land, Water and Planning carrying the filenames “VBA\_FAUNA25” and “VBA\_FAUNA100” and which can be obtained via the Victorian Government website located at [www.data.vic.gov.au](http://www.data.vic.gov.au).

13. On 11 July 2000, the Minister for the Environment and Heritage declared Leadbeater’s Possum to be listed as a threatened species in the endangered category by declaration under s 178 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act).'

14. On 22 April 2015, the Minister for the Environment (**the Minister**) approved a conservation advice and transferred the Leadbeater’s Possum to the critically endangered category under the EPBC Act, with effect from 2 May 2015.

15. On 2 May 2016, the Minister included the Greater Glider as a threatened species in the vulnerable category under the EPBC Act. On 25 May 2016, the Minister approved, by delegate, a conservation advice for the species with effect from 5 May 2016.

1. The agreed facts concerning the failure to undertake reviews of the performance of the Central Highlands RFA as contemplated by cl 36 were:

23. Clause 5 of the CH RFA provides that the CH RFA will remain in force for 20 years. The expiry date for the CH RFA is 27 March 2018.

24. Clause 36 of the CH RFA provides that, every five years, a review of the performance of the CH RFA will be undertaken.

25. Clause 38 of the CH RFA provides that the mechanism for the review will be determined by both Parties before the end of the five-year period and the review will be completed within three months.

26. The first five-yearly review for the CH RFA was not undertaken within the first five-year period fixed by cl 36 of the CH RFA.

27. The second five-yearly review for the CH RFA was not undertaken within the second five-year period fixed by cl 36 of the CH RFA.

28. The third five-yearly review for the CH RFA was not undertaken within the third five-year period fixed by cl 36 of the CH RFA.

# The positions of the parties and interveners

1. It is appropriate to set out the terms of s 38(1) of the EPBC Act here, although I set them out again later in these reasons. The text of s 6(4) of the RFA Act is identical to the text of s 38(1).

**Division 4—Forestry operations in certain regions**

**Subdivision A—Regions covered by regional forest agreements**

**38 Part 3 not to apply to certain RFA forestry operations**

(1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

(2) In this Division:

***RFA*** or ***regional forest agreement*** has the same meaning as in the *Regional Forest Agreements Act 2002*.

***RFA forestry operation*** has the same meaning as in the *Regional Forest Agreements Act 2002.*

Note: This section does not apply to some RFA forestry operations. See section 42.

1. The applicant contended the EPBC Act, read with the RFA Act and the legislative history of both Acts led to two propositions:
2. the RFA regime replaces the EPBC Act; and
3. there must be “full compliance” with the RFA regime.
4. In general terms, neither VicForests nor the interveners disagreed with the first proposition. Whether the verb is “replace” or “substitute”, the contended effect is the same, and can be accepted. The applicant correctly recognises the role of s 38(1) as an exemption to a scheme otherwise involving prohibitions, and the granting of permissions to avoid the prohibitions. The constructional debate turns on the circumstances in which the exemption operates: that is, the second of the applicant’s two propositions.
5. At a textual level, the applicant, the Commonwealth and the State all gave the same or similar meaning to the phrase “in accordance with” in the Pt 4 exemptions, including in s 38(1). They all submitted it meant “consistently with”, “in conformity with” or “in compliance with” – whichever expression is chosen, the core element is that there was a requirement for forestry operations to conform with the terms in, and the regulatory scheme of, an RFA.
6. In contrast, VicForests contended the phrase was used as a reference point: that is, as a mechanism to identify a link between the forestry operations and a particular RFA. In other words, if forestry operations were being conducted in an “RFA region” and were referable to an RFA, then they were being conducted “in accordance with” an RFA. As I explain below, I reject this construction of the phrase “in accordance with”, in the context in which it appears in s 38(1) and s 6(4).
7. The applicant submitted the two Acts and their extrinsic materials:

…indicate that the RFA regime was intended to replace the EPBC Act and provide an alternative regime, pursuant to which forestry operations could be conducted. It follows from the fact that the RFA regime was intended to replace the operation of the EPBC Act that compliance with all terms of the RFA regime (rather than isolated provisions) is necessary.

1. This passage reflects the applicant’s primary contention: namely wherever the “regime” established by an RFA imposes obligations (whether in terms of conduct, performance of functions, or decision-making or all of these), those obligations must be met before any forestry operations will be exempt.
2. Its second, and alternative, position is that there must be “substantial compliance” with the “material” provisions of the RFA. It submits cl 36 of the Central Highlands RFA is a material provision, in respect of which there has been not even substantial compliance, and that is sufficient to render the exemption inapplicable. In oral argument senior counsel for the applicant resisted the need to pinpoint each clause in the Central Highlands RFA which could be said to fall into this category of “material” provisions. It was sufficient, he submitted, for the applicant to persuade the Court that cl 36 was in this category. He summarised the applicant’s contention about how one could make the distinction by accepting that some clauses in the Central Highlands RFA are “hortatory”, or expressions of hope. He referred to cl 48 as an example, which provides:

48. Parties agree that the current forest management system could be enhanced by further developing appropriate mechanisms to monitor and review the sustainability of forest management practices. To ensure that this occurs, Parties agree to establish an appropriate set of sustainability indicators to monitor forest changes. Any indicators established will be consistent with the Montreal Process Criteria (as amended from time to time), the current form of which is specified in Attachment 7, and will take into account the framework of regional indicators developed by the Montreal Process Implementation Group (MIG). Indicators will be practical, measurable, cost-effective and capable of being implemented at the regional level.

1. Clause 36, senior counsel submitted, is more definite, and the obligations it imposes are thus capable of being assessed for compliance, as the use of the phrase “in accordance with” suggests should occur. He noted the text in cl 36 is very specific, and includes timeframes. The substance of the obligation in cl 36 was also submitted to be critical because it ensures the parties will focus on whether the Central Highlands RFA is working. Senior counsel agreed with submissions by the Commonwealth that there were other parts of the RFA which imposed certain and material obligations with which compliance was required for the benefit of the s 38(1) exemption to be claimed. He agreed that cl 57 and that part of Attachment 2 dealing with the approved recovery plan for the Leadbeater’s Possum was one example; and the implementation of the CAR Reserve System as set out in Attachment 1 was another.
2. However, the applicant submitted that such obligations in terms really only look forward for the first five years after the Central Highlands RFA was concluded: that is, until 2003. Thereafter, the maintenance of appropriate priorities, commitments, plans and processes depends, the applicant submits, on the conduct of the five-yearly reviews and the adjustment of priorities and commitments after those reviews. The applicant submits the contents of the Central Highlands RFA demonstrate that the priorities and commitments with which the reviews are concerned are intended to provide the basis for the ongoing conduct of forestry operations in the Central Highlands RFA region.
3. VicForests contended, consistently with its proposed construction of the term “in accordance with” in both s 38(1) and s 6(4), that any forestry operations that:

(a) are forestry operations as defined by an RFA as in force on 1 September 2001; and

(b) are conducted in relation to land:

(i) in a region covered by the RFA; and

(ii) where those operations are not prohibited by the RFA

are exempt from the operation of pt 3 of the EPBC Act.

1. That is, VicForests contended the exemption would operate where there was:

* a characterisation of the conduct (whether “forestry operations” as defined in the EPBC/ RFA Act);
* identification of the geographical location of those forestry operations (whether in an RFA region); and
* an absence of any express prohibition in the RFA (I did not understand the submissions to encompass any implied prohibitions).

1. In oral argument, senior counsel for VicForests accepted that this approach might have the consequence that there could, in fact, be a significant impact on a listed threatened species from the conduct of forestry operations and yet the exemption would still apply if these three conditions were met. He submitted the legislative and policy protocols in existence at State level would make such a scenario unlikely, but he frankly conceded this was a consequence of the construction for which VicForests contended. He submitted Parliament’s intention was to provide a broad exemption, the State’s ongoing conduct of forestry operations having essentially been audited and approved by the Commonwealth through the RFA process, and thereafter the federal legislative scheme was not intended to reach forestry operations other than in the limited circumstances he had outlined.
2. The position of the Commonwealth, and the State, sat somewhere in between the parties’ positions.
3. The Commonwealth submits that more is required for the s 38(1) exemption to operate than simply whether the forestry operations are properly characterised as “RFA forestry operations” because they are conducted in an RFA region. That matter provides, the Commonwealth submits, the eligibility for the application of the exemption. Whether s 38(1) is engaged in respect of eligible RFA forestry operations depends on how, if at all, the particular RFA regulates the actual conduct of forestry operations in that region. Where a particular RFA does regulate the way forestry operations are to be undertaken, then any forestry operations in that RFA region must be “in accordance with” what the RFA requires. Senior counsel for the Commonwealth gave a number of examples, to which I refer below in the section of these reasons dealing with the Central Highlands RFA. To support its construction of the work to be done by the words “in accordance with”, and consistently with its broader submission that the terms of the RFA Act are the terms which should be consulted first, before the EPBC Act, the Commonwealth relies on the text of s 7 of the RFA Act.
4. Section 7 provides:

The termination of an RFA by the Commonwealth is of no effect unless it is done in accordance with the termination provisions of the RFA, being those provisions as in force:

(a) at the time of commencement of this section; or

(b) at the time the RFA comes into force;

whichever is later.

1. The Commonwealth submits it is clear that the work to be done by the words “in accordance with” is to pick up the specific terms of a particular RFA and to require compliance with those terms for there to be a valid termination of the agreement. I accept the force of this submission, although as I note elsewhere, in my opinion the phrase “in accordance with” in the EPBC Act does the same work in any event.
2. The State adopted a similar position to the Commonwealth.
3. It submits that the non-observance of the Central Highlands RFA that is alleged by the applicant is not directed to the “forestry operations” that are authorised by the Central Highlands RFA, and instead is directed to non-compliance by the State of Victoria with non-binding obligations it assumed under the Central Highlands RFA.
4. There were aspects of the State’s written submissions which seemed to bring its position closer to that of VicForests than the Commonwealth. For example, the following written submission:

Once the Court is satisfied that the agreement *is* an RFA for the particular region, the forestry operations taking place within its geographic bounds are not subject to any regulation under Part 3 of the EPBC Act.

1. Later however in its written submissions, the State contended:

***Second***, it is “forestry operations” that are exempted from the operation of the EPBC Act. To the extent that the obligation to undertake those operations “in accordance with” the relevant RFA is imposed, it is limited to obligations actually imposed by the RFA that relate to “forestry operations”. The Applicant in this case has not identified any such obligation.

1. In oral submissions, senior counsel for the State confirmed his client’s position was the State did not embrace the position that was put by VicForests in its written and oral submissions. He clarified that to the extent the position of the Commonwealth was distinguished from that of VicForests, the position of the State of Victoria is in accordance with the Commonwealth’s position. Senior counsel for the State placed one caveat, on behalf of the State, on its agreement with the Commonwealth submissions. This concerned some of the examples given by Mr Howe QC for the Commonwealth during oral argument. Mr Caleo QC for the State submitted that the examples given at a “granular level” from the terms of the RFA would need to be investigated where a question arose about the compliance of particular forestry operations with those “granular” provisions. There was no concession on behalf of the State that each and every example given by senior counsel for the Commonwealth would, in relation to a particular set of forestry operations, necessarily regulate the undertaking of those forestry operations so that the s 38(1) exemption would not apply if there was non-compliance.
2. The State’s caveat is understandable. The caveat recognises and accepts the examples as useful to illustrate the distinction in terms of constructional choice. However, any determination of how non-compliance with – for example – the Victorian Code of Practice for Timber Production – could or would render particular forestry operations in the Central Highlands RFA region outside the exemption in s 38(1) of the EPBC Act would need to await consideration and determination where such allegations were specifically made. That, with respect, must be so. It does not detract from the usefulness of the examples to which the Commonwealth referred the Court, and which I have set out later in my reasons.

# Resolution of the separate question

1. In this part of my reasons I set out the approach I have taken to the making of the constructional choices presented by the separate question. I then set out the scheme of the EPBC Act and my findings about that scheme as relevant to the resolution of the separate question. I undertake the same task in relation to the RFA Act, the National Forest Policy Statement and the Central Highlands RFA. I then explain what the key factors in reaching my conclusion that the construction of s 38(1) (and s 6(4) of the RFA Act) advanced by the Commonwealth, supported by the State, is the correct one.

## Making constructional choices

1. The parties and interveners relied on a range of factors they each submitted inform the constructional choices that all accepted exist. In the end the text, context and purpose of the EPBC Act (and, in a more restricted way, the RFA Act) control the choice to be made by the Court: *Lacey v Attorney-General of Queensland* [2011] HCA 10; 242 CLR 573 at [44]; *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; 248 CLR 378 at 389 [24]–[25] (French CJ and Hayne J); *Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664 at [23], (French CJ, Hayne, Kiefel, Gageler and Keane JJ). In *Esso Australia Pty Ltd v The Australian Workers’ Union* [2017] HCA 54; 92 ALJR 106, Gageler J said at [71]:

Difficult though it is, the constructional choice can and must be made in the application of workaday interpretative methodology. Nothing simpler or more sophisticated is involved than attempting sympathetically to determine which construction of the contested statutory text better fits the context of the statutory scheme of which that text forms part. Linguistic indications are important. More important is the "purpose and policy" reasonably attributed to the provision within the statutory scheme.

(Footnotes omitted).

1. In other judgments dealing with the correct approach to statutory construction, and to constructional choices, I have referred to the recent decision of the High Court in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 347 ALR 405 where, at [14], the plurality said:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

(Footnotes omitted.)

1. Similarly, Gageler J (who was in dissent, as his Honour was in *Esso Resources*, but not on the principles of statutory construction) said at [37]-[39]:

Both of those passages have been “cited too often to be doubted”. Their import has been reinforced, not superseded or contradicted, by more recent statements emphasising that statutory construction involves attribution of meaning to statutory text. The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility “if, and in so far as, it assists in fixing the meaning of the statutory text”.

The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from “a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural”, in which case the choice “turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies”.

Integral to making such a choice is discernment of statutory purpose. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth Act, “the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation” “is in that respect a particular statutory reflection of a general systemic principle”.

(Footnotes omitted.)

1. The choices presented by the separate question do not depend on the meaning of an individual word, although they do turn to a material extent on the meaning of the phrase “in accordance with”. Nevertheless, this is not a situation where the Court is faced with that mythical creature called the “ordinary” or “natural” meaning of a word in a statutory provision. Rather, as Gageler and Keane JJ said in *SZTAL* at [38] (citing *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9; 253 CLR 531 at 557 [66], the constructional choice turns “on evaluation of the relative coherence of the alternatives with identified statutory objects or policies”.
2. Context and purpose are particularly important in the constructional choices to be made about s 38(1) and s 6(4), including the correct meaning to be given to the phrase “in accordance with” in s 38(1).
3. In making constructional choices, the nature of the provision is also important. Section 38(1) operates as an exemption not only from the controlled action approvals process in Pt 9 of Ch 4, but antecedent to this, as an exemption from the prohibitions in Pt 3 of Ch 2. In relation to each matter of national environmental significance set out in Pt 3 (World Heritage, National Heritage, wetlands of international importance, listed threatened species and communities, listed migratory species, protection of the environment from nuclear actions, marine environment and the remaining matters referred to), Pt 3 creates criminal offences and imposes civil penalties for contraventions of the prohibitions. The target of these offences and civil penalty provisions are those people or entities who take an “action”. A construction which promotes clarity and an understanding of what, practically, is required to comply with the law will generally be preferred over one which creates, or is likely to create, ambiguity or uncertainty for those whose conduct is being regulated.
4. In the statutory context of civil penalty provisions of the *Fair Work Act 2009* (Cth), in *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89; 268 IR 113, a Full Court of this Court (Allsop CJ, White and O’Callaghan JJ), said (at [15]):

[I]t is helpful to say something as to the approach to the provisions, in both the FW Act and the 2004 Victorian Act, and indeed in the other legislation to be mentioned. First, to the extent that a provision is a civil remedy or civil penalty provision a necessary clarity of meaning should be striven for, to the extent that is possible and conformable with the language employed and context legitimately available. Secondly, notwithstanding the closely regulated environment of industrial and employment legislation, provisions as to entry on to work sites and the regulation thereof should be construed conformably with the language used by Parliament practically and with an eye to commonsense so that they can be implemented in a clear way on a day-to-day basis at work sites. The legislation needs to work in a practical way at the work site, and if at all possible not be productive of fine distinctions concerning the characterisation of entry on to a site.

1. I respectfully adopt those two observations, and consider them applicable to the circumstances of the scheme established by the EPBC Act.
2. As I note below, an understanding of s 6(4) and the RFA Act generally is a key component in understanding the correct construction of s 38(1). Ultimately, it is s 38(1) which must be the subject of the constructional choice, which will then flow through to s 6(4).

## The use of extrinsic material

1. Both parties and the interveners relied substantially on extrinsic material, by way of second reading speeches and explanatory memoranda. Despite repeated judicial caution, courts are still urged to rely on statements extraneous to the text of the legislation as a starting point for constructional choices about a legislative provision, or a legislative scheme.
2. In *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 (French CJ, Hayne, Crennan, Bell and Gageler JJ) at [39], quoting the Court’s judgment in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; 239 CLR 27 at [47], the Court said:

“This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text”. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

1. In their text, Interpretation and Use of Legal Sources (2009), Herzfeld, Prince and Tully refer (at p 85) to a rationale for the focus on statutory text and not on the text used in extrinsic material or by responsible Ministers in Parliament:

“[I]n a society living under the rule of law citizens are entitled to regulate their conduct according to what a statute has said, rather than by what it was meant to say or by what it would otherwise have said if a newly considered situation had been envisaged”. (*Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231; [1978] 1 A11 ER 948 (HL), Lord Simon at 237 (WLR))

1. I respectfully agree. At times, the submissions of the parties and the interveners appeared to encourage the Court to resort first to the extrinsic material before or as a substitute for close examination of the legislative schemes of the EPBC Act and the RFA Act. I have not taken that approach, although in my opinion the extrinsic material confirms the construction I have reached, or at least is not inconsistent with it.
2. The use of extrinsic material to confirm a meaning at which the Court has arrived by reference to the text, context and purpose of a provision in its legislative scheme is a legitimate use for extrinsic material and expressly contemplated by s 15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth).

### The extrinsic material in this case

1. In the Explanatory Memorandum for the *Regional Forest Agreements Bill 2002* (Cth), the notes to cl 6 (which became s 6(4) of the RFA Act) stated:

This clause provides that forestry operations in regions subject to RFAs are excluded from certain Commonwealth legislation. This is because the environmental and heritage values of those regions have been comprehensively assessed under relevant legislation during the RFA process and the RFAs themselves contain an agreed framework on the ecologically sustainable development of these forest regions over the next 20 years.

1. This passage was considered by the Full Court in *Forestry Tasmania v* *Brown* [2007] FCAFC 186; 167 FCR 34 (Sundberg, Finkelstein and Dowsett JJ) at [62]. As the Commonwealth correctly submitted, since it was the RFA Act which introduced the present text of s 38(1), it is important to have regard to the extrinsic material to this Act. However, as I have found, the original text of s 38(1) of the EPBC Act took the same form as many of the other exemptions in Pt 4 of the EPBC Act, and I do not see the changes in textual formulation in 2002 as being of any significance to the meaning of s 38(1). Rather, the original form, reflecting the form used throughout Pt 4, confirms the meaning I have preferred, and the change in language in 2002 is explained simply by the fact it was drafted separately and introduced through another piece of amending legislation.
2. As to the content of the extrinsic material concerning the RFA Act, I accept the following submissions by the Commonwealth, which I understood to be put by reference to the applicant's contentions concerning cl 36 of the Central Highlands RFA:

The EM [to the RFA Act] also stated that the RFA Bill ‘seeks to underpin the agreements’ by inter alia (i) ‘preventing application of Commonwealth environmental and heritage legislation as they relate *to the effect of forestry operations* where an RFA, based on comprehensive regional assessments, *is in place* (reflecting provisions already in the EPBC Act)’ (emphasis added); and (ii) ‘ensuring that the Commonwealth is bound to the termination … provisions in RFAs’. No reference was made in the EM to underpinning RFAs by tying the regulatory carve-outs in ss 38 and 6(4) to executive implementation of one or more provisions of RFAs.

….

Similarly, there is no support in the Minister’s Second Reading Speech for the Applicant’s construction. Rather, the Minister made several statements indicating that any non-compliance with the provisions of an RFA would be dealt with ‘through processes set out in the RFAs’. Again, no mention was made of parties’ non-compliance with provisions of an RFA triggering application of Part 3 of the EPBC Act.

(citations omitted).

1. The extrinsic material to the EPBC Act leads to no different conclusion. The applicant relied on the following extract from the Explanatory Memorandum accompanying the Bill that became the EPBC Act, describing the object of what became Div 4 of Pt 4 of Ch 2 of the EPBC Act (including s 38(1)). The extract on which the applicant relied actually referred to cl 39 of the Bill, which became s 39 of the Act. These are thus not statements directed at the terms of what was to become s 38(1). Rather they are statements directed at what was to become subdivision B, containing ss 39 to 42. It is subdivision B which has an objects clause, as I note below, while subdivision A (which only contains s 38) has no objects clause.
2. These variations demonstrate why reliance on extrinsic material can be inadvertently problematic. Nevertheless, since the applicant relied on it, I set out what the explanation for cl 39 (and subdivision B) was:

The object of this subdivision recognises that in each RFA region a comprehensive assessment is being, or has been, undertaken to address the environmental, economic and social impacts of forestry operations. In particular, environmental assessments are being conducted in accordance with the *Environment Protection (Impact of Proposals) Act 1974*. In each region, interim arrangements for the protection and management of forests are in place pending finalisation of an RFA. The objectives of the RFA scheme as a whole include the establishment of a comprehensive, adequate and representative reserve system and the implementation of ecologically sustainable forest management. These objectives are being pursued in relation to each region. The objects of this Act will be met through the RFA process for each region and, accordingly, the Act does not apply to forestry operations in RFA regions.

1. This is the passage considered by the Full Court in *Brown* at [61], to which I refer below. It also appears not to have been noted before the Full Court that this statement was directed at cl 39. Even if one reads the statement as broadly applicable to Div 4 of Pt 4 as a whole, the explanation takes the analysis no further, but it is at least not inconsistent with the Commonwealth’s submissions and the conclusions I have reached.

## The EPBC Act generally

1. I described the scheme of the EPBC Act in *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* [2016] FCA 168; 337 ALR 96 at [19]-[34]. Although the Full Court allowed an appeal from that decision (see: *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* [2016] FCAFC 129; 244 FCR 21 (Allsop CJ, Griffiths and Moshinsky JJ)), the general structure of the legislative scheme which I described was not subject to any criticism. I adopt what I said in that judgment concerning the general structure of the EPBC Act, the role of the prohibitions in Pt 3 of Ch 3 of the Act, and the corresponding approvals regime for the taking of an action, which is located in Ch 4 of the EPBC Act.
2. Before turning to the specific provisions which need to be considered in the context of the separate question, consideration should be given to a number of other provisions, commencing with the objects of the EPBC Act in s 3.
3. Section 3(1) provides:

**3 Objects of Act**

(1) The objects of this Act are:

(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and

(c) to promote the conservation of biodiversity; and

(ca) to provide for the protection and conservation of heritage; and

(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and

(e) to assist in the co-operative implementation of Australia’s international environmental responsibilities; and

(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and

(g) to promote the use of indigenous peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

1. Those objects have a common focus on the policies of environmental protection and biodiversity conservation, while recognising a variety of circumstances in which those policies will need to operate. A purposive construction of the EPBC Act will take account of that common focus.
2. Section 3(2) then sets out a description of the way the EPBC Act seeks to achieve those objects. Prominent in the methods to be adopted are references to intergovernmental co-operation, and the minimisation of duplication, as well as a “partnership approach” to environmental protection and biodiversity conservation. These methods are reflected in the terms of Pt 4 of Ch 2 of the EPBC Act, which I discuss below.
3. Although it is a term used throughout the EPBC Act, including in the objects provision, the term “matters of national environmental significance” is not defined. The heading to Div 1 of Pt 3 is entitled “Requirements relating to matters of national environmental significance”. Part 3 not only contains identified “matters”, but also makes provision for further matters to be declared within this category by regulation: see s 25. Thus, the “matters” are to be extrapolated from the contents of Pt 3 itself, together with the applicable regulations.
4. The current matters of national environmental significance with which the EPBC Act is concerned are: World Heritage properties and areas; National Heritage Places; Wetlands of international importance; Listed threatened species and communities; Listed migratory species; nuclear actions, the marine environment, the Great Barrier Reef Marine Park and water resources affected by coal seam gas and mining.
5. The prohibition on conduct affecting listed threatened species as a matter of national environmental significance is contained in s 18:

**18 Actions with significant impact on listed threatened species or endangered community prohibited without approval**

*Species that are extinct in the wild*

1. A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the extinct in the wild category; or

(b) is likely to have a significant impact on a listed threatened species included in the extinct in the wild category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

*Critically endangered species*

1. A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the critically endangered category; or

(b) is likely to have a significant impact on a listed threatened species included in the critically endangered category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

*Endangered species*

1. 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.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

*Vulnerable species*

(4) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the vulnerable category; or

(b) is likely to have a significant impact on a listed threatened species included in the vulnerable category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

*Critically endangered communities*

(5) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened ecological community included in the critically endangered category; or

(b) is likely to have a significant impact on a listed threatened ecological community included in the critically endangered category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

*Endangered communities*

(6) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened ecological community included in the endangered category; or

(b) is likely to have a significant impact on a listed threatened ecological community included in the endangered category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

1. Section 19 is the provision which then draws in both the permission regime in Pt 9 of Ch 4 of the Act, and the operation of a range of exemptions to the s 18 prohibition, for which the scheme provides. Section 19 relevantly provides:

**19 Certain actions relating to listed threatened species and listed threatened ecological communities not prohibited**

(1) A subsection of section 18 or 18A relating to a listed threatened species does not apply to an action if an approval of the taking of the action by the person is in operation under Part 9 for the purposes of any subsection of that section that relates to a listed threatened species.

...

(3) A subsection of section 18 or 18A does not apply to an action if:

(a) Part 4 lets the person take the action without an approval under Part 9 for the purposes of the subsection; or

(b) there is in force a decision of the Minister under Division 2 of Part 7 that the subsection is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner; or

(c) the action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).

(4) A subsection of section 18 or 18A does not apply to an action, to the extent that it is covered by subsection 517A(7).

1. The terms of s 517A are not material to the construction question before the Court. A material feature of s 19(3), consistent with the construction I adopt of s 38(1), is that it does not distinguish between the various exemptions and exceptions in Pt 4 of Ch 2. Rather it simply provides that there will be no contravention if “Part 4 lets” a person take the particular action. This is one textual and contextual indication that s 38(1) is intended to operate no differently from the other exemptions in Pt 4.
2. Although there are few agreed facts about the two species themselves, the relevant provisions of the EPBC Act dealing with threatened species should be noted. Listed threatened species are dealt with in Div 1 of Pt 13 of the Act. Section 178 requires the Minister to establish a list of threatened species, by descending categories of the severity of their status:

**178 Listing of threatened species**

(1) The Minister must, by legislative instrument, establish a list of threatened species divided into the following categories:

(a) extinct;

(b) extinct in the wild;

(c) critically endangered;

(d) endangered;

(e) vulnerable;

(f) conservation dependent.

1. Section 179 sets out what criteria are to be used to determine the category in which a species is to be listed. The “critically endangered” and “vulnerable” categories are defined in the following way:

**179 Categories of threatened species**

…

(3) A native species is eligible to be included in the ***critically endangered*** category at a particular time if, at that time, it is facing an extremely high risk of extinction in the wild in the immediate future, as determined in accordance with the prescribed criteria.

…

(5) A native species is eligible to be included in the ***vulnerable*** category at a particular time if, at that time:

(a) it is not critically endangered or endangered; and

(b) it is facing a high risk of extinction in the wild in the medium‑term future, as determined in accordance with the prescribed criteria.

…

1. In making these decisions, the Minister is required by s 189 to consider advice given by the Threatened Species Scientific Committee established under s 502 of the Act. Lists may be amended (s 184) and are to be publicly available (s 194). There is a detailed nomination and listing process set out in Subdiv AA of Pt 13, as well as a permit system relating to the killing or taking of individual members of a listed threatened species (Subdiv B). Holding a permit will avoid commission of any of the several offences created in Subdiv B (for eg, s 196 which creates an offence for taking or killing individual members of a listed threatened species, in a Commonwealth area): s 197. There will also be no offence if the action is taken “in accordance with” the arrangements, authorisations and agreements to which I refer below: see the terms of s 197.
2. Notably however s 38(1), and the undertaking of forestry operations in accordance with an RFA, is not an action which is set out in s 197 as one which avoids the operation of the provisions in s 196. It is a singular omission. The explanation may be that forestry operations do not occur in a “Commonwealth area” as that term is defined in s 525 of the EPBC Act, so that s 196 is unlikely to apply.

## Part 4 of Ch 2: the exemptions and exceptions to Part 3

1. I turn now to consider the exceptions and exemptions to the combined regime of prohibitions in Pt 3 of Ch 2 and the approval regime in Ch 4.
2. Part 4 of Ch 2 of the EPBC Act is headed “Cases in which environmental approvals are not needed”. Section 38(1) is located in Pt 4, but to appreciate the context of s 38(1) it is necessary to look at the range of circumstances covered by Pt 4.
3. The exceptions or exemptions set out in Pt 4 cover a wide range of circumstances. Division 1 deals with actions covered by bilateral agreements. These are agreements between the Commonwealth and a State or Territory. The detail relating to the making of such agreements can be found in Pt 5 of Ch 3. These agreements reflect the Commonwealth’s agreement (through the Minister) to allow a State or Territory to use its own processes (of both management and authorisation) to approve conduct that would otherwise constitute the taking of an action in relation to a matter of national environmental significance.
4. Section 53(2) sets out specific matters concerning listed threatened species about which the Federal Minister must be satisfied before she or he can enter into a bilateral agreement:

**53 Agreements relating to listed threatened species and ecological communities**

…

(2) The Minister may accredit a management arrangement or an authorisation process under section 46 for the purposes of a bilateral agreement containing a provision relating to a listed threatened species or a listed threatened ecological community only if:

(a) the Minister is satisfied that the management arrangement or authorisation process is not inconsistent with Australia’s obligations under:

(i) the Biodiversity Convention; or

(ii) the Apia Convention; or

(iii) CITES; and

(b) the Minister is satisfied that the management arrangement or authorisation process will promote the survival and/or enhance the conservation status of each species or community to which the provision relates; and

(c) the Minister is satisfied that the management arrangement or authorisation process is not inconsistent with any recovery plan for the species or community or a threat abatement plan; and

(d) the Minister has had regard to any approved conservation advice for the species or community.

1. Where a bilateral agreement is “in operation” (see s 29(1)(c)), then an action “described in a provision of Part 3” (that is, actions that will or are likely to have a significant impact on one or more of the matters of national environmental significance with which Pt 3 deals) will not need approval under Pt 9. The text of s 29 provides the answer as to why that is so. Section 29(1)(b) sets out, as one of the conditions of the application of this exception, that:

[T]he action **is approved** in accordance with a management arrangement or authorisation process that is a bilaterally accredited management arrangement or a bilaterally accredited management process for the purposes of the bilateral agreement. (emphasis added)

1. As their names suggest, a “bilaterally accredited management arrangement” and a “bilaterally accredited management process” have both received accreditation from the responsible Minister. Pursuant to s 46(3)(b), the Minster may only give such accreditation if she or he is satisfied, amongst other things, that there has been or will be adequate assessment of the impacts that action approved in accordance with the management arrangement or authorisation process have or will have; or are likely to have on a matter of national environmental significance in Pt 3. The Minister must also be satisfied, pursuant to s 46(3)(c), that actions approved in this way will not have “unacceptable or unsustainable impacts” on protected matters.
2. In other words, the two processes of “bilaterally accredited management arrangement” and a “bilaterally accredited management process” are processes the scheme intends to be substitutes for the assessment and approvals process under Pt 9. Actions taken in accordance with these processes are, therefore, assessed in a different way, but they are still assessed by reference to the same underlying criteria as a controlled action governed by Pt 9.
3. Section 29(1)(e) then imposes the further condition that:

The action **is taken** in accordance with the bilaterally accredited management arrangement or the bilaterally accredited authorisation process. (emphasis added)

1. I return later in these reasons to explain the significance of the textual commonality between provisions such as s 29(1)(e) and s 38(1).
2. Division 2 of Pt 4 deals with actions covered by Ministerial declarations. By this Division, the responsible Minister is empowered to make declarations over a class of actions that she or he determines do not need approval under the regime in Pt 9 of the Act. The basis for such a declaration will be that the action has been “approved in accordance with an accredited management arrangement or an accredited authorisation process”: see s 32(a). If the declaration is in operation at the time the action is taken, then it can be taken without an approval under Pt 9, provided:

…the action is taken in accordance with the accredited management arrangement or accredited authorisation process.

1. Once again, the scheme contemplates the action is approved and regulated by a substitute regime: it is nonetheless regulated. Confirmation that approval of a class of actions by way of Ministerial declaration affords no less protection to matters of national environmental significance can be found in s 34A(a) which imposes a requirement that the Minister must be satisfied any declaration she or he makes “accords with the objects of this Act”. Subdivision C (in which s 34A is located) then also imposes a range of other preconditions on a Ministerial declaration, each of which is specific to a matter of national environmental significance. For example, s 34D(2) provides, in relation to listed threatened species:

**34D Declarations relating to listed threatened species and ecological communities**

…

(2) The Minister may accredit a management arrangement or authorisation process under section 33 for the purposes of a declaration relating to a listed threatened species or a listed threatened ecological community only if:

(a) the Minister is satisfied that the management arrangement or authorisation process is not inconsistent with Australia’s obligations under:

(i) the Biodiversity Convention; or

(ii) the Apia Convention; or

(iii) CITES; and

(b) the Minister is satisfied that the management arrangement or authorisation process will promote the survival and/or enhance the conservation status of each species or community to which the declaration relates; and

(c) the Minister is satisfied that the management arrangement or authorisation process is not inconsistent with any recovery plan for the species or community or a threat abatement plan; and

(d) the Minister has had regard to any approved conservation advice for the species or community.

1. Division 3 deals with another form of Ministerial declaration: namely, those concerning bioregional plans. These are made under s 176 of the Act. By s 37B, the same sorts of considerations (using the same language) as for Div 2 govern the making of such a declaration to exempt an action, with the addition of consideration of economic and social matters. By s 37G, which deals expressly with listed threatened species, the Minister’s power to make a declaration is constrained in the same way, and using the same language as it is under s 34D(2). Section 37 then provides that if an action is taken in a bioregion to which a declaration applies, the action does not need approval under Pt 9 if it is taken “in accordance with the plan”: (s 37(c)(ii)).
2. Division 3A deals with conservation agreements. This refers to agreements made under s 305 of the Act. Such agreements are not intergovernmental in nature, although s 305 may well permit the agreement to be intergovernmental. Its language refers only to agreements between the Commonwealth and “persons”. Section 304 describes the subject matter of such agreements:

**304 Object of this Part**

(1) The object of this Part is to provide for:

(a) conservation agreements between the Commonwealth and persons related to the protection and conservation of the following:

(i) biodiversity;

(ii) the world heritage values of declared World Heritage properties;

(iii) the National Heritage values of National Heritage places;

(iv) the Commonwealth Heritage values of Commonwealth Heritage places;

(v) the ecological character of a declared Ramsar wetland;

(vi) the environment, in respect of the impact of a nuclear action;

(vii) the environment in a Commonwealth marine area;

(viia) a water resource, in respect of the impact of an action involving coal seam gas development or large coal mining development;

(viii) the environment on Commonwealth land; and

(b) the effect of conservation agreements; and

(c) the publication of conservation agreements.

(2) Conservation agreements are agreements whose primary object is to enhance the conservation of matters referred to in paragraph (1)(a). They may relate to private or public land, or to marine areas.

Note: Conservation agreements cannot cover all or part of a Commonwealth reserve (see subsection 305(4)).

1. Part 14 of the Act, in which s 304 is located, sets out a lengthy series of matters which must be dealt with before the Minister may enter into a conservation agreement on behalf of the Commonwealth. To take a relevant example of a precondition, s 305(2)(a) provides that the Minister must not enter into a conservation agreement unless satisfied of certain matters:

**305 Minister may enter into conservation agreements**

…

(2) However, the Minister must not enter into a conservation agreement unless satisfied that:

(a) in the case of a proposed agreement wholly or partly for the protection and conservation of biodiversity—the agreement:

(i) will result in a net benefit to the conservation of biodiversity; and

(ii) is not inconsistent with a recovery plan, threat abatement plan or wildlife conservation plan;

1. I pass over Div 4 of Pt 4 which deals with forestry operations and contains s 38, as I deal separately with this division below.
2. The final categories of exception or exemption contained in Pt 4 are Div 5 and Div 6. Division 5 deals with actions taken in the Great Barrier Reef Marine Park, which is separately regulated under the *Great Barrier Reef Marine Park Act 1975* (Cth), and therefore the exception in s 43 is directed at only the geographical location of the action, and the purpose of it – the latter needing to be a purpose authorised in that zone by a zoning plan made under the Great Barrier Reef Marine Park Act.
3. Division 6 concerns actions taken with “prior authorisation”. This Division deals with actions authorised under environmental protection regimes prior to the enactment of the EPBC Act (such as the *Environmental Protection (Impact of Proposals) Act 1974* (Cth); or authorisations under State or Territory law). The details of the Division are not relevant, suffice to say that it strictly confines the circumstances in which an action authorised before the commencement of the Act can continue to be taken without engaging the prohibitions in Pt 3 of the Act. Nevertheless, it is understandable that the legislative scheme needed to provide for unchanged but continuing conduct that had been the subject of previous environmental assessment and authorisations prior to the EPBC Act.

## Division 4 of Part 4 of the EPBC Act, including section 38, the RFA Act and the National Forest Policy Statement

1. Division 4 of Part 4 the EPBC Act is headed “Regions covered by regional forest agreements”. I propose to consider Div 4 of the EPBC Act, and the RFA Act together, as their content and purpose is inextricably linked. The same is true of the National Forest Policy Statement, to which the RFA Act refers.
2. I begin with some of the legislative history. At the commencement of the EPBC Act in July 2000, Div 4 and s 38 in particular were present in the scheme, but in a marginally different form:

**Division 4—Forestry operations in certain regions**

**Subdivision A—Regions covered by regional forest agreements**

**38 Approval not needed for forestry operations permitted by regional forest agreements**

(1) A person may undertake RFA forestry operations without approval under Part 9 for the purposes of a provision of Part 3 if they are undertaken in accordance with a regional forest agreement.

Note: This section does not apply to some forestry operations. See section 42.

(2) In this Act:

***regional forest agreement*** has the same meaning as in the *Regional Forest Agreements Act 1999.*

***RFA forestry operations*** has the same meaning as in the *Regional Forest Agreements Act 1999.*

1. The *Regional Forest Agreements Act 1999* (Cth) (which took the form only of the *Regional Forest Agreements Bill 1998* (Cth)) was never enacted. The Bill (in s 3) had defined “RFA forestry operation” as follows:

***RFA forestry operations*** means forestry operations that:

* 1. are conducted in relation to land in a region covered by an RFA (being land where those operations are not prohibited by the RFA); and
  2. are conducted in relation to a forest (within the meaning of the RFA).

1. Paragraph (b) of this definition was not retained when the current RFA Act was enacted, but I do not consider its absence adds to or illuminates anything about the construction of s 38 and other relevant provisions.
2. It is worthwhile noting two matters about the original s 38. The first is that its form – “a person may undertake” is a formulation retained in many of the exception and exemption provisions in the EPBC Act. This form uses the active voice, and directs itself at the person undertaking the action. Examples from the current EPBC Act include ss 37 and 37M, to which I have referred above. The applicant did emphasise that the current form of s 38 uses the passive voice, and I discuss this submission below.
3. Aside from the change in formulation and voice, the substance of the exemption remains as it was enacted with the EPBC Act in 2000. The focus of the provision is on the undertaking of forestry operations: that focus is critical to the conclusion I have reached about the correct construction of s 38. It is of some weight in the constructional choice that this has been the focus of s 38, in its context in Pt 4 of Ch 2, since the introduction of the legislative scheme of the EPBC Act.
4. The process of inquiry into and assessment of forest in all regions around Australia, and the flora and fauna those forests supported, was a long and often contentious one. It was commenced under the predecessor legislation to the EPBC Act – the EPIP Act. This regime was given continuing effect by the *Environmental Reform (Consequential Provisions) Act 1999* (Cth).
5. The terms of the EPIP Act were used as the vehicle for the assessment process resulting in RFAs. Some RFAs were concluded under that process prior to the commencement of the EPBC Act: the Tasmanian RFA was one such (see *Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources* (2007) FCAFC 175; 166 FCR 154 (Branson, Tamberlin and Finn JJ) at [35].
6. The current form of Div 4 and s 38 commenced on 3 May 2002. These amendments resulted from the passage of the RFA Act.
7. Clause 1 of Sch 1 to the RFA Act repealed and substituted s 38 of the EPBC Act. It made some further consequential amendments to the EPBC Act to reflect the passage of the RFA and in particular the operative definition of RFA forestry operations.
8. Section 6 of the RFA Act as passed set out three pieces of federal legislation dealing with forestry operations or forestry products which would, because of enactment of the RFA Act and the system of RFAs across Australia, no longer apply in the same way. Two were the *Export Control Act 1982* (Cth) (in relation to the export of “RFA wood”) and the *Australia Heritage Commissions Act 1975* (Cth) (in relation to forestry operations).
9. The third was the EPBC Act. Section 6(4) of the RFA Act as passed provided:

**6 Certain Commonwealth Acts not to apply in relation to RFA wood or RFA forestry operations**

…

(4) 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.

Note: This subsection does not apply to some RFA forestry operations. See section 42 of the *Environment Protection and Biodiversity Conservation Act 1999.*

1. Section 6(4) remains in this form.
2. The RFA Act states that one of its objects in s 3(a) is to give effect to “certain” of the Commonwealth’s obligations under the various RFAs it had entered into with the States. Provisions in the RFA Act deal with termination of RFAs and the payment of compensation to States, tabling of RFAs and annual reports about each RFA and the obligation to publish information about them. Section 10A also required the responsible Federal Minister to establish a:

…comprehensive and publicly available source of information:

(a) for national and regional monitoring and reporting in relation to all of Australia’s forests; and

(b) to support decision-making in relation to all of Australia’s forests.

1. The RFA Act also created the Forest and Wood Products Council, a statutory body intended to assist in the development and co-ordination for the forest and wood products industry. VicForests is correct to emphasise that the system of RFAs, and the place given to them through the RFA Act was wider than simply the protection of the environment. The RFA Act, and the RFA system itself, were intended to create a new model through which the conservation, use and development of Australia’s forest resources would occur. To recognise that fact is not inconsistent with giving s 38(1) of the EPBC Act, and s 6(4) of the RFA Act, a construction which advances the environmental protection and biodiversity conservation objectives of the RFAs, the RFA Act and the EPBC Act. Industry development objectives, and environmental protection and conservation objectives, are not necessarily mutually exclusive, and the RFA scheme does not make them so.
2. Another object of the RFA Act is to give effect to “certain aspects of” the National Forest Policy Statement: see s 3(b). The NFPS was first issued in 1992, and re-issued in 1995, after Tasmania – the last State to do so – endorsed the policy. The NFPS – unlike the RFAs– covers both private and public forests. The breadth of input, and adherence to the policy contained in the statement is set out in the foreword:

During the past decade there has been considerable debate, both within Australia and internationally, about global and domestic environmental issues, including the use and management of forests. The global focus culminated in the United Nations Conference on the Environment and Development in Rio de Janiero in June 1992, at which Australia endorsed the Global Statement of Principles on Forests and signed a number of conventions relating to Biological Diversity and Climate Change.

The Commonwealth, State and Territory Governments attach the utmost importance to sustainable management of Australia’s forests. In order to achieve the full range of benefits that forests can provide now and in the future, the Governments have come together to develop a strategy for the ecologically sustainable management of these forests. The strategy and its policy initiatives will lay the foundation for forest management in Australia into the next century.

This Statement has been jointly developed by the Commonwealth, States and Territories through the Australian Forestry Council and the Australian and New Zealand Environment and Conservation Council in consultation with other relevant government agencies, the Australian Local Government Association, unions, industry representatives, conservation organisations and the general community. The Statement was signed by all participating Governments, with the exception of Tasmania, at the Council of Australian Governments’ meeting, held in Perth in December 1992. Tasmania became a signatory to the Statement on 12 April 1995. The Statement has been developed concurrently with the development of the Ecologically Sustainable Development National Strategy and the National Greenhouse Response Strategy.

In endorsing this Statement, we commit our respective Governments to implement, as a matter of priority, the policies in it for the benefit of present and future generations of Australians. We acknowledge that implementation of policies requiring funding will be subject to budgetary priorities and constraints in individual jurisdictions.

1. The combination of needs and objectives to be served by the NFPS was recognised in the Introduction:

In developing this Statement, the Commonwealth, State and Territory Governments have been mindful of the many values that Australia's forests have, of forests' role in the full suite of ecological processes that sustain life on this continent and their function as habitat for a diverse range of flora and fauna, and of the contribution that forest-based activities make to the national economy and regional and local employment.

1. The NFPS also recognised, in the Introduction, the need to accommodate change in forest management, and the need for adaptation to changing circumstances:

Managing Australia's forests in a sustainable manner calls for policies, by both governments and landowners, that can be adapted to accommodate change. Pressures for change may result from new information about forest ecology and community attitudes, new management strategies and techniques (such as those that incorporate land care and integrated catchment management principles), and new commercial and non-commercial opportunities for forest use. These pressures may affect the forests themselves.

1. The NFPS then sets out four agreed approaches to forest management:

The objectives and policy initiatives are underpinned by the following agreed approaches to forest management:

* The Governments will set the regulatory framework for the use of native forests in order to achieve social and environmental objectives. Within those constraints, market forces should determine the extent of resource use and the nature of industry operations, within the parameters of government industry policy.
* Commercial uses of forests (including wood production) that are based on ecologically sustainable practices are appropriate and desirable activities. In this context, the establishment of plantations for wood production should be determined on the basis of economic viability and international competitiveness.
* The Governments will seek complementary management of forests for all uses through integrated strategic planning and operational management across agencies with responsibility for forests in Australia.
* There should be a sound scientific basis for sustainable forest management and efficient resource use.

1. Part 4.1 of the NFPS deals with what it describes as two of the “principal objectives” of the NFPS: the maintenance of an extensive and permanent native forest estate in Australia and the protection of nature conservation values in forests. The Statement goes on to describe how these objectives will be achieved:

The protection of the full range of forest ecosystems and other environmental values is fundamental to ecologically sustainable forest management. It entails the maintenance of the ecological processes that sustain forest ecosystems, the conservation of the biological diversity associated with forests (particularly endangered and vulnerable species and communities), and the protection of water quality and associated aquatic habitats.

The Governments recognise the unique nature of Australia's biota and that the natural inter-relationship between native flora and fauna is essential for the health of the forest ecosystem. Accordingly, they will manage for the conservation of all species of Australia’s indigenous forest fauna and flora throughout those species’ ranges, and they will maintain the native forest cover where a reduction in this cover would compromise regional conservation objectives, consistent with ecologically sustainable management. The Governments also recognise that maintaining the integrity of native forests and plantings in urban areas is important for conserving nature in those environments.

The Governments agree to manage public native forests for the protection of the range of other conservation values, such as wilderness and heritage values, cultural significance (including significance to Aboriginal people), and landscape and aesthetic attributes. State Governments have already made considerable progress towards meeting these objectives.

The Governments also acknowledge that a variety of uses of public native forests is desirable, provided those uses comply with the principles of ecologically sustainable development. The objective here is the management of public native forests so as to retain the full suite of forest values over time. The Governments acknowledge, however, that some uses, including non-commercial uses, may inevitably compromise other values, such as tourism and recreation values, at least in the short term.

1. Putting to one side how the NFPS nature conservation objectives would be achieved in private forests, in public forests, the NFPS identified two ways in which those consideration objectives would be achieved. First, through a “reserve system” setting aside parts of the public native forest estate as “dedicated nature conservation reserve systems to protect native forest communities, based on the principles of comprehensiveness, adequacy and representativeness”. The NFPS states that this reserve system will “safeguard endangered and vulnerable species and communities”, although it also notes (on p 7) that other areas of forest, outside the reserves, will also be protected to safeguard special areas and to provide links where possible between reserves or other protected areas. Thus, the second method identified was a system of what the NFPS calls “complementary management” in public forests outside reserves that are available for wood production and other commercial uses.
2. A national working group was to be established to identify the areas which should be set aside as reserves, based on the three criteria of comprehensiveness, adequacy and representativeness. The conservation of old growth forests and wilderness areas was to be given particular attention in the design of the reserve system: see page 9-10 of the NFPS.
3. The second identified way of achieving the Statement’s conservation objectives – “complementary management” – was given the formal description in the NFPS of “Ecologically sustainable forest management and codes of practice”. The NFPS described this concept at pp 10 -11:

Ecologically sustainable forest management will be given effect through the continued development of integrated planning processes, through codes of practice and environmental prescriptions, and through management plans that, among other things, incorporate sustainable-yield harvesting practices. The management plans will provide a set of operational requirements for wood harvesting and other commercial and non-commercial uses of forest areas, including conservation reserves and leased Crown land.

To ensure that nature conservation objectives are met in forests, the management of public native forests outside the reserve system will complement the objectives of nature conservation reserve management. Forest management agencies will continue to assess forest areas for the purpose of developing strategic management plans and, where necessary, operational harvesting plans. As a consequence of these forest assessments, areas that have important biological, cultural, archaeological, geological, recreational and landscape values will continue to be set aside and protected from harvesting operations or managed during operations so as to safeguard those values.

* Accordingly, and in keeping with the 'precautionary principle', the State Governments will undertake continuing research and long-term monitoring so that adverse impacts that may arise can be detected and redressed through revised codes of practice and management plans.

1. Towards the end of the NFPS, the government signatories set out the agreements they had reached about to implement the NFPS as described in this document. On pp 15-23, the NFPS describes the process of completing the “comprehensive regional assessments” to, amongst other matters, underpin the Comprehensive, Adequate and Representative Reserve System and wood production targets and the “collection and evaluation of information on environmental and heritage aspects of forests in the region”, assistance to be given to forest industry development (including removing some export controls, as eventually occurred in s 6 of the RFA Act), and a range of other methods by which the policy objectives set out in the NFPS would be achieved. The NFPS then states (at p 21-22):

These assessments will provide the basis for enabling the Commonwealth and the States to reach a single agreement relating to their obligations for forests in a region. Commonwealth obligations include assessment of national estate values, World Heritage values, Aboriginal heritage values, environmental impacts, and obligations relating to international conventions, including those for protecting endangered species and biological diversity.

….

The Commonwealth-State regional agreement resulting from the assessment will also cover guidelines for all aspects of ecologically sustainable management of the forests in question, taking into account the existing regulatory framework in the States and building on forest management strategies and practices. In this respect, the guidelines will cover, for example, management for sustainable yield, the application and reporting of codes of practice, and the protection of rare and endangered species and national estate values. They may also specify the levels and types of disturbance that are acceptable for a particular forest so as not to adversely affect national estate and other conservation values of that forest.

1. The NFPS was made well before the enactment of the EPBC Act. The NFPS refers to the predecessor federal environmental legislation: the EPIP Act.
2. The NFPS recognises the primary responsibility of the States for land use decision-making and management, but also acknowledges the Commonwealth’s role in land use decision-making.
3. For example, at p 19 of the NFPS, the following statement appears:

The Commonwealth Government has a number of nature conservation and heritage obligations arising from Acts of Parliament and international conventions, and it needs to assure itself that the processes and mechanisms used allow it to honour its responsibilities and satisfy its interests.

1. I have spent some time describing the purpose and content of the NFPS because its implementation is one of the objectives of the RFAs, and once the relevant content and purpose of the NFPS is understood, it informs an understanding of the structure and content of RFAs themselves, the RFA Act, and the exemptions in s 6(4) and s 38(1) in particular.
2. I have set s 38 out already, but it bears repetition here. The current form of s 38 of the EPBC Act provides:

**38 Part 3 not to apply to certain RFA forestry operations**

(1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

(2) In this Division:

***RFA*** or ***regional forest agreement*** has the same meaning as in the *Regional Forest Agreements Act 2002*.

***RFA forestry operation*** has the same meaning as in the *Regional Forest Agreements Act 2002.*

Note: This section does not apply to some RFA forestry operations. See section 42.

1. The current meaning of “RFA forestry operation” appears in s 4 of the RFA Act:

***RFA forestry operations*** means:

(a) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and New South Wales) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or

(b) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Victoria) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or

(c) harvesting and regeneration operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Western Australia) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or

(d) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA).

For the purposes of paragraph (b), the East Gippsland RFA (as in force on 1 September 2001) is taken to include a definition of ***forestry operations*** that is identical to the definition of ***forestry operations*** in the Central Highlands RFA (as in force on 1 September 2001).

1. It is paragraph (b) of this definition which is applicable to the circumstances of the current proceeding.
2. The Central Highlands RFA defines forestry operations as:

"**Forestry Operations**" means

(a) the planting of trees; or

(b) the managing of trees before they are harvested; or

(c) the harvesting of Forest Products

for commercial purposes and includes any related land clearing, land preparation and regeneration (including burning), and transport operations[.]

1. VicForests placed some emphasis on an implication it submitted arose from the text of s 4 of the RFA Act: namely, that a particular RFA could itself prohibit forestry operations in certain areas covered by that RFA. VicForests submitted the phrase “in accordance with the RFA” in s 38(1) should not be given the meaning for which the applicant contends, because, where the legislature had wanted specifically to refer to something permitted or prohibited, it did so in very plain language.
2. The remainder of Div 4 of Ch 2 of the EPBC Act has some bearing on the proper construction of s 38(1). Sections 39 and 40 (Subdiv B) deal with regions where no RFA has yet been concluded. Due to the slow progress of the negotiation of RFAs with various states in relation to a variety of forest regions, the EPBC Act needed to address two situations: the situation where there was a concluded RFA and the situation where there was not. Subdiv A and s 38 were directed at the former, Subdiv B (ss 39, 40 and 41) were directed at the latter. The purpose of ss 39, 40 and 41 of the EPBC Act is to recognise that as at July 2000, when the EPBC Act commenced, there were a number of RFAs that were yet to be concluded. That remained the case even in May 2002 when the RFA Act was enacted and the amendments to Div 4 introduced. The Court was informed by the Commonwealth that, as at the date of the trial of the separate question, only the RFA region known as South East Queensland (see s 41(1)(h)) engaged the operation of these provisions.
3. Section 39 states the purpose of Subdiv B expressly, in contrast to Subdiv A and s 38, which has no purposive provision. It provides:

**39 Object of this Subdivision**

The purpose of this Subdivision is to ensure that an approval under Part 9 is **not required** for forestry operations in a region for which a process (involving the conduct of a comprehensive regional assessment, assessment under the *Environment Protection (Impact of Proposals) Act 1974* and protection of the environment through agreements between the Commonwealth and the relevant State and conditions on licences for the export of wood chips) of developing and negotiating a regional forest agreement is being, or has been, carried on.

(Emphasis added.)

1. The term “not required” reinforces the character of Div 4, like the other divisions in Pt 4, as a substitute protection regime for matters of national environmental significance affected by forestry operations. To say that approval, in a legislative scheme as prescriptive and prohibitive as the EPBC Act, is “not required” for a certain kind of action is explained by the existence in the scheme of a recognised substitute protection.
2. Section 40 in this subdivision retains the original formation of the s 38(1) exemption (“a person may undertake…”: see s 40(1)), which is one textual indication telling against placing too much weight on the use of the passive voice in the current form of s 38(1), contrary to the emphasis given to this feature by the applicant. Further, since the active voice is used throughout the other exceptions and exemptions in Pt 4, aside from one matter, I do not consider the Parliament intended any different construction to be given because of the contrasting use of the active and passive voices.
3. That finding is subject to the importance, to which I return below, of the focus of s 38(1) on an RFA forestry operation. The use of the passive voice (“a RFA forestry operation that is undertaken…”) increases the emphasis of the section on the particular “action” for which the exemption is provided. The “action” is the undertaking of a forestry operation, and no wider than that. As I set out below, it is that action – that conduct – which must be “in accordance with” an RFA.
4. Section 42 is a “stand-alone” provision in Div 4. It was the subject of consideration by a Full Court of this Court in *Wilderness Society Ltd v Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175; 166 FCR 154. It is, so to speak, an exception from the exemptions. In other words, it reapplies the effect of the controlling provisions of the EPBC Act to forestry operations in three circumstances. It provides:

**Subdivision C–Limits on application**

**42 This Division does not apply to some forestry operations**

Subdivisions A and B of this Division, and subsection 6(4) of the *Regional Forest Agreements Act 2002*, do not apply to RFA forestry operations, or to forestry operations, that are:

(a) in a property included in the World Heritage List; or

(b) in a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention; or

(c) incidental to another action whose primary purpose does not relate to forestry.

1. It was the third of these circumstances which was in issue in the *Wilderness Society* case.
2. For present purposes, I note that the use of the two alternative phrases “RFA forestry operations” (if the region is covered by a RFA) and “forestry operations (if it is not) confirms that the focus in this entire division is on forestry operations as the “action” for the purposes of the EPBC Act and the definition of “action” in ss 523-524 of the EPBC Act.

## RFAs and the Central Highlands RFA in particular

1. As I have noted above, the NFPS became the basis for the RFA strategy, and it was from this policy basis that negotiations were conducted for the conclusion of these regional agreements.
2. The Central Highlands RFA was concluded on 27 March 1998, well before the commencement of the EPBC Act, but as contemplated by the NFPS. There are three parts to the Central Highlands RFA, and the fact that the agreement makes a clear division between Pt 2 which is expressed not to create legally binding obligations and Pt 3, which is expressed to do so, was a fact emphasised by VicForests and by the interveners. This would appear to be a common feature of RFAs. The Tasmanian RFA considered in *Brown* had the same structure, and the division between obligations expressed to be binding and those expressed not to be was also a factor that the Full Court considered significant in the resolution of the issues in that case: see *Brown* at [44].
3. Part 1 of the Central Highlands RFA is introductory in nature, and contains matters such as definitions. It also provides for amendment of the agreement and dispute resolution procedures. It contains a definition of “forestry operations” that is identical to that which was subsequently adopted in the RFA Act. Clause 5 sets the duration of the Central Highlands RFA at 20 years. The length of the agreement is something to which the applicant points, in terms of supporting its contentions about the critical position of the five-yearly reviews in the regime of the RFA. Clause 7 reiterates the basis of the parties’ agreement as residing in the NFPS:

7. Parties confirm their commitment to the goals, objectives and implementation of the *National Forest Policy Statement (NFPS)* by:

* developing and implementing Ecologically Sustainable Forest Management (ESFM);
* establishing a Comprehensive, Adequate and Representative (CAR) reserve system; and
* facilitating the development of an internationally competitive wood production and wood products industry.

1. VicForests submitted this clause demonstrated the balancing of interests, which is apparent in the RFA and that submission can be accepted. However, I also consider the fact that the Central Highlands RFA reaffirms the parties’ commitments to the objectives of the NFPS, taken together with the analysis of the NFPS I have set out above, indicates that the form of substitute regulation for which the RFA provides is an active and ongoing one, intending to ensure on an adaptive basis that forestry operations are conducted in a manner that delivers the environmental protection and biodiversity conservation objectives to which the NFPS and the EPBC Act refer.
2. Part 2 of the Central Highlands RFA is the Part which is expressed not to give rise to binding obligations between the parties. Clause 16 states:

This Part is not intended to create legally binding relations and provisions in Part 1 in so far as they relate to Part 2 are also not binding. Where there are references in this Part to obligations which are referred to in Part 3 and are intended to be legally binding, they are only included in Part 2 insofar as they provide context and for the sake of completeness so that the whole scheme which the Parties wish to implement is set out in this Part. The inclusion of references to these legally binding obligations in Part 2 does not derogate from the Parties intent that they be legally binding in Part 3.

1. The applicant submits that whatever the RFA might provide as between the parties does not affect the operation of s 38(1) of the EPBC Act. To a more limited extent, the Commonwealth’s submissions also lead to that outcome, as I explain below.
2. Accepting that the distinction between the terms in Part 2 and the terms in Part 3 in relation to enforceability as between the parties is a critical feature of the Central Highlands RFA, that feature does not render the terms of Pt 2 irrelevant to an understanding of how the exemption in s 38(1) operates in the context of RFAs. As is apparent from what I have set out above, there is an inextricable link drawn in the RFA Act between the NFPS, the whole of the contents of RFAs and the circumstances governing the exemption of forestry operations from the controlling provisions of the EPBC Act.
3. The Commonwealth’s written submissions noted cl 23, and it seems to me it tends against the applicant’s construction. Clause 23 is contained in Pt 2, that is in the Part said not to create legally binding relations between the parties. It provides:

The Commonwealth, in signing the Agreement, confirms that its obligations under the *Environment Protection (Impact of Proposals) Act 1974* have been met. The Commonwealth also confirms that, under the administrative procedures of the Act, any activities covered by the Agreement, including the 5 yearly review and minor amendments to the Agreement, will not trigger further environmental impact assessment.

1. Clearly, and taking into account this agreement was made in 1998, the reference to the EPIP Act might be said to render cl 23 of little ongoing utility. However, what it does confirm is the parties’ intention that there be a substitute system of regulation that removes the need for ongoing environmental assessments under federal legislation, notwithstanding the outcomes of the five-yearly reviews. The substitute system is to remain a self-contained one. The express intention that the five-yearly reviews under cl 36 are not to trigger any further environmental impact assessment, might be defeated if the applicant’s contentions were correct. It is not a matter of great weight, but the presence and text of cl 23 does seem to me to tend against the applicant’s arguments.
2. Clauses 24 and 25 provide:

24. The Commonwealth, in signing the Agreement, confirms that its obligations under the *Endangered Species Protection Act 1992* have been met.

25. The Commonwealth notes that its obligations to promote endangered species protection will involve ongoing cooperative work with Victorian agencies concerning the Central Highlands.

1. Two matters can be observed about these provisions. First, the parties intend the terms of the Central Highlands RFA to deal with the protection of threatened species. Otherwise, cl 24 would be irrelevant. Second cl 25 expressly deals with “ongoing cooperative work”, which does not suggest that the RFA is intended to provide any fixed or static arrangements as at 1998. That the agreement is intended to deal with an adaptive, dynamic situation whereby the management of forestry operations may well need to change in order to respond to environmental considerations (including, for example, changes in threat levels, habitat destruction or changes in the endangered status of particular species) can also be seen from the text of cl 33 which provides, in part, that:

Victoria also confirms its commitment to the ongoing implementation of its plans, codes and prescriptions relevant to the achievement of ESFM.

1. ESFM is defined in cl 2:

"Ecologically Sustainable Forest Management" or "ESFM" means forest management and use in accordance with the specific objectives and policies for ecologically sustainable development as detailed in the National Forest Policy Statement.

1. Clause 40 in Pt 2 records the parties’ agreement that Victorian processes and systems existing at the time of the Central Highlands RFA “provide for ecologically sustainable management of forests in the Central Highlands and that these processes and systems are accredited in clause 47 of this Agreement”. There are four components of the Victorian regulatory system which are accredited under cl 47. It is worthwhile noting them, in particular because some of them directly affect the conduct of forestry operations and are the subject-matter of the RFA that the Commonwealth contends is (at least) capable of affecting the operation of the exemption in s 38(1) of the EPBC Act. The four components of the accredited Victorian system in cl 47 are:

* the Forest Management Plan and the process for its review;
* the *Flora and Fauna Guarantee Act 1988* [(Vic)];
* the process for forecasting sawlog sustainable yield in the Central Highlands; and
* the systems and processes established by the Code of Forest Practices for Timber Production and the Code of Practice for Fire Management on Public Land.

1. The last component bears directly on the conduct of forestry operations in the Central Highlands RFA region. The provisions of theFlora and Fauna Guarantee Act are also capable of having a direct bearing on the conduct of forestry operations.
2. The key provision on which the applicant relies to contend the exemption in s 38(1) of the EPBC Act is inapplicable is cl 36 of the Central Highlands RFA. Clause 36 states:

Within each five year period, a review of the performance of the Agreement will be undertaken. The purpose of the five yearly review is to provide an assessment of progress of the Agreement against the established milestones, and will include:

* the extent to which milestones and obligations have been met including management of the National Estate;
* the results of monitoring of sustainability indicators; and
* invited public comment on the performance of the Agreement.

Each review will be scheduled concurrent with the five yearly reviews required for the East Gippsland RFA.

1. It is convenient here to set out the applicant’s submissions about the role and function of cl 36 in the Central Highlands RFA. The applicant submits that, as an agreement spanning a 20-year period, the Central Highlands RFA is intended to be a substitute mechanism providing for protection of environmental values, otherwise provided for under the EPBC Act. Just as the scheme of the EPBC Act envisages additions to the threatened species list, changes in the status of threatened species, and review of recovery plans, so too the Central Highlands RFA contains clauses that envisage such changes: for example, the applicant submits, cl 48 and cl 57.
2. The applicant submits the five-yearly reviews enable threatened species developments, progress against RFA milestones and public comment to occur at regular intervals. If necessary, there can then be changes to the RFA as cl 37 contemplates, or amendments to Attachment 2. The applicant submits the five-yearly reviews will consider the results of monitoring of the “sustainability indicators”, which Victoria was required to establish under cl 48 – 50 of the Central Highlands RFA and which, in fact it has established. The “Criteria and Indicators for Sustainable Forest Management in Victoria” is an agreed document tendered as part of the evidence on the separate question, in its full version and also in a summary version prepared and published by the State of Victoria. The document includes indicators such as the “status of forest dependent species at risk of not maintaining viable breeding populations” (Indicator 1.2a) and the area of “habitat available for forest dependent indicator species” (Indicator 1.2b), to take two examples of relevance to the Greater Glider and the Leadbeater’s Possum.
3. The milestones to which cl 36 refers are set out in Attachment 4 to the Central Highlands RFA. They should be set out in full.

**MILESTONES**

|  |  |  |
| --- | --- | --- |
| **Clause** | **Action** | **Timeline** |
| 44 | Victoria to implement an on-going quality assurance program | 2000 |
| 45 | Victoria to complete and publish regional prescriptions for timber production | December 1998 |
| 45 | Victoria to complete and publish management plans for all National and State Parks | December 1998 |
| 45 | Victoria to implement the Integrated Forest Planning System and the Statewide Forest Resource Inventory | 2001 |
| 50 | Victoria and the Commonwealth to develop sustainability indicators | 2002 |
| 57 | Victoria and the Commonwealth to undertake and where relevant complete threatened species work as detailed in Attachment 2 | 2002 |
| 59 | Victoria to develop programs for pest plant and pest animal control | 2003 |
| 65 | Victoria to publish a Central Highlands Forest Management Plan | 30 June 1998 |
| 82 | Victoria to complete a review in accordance with the Competition Principles Agreement | 1999 |
| 81 | Victoria will report on progress of the development of a long term timber harvesting and water production strategy for the Thomson Reservoir catchment. | 2002 |
| 86 | Victoria and the Commonwealth will develop a schedule to the Statewide data agreement and lodge archival copies of data | September 1998 |
| Att 1 | Victoria to assess endangered, vulnerable or rare EVCs on Melbourne Water Corporation Lands | 2002 |
| Att 1 | Victoria to prepare Regional Vegetation Plans covering the Central Highlands which provide for the protection of endangered, vulnerable or rare EVCs on private land | 2001 |
| Att 1 | Victoria to publish a Technical Report on Rainforest | 1998 |
| Att 3, cl 5 | Victoria and the Commonwealth to prepare Statewide Cultural Heritage Guidelines | December 1999 |

The milestones in this Attachment should be read in conjunction with the relevant clauses in the Agreement.

1. The applicant particularly emphasised the milestone linked to cl 57 of the Central Highlands RFA. It submitted that the phrase “threatened species work” meant actual conduct: that is, taking steps set out in recovery plans, not merely issuing a recovery plan. I do not agree. In my opinion the cross-reference to the matters in Attachment 2 indicates that what is meant by “threatened species work” in the “Milestones” table is the preparation of action plans and recovery plans, adapting and adjusting them as new information arises about identified species, and if necessary issuing new action statements and recovery plans for species that have been more recently included in one of the threatened species categories. I also consider it includes review, adjustment and modification of prescriptions for forestry operations so as to ensure protection of threatened species and their habitat from forestry operations. It is the content of the regulatory outcome of this “work” – the action statements, recovery plans and management prescriptions, which will govern the conduct of forestry operations.
2. That construction is consistent with the construction I prefer in relation to s 38(1). The actual conduct of forestry operations (being an action for the purposes of the EPBC Act) must be undertaken in accordance with the contents of the Central Highlands RFA – that is, in compliance with any restrictions, limits, prescriptions, contents of the Victorian Code of Practice for Timber Production – in order to secure the benefit of the exemption in cl 38(1). In contrast, cl 57 of the Central Highlands RFA commits the State of Victoria to undertake its “threatened species work” in the preparation of new action statements, recovery plans and new or modified timber harvesting prescriptions, but that is a task it assumes vis-a-vis the Commonwealth. This is an intergovernmental term. It is not part of the conduct of forestry operations, and so compliance or non-compliance with cl 57 and the milestones in Attachment 4 have no effect on the availability of the exemption in cl 38(1).
3. Clauses 37 and 38, which are consequential provisions dealing with what should occur after a five-yearly review, provide:

37. While the review process will not open up the Agreement to re-negotiation, both Parties may agree to some minor modifications to incorporate the results of the review.

38. The outcomes of the review will be made public. The mechanism for the review will be determined by both Parties before the end of the five year period and the review will be completed within three months.

1. There are a series of specific provisions dealing with threatened flora and flora in the Central Highlands RFA region, commencing with cl 54. That clause records the parties’ agreement that the statutory regulatory framework at state and federal level provides for the protection of rare or threatened flora and fauna species and ecological communities. Clause 55 deals with an agreement to adopt a coordinated approach to action statements or recovery plans where flora or fauna are covered by both state and federal protection regimes. Clause 56 extends this agreement to cooperate with other governments, where recovery plans extend beyond Victoria’s boundaries.
2. Clause 57 is important and should be set out in full:

Parties will continue to consult on the priorities for listing threatened species, ecological communities and threatening processes, and the preparation of Action Statements and Recovery Plans, recognising that priorities can change in the light of new information. Currently agreed priorities and commitments for the next five years are outlined in Attachment 2.

1. In its oral submissions, the Commonwealth used cl 57 as an example of a clause in the RFA which, when the two sentences it contains are read together, may be capable of resulting in the exemption in s 38(1) not applying to RFA forestry operations. That, the Commonwealth submits, is because of the content of Attachment 2 to the RFA, to which cl 57 refers.
2. As cl 57 indicates, Attachment 2 to the Central Highlands RFA sets out the parties’ agreed priorities and commitments for the protection of threatened species, ecological communities and threatening processes.
3. One of the former pieces of federal legislation, the *Endangered Species Protection Act 1992* (Cth) contained a definition of this term in s 4:

“***threatening process***” means a process that threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community.

1. The Endangered Species Protection Act also contained a list of “key threatening processes” in Schedule 3.
2. The term “threatening processes” now has a very similar defined meaning in the EPBC Act. Section 188(3) provides:

(3) A process is a ***threatening process*** if it threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community.

1. Attachment 2 contains a list of what is described as the “priority species” and ecological vegetation classes under Victoria’s Flora and Fauna Guarantee Act. It then sets out what are described as “priority potentially threatening processes” under the same Act for preparation of action statements. The first is loss of hollow bearing trees – a threat relevant to both species in issue in this proceeding because both use tree hollows, and as a process obviously relevant to the conduct of forestry operations. So much is evident from the information in the conservation advices for each species, which were agreed documents on the separate question. It is possible to see how other identified threatening processes (such as the use of phytophthora-infected gravel in the construction of roads) could also be relevant to the conduct of forestry operations.
2. Attachment 2 then nominates phytophthora as a priority for the preparation of a threat abatement plan. In [4] it sets out a number of flora and fauna species which are identified as priority species for the preparation of action statements and recovery plans.
3. Specific and detailed arrangements and prescriptions are then set out for the protection of the Baw Baw Frog and its habitat in the Central Highlands RFA region, by what is described as an “interim strategy”. It is clear from the content of this interim strategy that what is in the RFA was intended to operate in much the same way as management prescriptions under the state’s Code of Practice for Timber Production might operate. For example, the interim strategy includes:

…

Until research and survey results are available, so as not to foreclose any long-term protection strategies, the Victorian Department of Natural Resources and Environment will adopt a precautionary approach above the 1000 m contour surrounding the Baw Baw plateau by:

* scheduling new coupes only in areas determined not to contain Baw Baw Frog habitat; and
* minimising fragmentation of Baw Baw Frog habitat by utilising existing roads wherever possible.

Where timber harvesting above the 1000 m level on the Baw Baw plateau is proposed prior to the results of the survey and research, the interim strategy provides for:

* training of field staff in the identification of potential breeding habitat;
* field survey, prior to harvesting, to confirm presence/absence of the species;
* protection of identified breeding habitat and associated interim protection zone of up to 200 m; and
* access for timber harvesting under standard prescriptions only in areas not containing potential habitat.

1. This portion of Attachment 2 also notes that Victoria will revise the Action Statement for the Baw Baw Frog by 1999. The following statement is then made:

This strategy is designed to ensure that viable populations of the Baw Baw Frog persist in the long term.

1. The example of the way the Central Highlands RFA deals with the Baw Baw Frog is instructive. As I noted earlier, an RFA is the conclusion of a federal environmental assessment process, whereby a State’s regulatory system, and reserve system, are “accredited” by the Commonwealth as providing sufficient environment protection and biodiversity conservation to meet the Commonwealth’s various international obligations as expressed (now) in the EPBC Act, and to meet the objectives of the EPBC Act.
2. Plainly, at the time the Central Highlands RFA was concluded, Victoria’s forest management systems were assessed by the Commonwealth as not providing sufficient protection for the Baw Baw Frog from forestry operations. The State’s substitute regime was insufficient, so express protections were written into the RFA itself. By the statements I have extracted at [166] and [167], the parties did not apprehend Victoria’s protection measures for the Baw Baw Frog would remain static, or remain inadequate. Victoria was to take steps to improve its own regulatory system to protect the Baw Baw Frog from forestry operations in the Central Highlands RFA region. If that occurred, then the new content of that regulatory system would have effect under the Central Highlands RFA, and be part of the system governing forestry operations for the purposes of s 38(1) and s 6(4). If it did not occur, the express terms of the RFA set out the steps the Commonwealth had assessed were necessary as at 1998 for the protection of the Baw Baw Frog, and to which forestry operations would need to conform.
3. Although I return to this point below, I note here that I accept the Commonwealth’s submissions that cl 57 and Attachment 2 provide appropriate examples of how the exemption in s 38(1) is intended to operate. It is not intended to operate, for example, on whether or not Victoria in fact did revise the action statement for the Baw Baw Frog by 1999. That conduct by the State of Victoria is, first, unlikely to be the taking of an action of the purposes of the EPBC Act, and secondly is certainly not the undertaking of forestry operations. In contrast, some of the matters I have extracted at [166] above (scheduling new coupes, timber harvesting) may constitute the taking of an action for the purposes of the EPBC Act and/or the undertaking of forestry operations. Those matters are intended by the RFA to regulate how forestry operations are undertaken, and how actions in connection with (or preparatory to) forestry operations are to be undertaken. They do so for the purpose of protecting and conserving the Baw Baw Frog and its habitat, the Baw Baw Frog being a listed threatened species.
4. At the start of Attachment 2, the parties to the Central Highlands RFA state that there is already in existence an Action Plan for the Leadbeater’s Possum under the (then) Endangered Species Protection Act. The existence of that Action Plan meant the parties did not need to spell out in the Central Highlands RFA itself any “interim strategy” as they did for the Baw Baw Frog. A concluded and approved strategy for the Leadbeater’s Possum existed, and the Commonwealth was prepared to accredit the Victorian system on the basis this federal action plan would be observed where (and if) its contents were relevant to the conduct of forestry operations.
5. Some of the content of the current equivalent in Victoria, in terms of an Action Statement, is apparent in the conservation advice which was an agreed document on the separate question. At page 13 of the Conservation Advice, the following statement is made about the Victorian Action Statement for Leadbeater’s Possum in existence at the time of the conservation advice:

A revised Action Statement under the *Victorian Flora and Fauna Guarantee Act 1988* for Leadbeater’s possum was approved and released in August 2014 (DEPI, 2014). This Action Statement sets out what is intended to be done by the Victorian Government to conserve and manage the species. Action Statements are designed to apply for three to five years, after which time they will be reviewed and updated. The Action Statement (DEPI, 2014) for Leadbeater’s possum notes further specific reductions in harvesting activities relative to Leadbeater’s possum ‘potential habitat’ (‘potential habitat’ = ‘suitable forest’). These include:

* that all future harvesting activities, including thinning and the construction of new roads, are to be excluded from the timber harvesting exclusion zone around *[verified]* colonies\* *[i.e. 200m radius]*;
* harvesting activities will be excluded from within 100m of modelled old growth ash forests;
* protection from harvesting activities for at least 30 per cent of ash forest (approximately 274 ha) to develop old growth forest;
* additional exclusions with a 200 metre radius (Special Protection Zones) will be established around all verified records of colony sites from the 15 years prior to February 2014, and all new records once the record is verified;
* harvesting will be delayed for two years in areas where modelling (Lumsden et al., 2013) predicts a greater than 0.65 probability of being occupied by Leadbeater’s possum. Should Leadbeater’s possums be confirmed to occur following surveys *[presumably undertaken across these areas within the two year timeframe?]*, these sites will be confirmed sites and zoned as Special Protection Zones.

\* colonies are required to be verified to a standard developed by DEPI.

1. The parallels with the “interim strategy” for the Baw Baw Frog contained in the Central Highlands RFA are apparent. The matters set out in the dot points are specific prescriptions applicable to the conduct of forestry operations. Insofar as those forestry operations occur within the Central Highlands RFA, by reason of cl 57 and Attachment 2, it is these kinds of management prescriptions which are intended by the RFA Act and the EPBC Act to be the substituted regulatory scheme, removing the need for any assessment and approval under the controlling provisions of Pt 9 of the EPBC Act.
2. Clause 58 provides yet another example of the contrasting outcomes of the various constructional choices about s 38(1). Clause 58 provides:

Parties reaffirm their commitment that species in the Central Highlands for which Recovery Plans or Action Statements have already been prepared will have all recommended actions completed or significantly advanced in accordance with the timelines specified in the Recovery Plans or Action Statements.

1. On the applicant’s construction, the parties’ agreement to implement or be significantly advanced towards implementing all recommended actions in recovery plans or action statements may be capable of imposing an obligation, non-compliance with which could deprive any forestry operations of the benefit of cl 38(1). I do not accept that is the case. However, as the Commonwealth submitted, insofar as any of those action plans or recovery statements themselves contain prescriptions or limitations on the manner in which forestry operations may be conducted in the Central Highlands RFA region, then in order to secure the benefit of s 38(1) forestry operations must be undertaken in compliance or conformity with those prescriptions or limitations. In that way, the regulatory purpose of the EPBC Act over matters of national environmental significance is preserved, but on the basis of agreed and accredited arrangements at an intergovernmental level, which is what Div 4 of the EPBC Act intends to achieve through a variety of mechanisms, regional forest agreements being but one.
2. Clauses 60–66 of the Central Highlands RFA deal with the reserve system contemplated by the NFPS. The CAR Reserve System (CAR is the acronym for “Comprehensive, Adequate and Representative”) was the cornerstone of the NFPS and is a core aspect of the RFA strategy. As cl 61 indicates, an RFA will identify through mapping those parts of an RFA region which the parties have agreed will form part of the CAR Reserve System.
3. Attachment 1 to the Central Highlands RFA sets out how the CAR Reserve System is intended by the parties to operate. Its general operation is described thus:

The National Forest Policy Statement (NFPS) established that the CAR Reserve System will in the first instance be selected from public land. Provision is also made in the JANIS Reserve Criteria for inclusion of private land in the CAR Reserve System, with the agreement of landholders, where the Criteria cannot be met from public land.

1. Attachment 1 then goes on to describe the nature and extent of the CAR Reserve System on public land in the Central Highlands RFA region. It sets out three components to the Reserve System:

The CAR Reserve System has the following three components, as described by the JANIS Reserve Criteria:

1. Dedicated Reserves. This comprises reserves established through legislation for conservation purposes such as National Parks, State Parks and Flora and Fauna Reserves.
2. Informal Reserves. This comprises elements of the Special Protection Zone (SPZ) in State forest and other areas of public land.
3. Values protected by Prescription. This comprises those elements of SPZ protected by regional prescriptions, including stream buffers and rainforest with a surrounding buffer.
4. Attachment 1 then refers to a map which indicates the dedicated and informal reserves. The latter, as the RFA states, includes what are called “special protection zones” within State forest: that is, these zones occur in what is otherwise forest that can be the subject of forestry operations, unlike a dedicated reserve.
5. The category of reserve in paragraph iii is critical to an understanding of how the Commonwealth submits s 38(1) operates in practice, a submission with which I agree. It will be seen that what is reserved is not a fixed and identifiable geographic area, but rather “values” that are protected by prescription. Prescriptions, as the extracts from the conservation advice to which I referred above reveal, are rules and restrictions which control the conduct of forestry operations. The example given in paragraph iii illustrates this proposition: a buffer (from forestry operations) around a stream is one kind of prescription. The “value” being protected is the habitat created by the stream. The “protection” is achieved by the imposition of a buffer between an area that can be logged and the stream. Obviously the size and location of any buffer will be specific to each stream and to each prescription. As a subsequent paragraph in Attachment 1 clearly states, “other areas protected by prescription are also included in the CAR Reserve System”.
6. Compliance with these prescriptions is required for the benefit of the exemption in cl 38(1). If that were not the case, then the subject matter intended to be protected by the Central Highlands RFA would not, in fact, receive any protection. A person or entity conducting a forestry operation could point to the mere existence of the Central Highlands RFA, and that would be enough. That is not the outcome s 38(1), in the context of the entire scheme and purpose of the EPBC Act, is intended to produce. Rather, it is intended to produce an outcome whereby those protections agreed at an intergovernmental level are those which will govern the conduct of forestry operations in an RFA region, enforceable if need be through the unavailability of the s 38(1) exemption.
7. As the Commonwealth submits, another example of a specific clause that is intended to regulate, at a practical level, the conduct of forestry operations, is cl 66 which provides:

Parties recognise that all Victorian rainforest is protected from harvesting through the range of mechanisms described in Attachment 1.

1. Attachment 1 is highly specific about how rainforest in the Central Highlands RFA region is to be protected. It states:

All rainforest in Victoria, including a surrounding buffer, is excluded from timber harvesting.

1. This is an absolute protection which the Commonwealth submits s 38(1) is intended to ensure is met by the use of the words “in accordance with”. On one view of VicForests’ construction, large or small areas of rainforest in the Central Highlands RFA region could be subject to clear felling and even the Commonwealth Minister (let alone a person in the applicant’s position) would be powerless under the EPBC Act to stop that action. The only federal remedy would be the complex and drawn out process of terminating the RFA, by which time the damage to the rainforest is done. Such an approach renders the scheme of the EBPC Act ineffective. It is unclear whether VicForests would concede these are forestry operations “prohibited” by the RFA so as to be outside the definition of “RFA forestry operation” and outside the s 38(1) exemption.
2. Attachment 1 goes on to set out in detail how the RFA parties intend to ensure rainforest stands are to be protected from timber harvesting. It states:

Rainforest stands are protected through all CAR Reserve components. Protection through the prescription component is effected through implementation of the Code of Forest Practices for Timber Production. The key elements of the Code with respect to rainforest conservation include:

* defined areas of rainforest, and a strategy for their management, included as part of planning for conservation of flora and fauna in Forest Management Plans and/or relevant prescriptions. The most important rainforest areas should be accorded highest protection;
* in the absence of detailed strategies within an approved Management Plan, prescriptions are provided for stands of lesser significance, for stands where *Nothofagus* makes up >20% of the canopy, and for stands containing nationally significant rainforest;
* the requirement that rainforest be identified on each coupe plan and that buffers be identified in the field;
* the protection of buffers from damage caused by trees felled in adjacent areas.

In accordance with the Code, the Central Highlands Forest Management Plan outlines a strategy for the management of rainforest in State forest.

1. The cross-reference to the Victorian Code of Forest Practices for Timber Production is important, as the Commonwealth’s submissions recognised. The specific and practical regulation of timber harvesting is intended by the Central Highlands RFA parties not only to be found in the text of the Central Highlands RFA itself, but by these kinds of cross-references to the prescriptions, limits and practices set out in Victorian forest management instruments. It is that system of regulation which has been accredited by the Commonwealth as a sufficient system of protection to justify the grant of an exemption from any federal assessment and approvals process for each set of forestry operations that might otherwise be likely to have a significant impact on a matter of national environmental significance. However the underlying premise is that the State system of protection and prescription will be complied with.
2. I turn now to Pt 3 of the Central Highlands RFA. This is the part expressed as intended to impose binding obligations on the parties. The Commonwealth also submits that there may be parts of Pt 3 which, if not complied with, could also deprive forestry operations of the benefit of the s 38(1) exemption. It refers as an example to cl 88 which provides:

**Forest Management**

88. Victoria will:

88.1. Complete and publish regional prescriptions for timber production by the end of 1998;

88.2. Implement the Integrated Forest Planning System and the Statewide Forest Resource Inventory (SFRI) in the Central Highlands in time for the next review of sustainable yield due in 2001;

88.3. Publish future reports of audits of compliance with the Code of Forest Practices for Timber Production;

88.4. Review legislation and policies relevant to the allocation and pricing of hardwood logs from State forest as part of the Competition Principles Agreement before the end of 1999;

88.5. Use its best endeavours to complete and publish management plans for all National and State Parks by the end of 1998.

1. In my opinion, a submission that non-compliance with cl 88 could result in forestry operations not being undertaken “in accordance with” the Central Highlands RFA would need further development to be sustained. At an impressionistic level, this clause seems to me to fall more closely into the category of cl 36, on which the applicant relies. I accept a key difference is that cl 88 appears in Pt 3 and cl 36 appears in Pt 2. But that distinction, in my opinion, says more about the rights of the parties, between themselves, than it does about the operation of s 38(1) of the EPBC Act. Certainly at an impressionistic level cl 88 is not as easily seen as forming part of the practical regulation of the conduct of forestry operations in the Central Highlands RFA region. It is not necessary for me to express a concluded view on this matter, but it is appropriate to note my preliminary impression that a clause such as this, dealing with a matter the State of Victoria has agreed to do, in its governmental capacity, is quite different from a clause that expressly addresses itself to how forestry operations are to be conducted, on the ground so to speak, in the Central Highlands RFA region.
2. Most of Pt 3 is occupied with terms relating to compensation payable by the Commonwealth to the State where the Commonwealth takes an action to provide further or additional protection to land within the Central Highlands RFA region so as to protect CAR values, National Estate values, World Heritage values, or Wild Rivers so that a “foreseeable or probable consequence” of such action is to prevent or substantially limit the land available for forestry operations, the sale of wood or mining products, or the construction of roads. In other words, the terms of this clause (cl 90) recognise that in the Central Highlands RFA the parties have agreed to the nature and scope of the limits on land use so that the Commonwealth can fulfil its national and international obligations in relation to the protection of matters of national environmental significance, and if there is to be any extension of these limits by the Commonwealth, and the State can show some harm may result, the Commonwealth may have to compensate the State. The relevance of these compensation provisions to the current constructional choice is, again, to emphasise the nature of the RFA as a substituted, protective regime for matters of national environmental significance. It is not a quarantining of areas of land from the need to protect matters of national environmental significance, but rather a substituted system which can be enforced.
3. The second major component of Pt 3 is the termination regime. This component is only of slight relevance to the question before the Court. The conduct set out in cl 92 as conduct justifying termination of the RFA is, in my opinion, an intergovernmental matter not intended by the parties, nor by the schemes of the EPBC Act and the RFA Act, to affect the availability of the exemption in s 38(1) and s 6(4).

### The Victorian regime in place in 1998

1. As the Commonwealth notes in its submission, at the time the Central Highlands RFA was concluded, and as the NFPS contemplated, there was in existence a regime under Victorian law for the protection and conservation of flora and fauna, and for the regulation of forestry operations. This included the *Conservation, Forests and Lands Act 1987* (Vic), the *Forests Act 1958* (Vic) and the Flora and Fauna Guarantee Act.
2. There was also, as the Central Highlands RFA identified (see Attachment 2), a Recovery Plan in existence for the Leadbeater’s Possum under the Endangered Species Protection Act. It is not to be supposed that the Commonwealth intended, in agreeing to the Central Highlands RFA, to abandon any supervision of the conservation measures and protections set out in that recovery plan in a region where the Leadbeater’s Possum had significant habitat. Rather, it entrusted conservation and protection to the Victorian regime, on the premise that if complied with, forestry operations would not be likely to have any significant impact on such a species, and could be exempted from the EPBC Act regime.

# Key factors

1. The key factors that have led me to the conclusion I have reached are the following:

* textual considerations in s 38(1), especially the use of the phrase “in accordance with”; and the focus of the provision on forestry operations;
* context: in particular the place of Div 4 (Forestry operations) within Pt 4 of the EPBC Act;
* purpose: which construction best promotes the purpose and objects of the EPBC Act;
* the scheme of the EPBC Act;
* the consequences of the competing constructions;
* why cl 36 of the Central Highlands RFA is not a compliance provision;
* consistency of the chosen construction with *Brown*; and
* the fact that the text, context and purpose of the RFA Act is consistent with this construction.

1. Many of these matters can be expressed in summary form, because I have addressed them above, where I set out the schemes of the EPBC Act, the RFA Act and the Central Highlands RFA.

## Text

1. Of s 38 itself, read in the context of the remainder of Div 4 of Pt 4, and Pt 4 more generally, the following propositions can be made:
   1. As I have found, although the provision uses the passive voice, it is clear that the phrase “RFA forestry operation that is undertaken…” is intended to have the same meaning as those other EPBC Act provisions which state that “a person may take an action…”. The only difference is that s 38(1) is limited in its operation to actions which fall within the definition of forestry operations, rather than using the statutory phrase “action”. The explanation for the different language, in my opinion, stems only from the fact that the current version of s 38(1) was introduced through a separate piece of legislation (the RFA Act), but no different meaning was intended.
   2. Similarly, the use of the phrase “Part 3 does not apply...” in s 38(1), rather than “a person may take an action described in a provision of Part 3 without an approval under Part 9”, being the formulation used elsewhere in Pt 4 (see e.g. s 37M) is not intended to have any different meaning because of the difference in the textual formulation. That is not to gainsay the usual approach to construction of striving to give meaning to every word used: see *Commonwealth v Baume* [1905] HCA 11; 2 CLR 405 (Griffiths CJ) at 414 and more recently *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) at [39]. Rather, it simply reflects the drafting choice made in s 6(4) of the RFA Act, which was then adopted through the amendments to s 38(1) of the EPBC Act. Whichever textual formulation is used in Pt 4, in my opinion the effect is the same: the prohibitions in Pt 3 will not apply (and nor will the controlled action provisions in Pt 9 of Ch 4) if the action is compliant or in conformity with the substituted regulatory regime identified in the agreement or instruments to which Pt 4 applies.
   3. The use of an RFA as integral to the scope of the action which is exempted by s 38(1) does mean, as VicForests submitted, that there is a geographical aspect to the exemption. However, if the geographical criterion were all that s 38(1) required, it could simply state:

Part 3 does not apply to an RFA forestry operation.

* 1. There is also a substantive aspect to the exemption, as the Commonwealth submits. That is the function performed by the second part of s 38(1) – “in accordance with an RFA”.
  2. I accept VicForests’ submissions, not disputed by the applicant or the interveners, that the picking up of the definition of RFA forestry operation from s 4 of the RFA Act means that any forestry operations prohibited, in terms, by an RFA, will not be covered by the s 38(1) exemption. A possible example, although I did not understand either party or the interveners to identify it in this way, might be the prohibition on timber harvesting from rainforest, contained in Attachment 1 to the Central Highlands RFA. Nevertheless, I do not see the contemplated capacity of an individual RFA expressly to prohibit particular forestry operations as impacting on the general construction and operation of s 38(1). A principal reason is that any such prohibition would be fixed at the time of the conclusion of the RFA (here, for example in 1998), whereas, as I explain below, the impacts of forestry operations on matters of national environmental significance will change over time, and the capacity of the scheme to respond and adapt to changed circumstances – through the CAR Reserve Systems and management prescriptions – is, I consider, a core aspect of the regulatory process established by the Act, and contemplated to regulate on an ongoing basis the conduct of forestry operations. That is especially so where, as here, the evidence shows that the reviews required by the Central Highlands RFA have not occurred as the terms of the RFA contemplate they would, and no amendments have been made to the agreement itself. Express prohibitions in an agreement made in 1998, in terms of active and effective protection and conservation of matters of national environmental significance, while of some utility if applicable to ongoing circumstances likely to be encountered in timber harvesting, would be no substitute at all for the regulation provided by the controlling provisions of the EPBC Act.

1. The applicant also sought to draw from the use of the passive voice in s 38(1) the proposition that it did not matter that VicForests was not responsible for the five-yearly reviews under cl 36, because the text of the provision does not require an actor to have ensured compliance with an RFA. It simply requires there to have been compliance. This textual argument must be rejected. For the reasons I have set out above, the textual difference does not result in s 38(1) being given any different meaning and operation from the other exemption in Pt 4 of Ch 2 of the EPBC Act. More importantly, for the reasons I set out below, the focus of s 38(1) is on the actual conduct of forestry operations and it is in that context that the use of the passive voice in s 38(1) must be understood. The result is that the focus is on the compliance of the actor (the person carrying out the action) with what is required, and what is prohibited, by an RFA, in the conduct of forestry operations.

### The focus on forestry operations in cl 38(1) and s 6(4)

1. I consider this to be one of the most important factors in the correct constructional choice. Textually, the link drawn by s 38(1) is between the conduct of forestry operations and the requirements of an RFA. That is to be expected, as I have set out earlier in these reasons, because the forestry operations are the “action” which the EPBC Act seeks to regulate, so as to avoid significant impact on any matter of national environmental significance. Although the subject matter of the RFA Act is only RFAs, the subject matter of the EPBC Act is quite different. As I noted above in discussing the objects of the EPBC Act, the sole focus of the Act is on environmental protection, biodiversity conservation and ecologically sustainable development in respect of matters of national environmental significance. The EPBC Act regulates the taking of actions (that term being defined in the broadest of ways) so as to advance those objects. As s 3(2) demonstrates, the scheme contemplates a variety of kinds of regulation, not only directly through the controlling provisions of the EPBC Act. Whatever the method of regulation, the objectives do not change.
2. Once the focus is set on the taking of an action (the undertaking of forestry operations), then the meaning of the substantive limb of s 38(1) becomes clear – the taking of the action (that is, the actual conduct of the person or entity) must be “in accordance with” the RFA. The correlation to be found is between what the RFA requires by way of regulation of the taking of actions, and the conduct of the person or entity concerned. There is no additional correlation between what the RFA requires of the parties to it, or by way of policy or planning, and the taking of the action.
3. As the Commonwealth submits, aside from the very character of an RFA, there is nothing in the text of s 38 which directs the reader to the state of compliance with RFA obligations as between the State concerned, and the Commonwealth. Rather, the reader is directed to how the forestry operations are to be undertaken, by whomsoever is to undertake them.
4. Section 6(4) has the same focus, but that fact is less revealing since the RFA Act is solely concerned with forestry operations. Aside from its contribution by way of the legislative history to an understanding of how s 38(1) ended up in the form it did, and to an understanding of the general framework for the operation of RFAs, s 6(4) of the RFA Act does not provide much assistance in resolving the constructional choices. Ultimately those choices are resolved by the terms of the EPBC Act.

### The use of “in accordance with” in this legislative scheme and in s 38(1)

1. The phrase “in accordance with” can be susceptible to different meanings in different statutory contexts. VicForests submitted “in accordance with an RFA” meant “conducted under an RFA”, accepting the premise that the operations must be in a region covered by an RFA. VicForests resisted the contention that the phrase connoted compliance with the content of an RFA, although as I have noted, VicForests did accept that if any forestry operations were expressly prohibited by an RFA, the s 38(1) exemption would not apply to those forestry operations. That concession does not sit easily with VicForests’ contended meaning for the phrase.
2. The applicant, and the interveners, all submitted the phrase “in accordance with” meant “consistently with”, “in conformity with” or “in compliance with”. They submitted that was also how the phrase was used elsewhere in the Act. I agree.
3. The applicant and interveners referred to authorities dealing with other statutory schemes where the phrase has been given a meaning that carries with it the need for more than a connection between two matters, but rather a need for conduct to be compliant. The applicant relied on *Ramsay v Sunbuild Pty Ltd* [2014] FCA 54; 221 FCR 315, a decision dealing with the use of the phrase in ss 501 and 502 of the *Fair Work Act 2009* (Cth)*,* where the phrase was held (at [95]-[96], Reeves J) to mean “in conformity with”, or “consistently with”. The applicant also relied on *Re LA* (1993) 41 FCR 151, where Gray J – again in an industrial context – held (at 158) that the requirement in reg 98(1)(a) of the *Industrial Relations Regulations 1989* (Cth), that an application to the Federal Court be made “in accordance with Form 11” meant the application had to be made “in complete agreement with” the Court’s form. The State relied on *Ramsay v Sunbuild* and *Re LA*, referring also to *Walker v Wilson* [1991] HCA 8; 172 CLR 195 at 208, where Deane, Dawson, Toohey and McHugh JJ gave the phrase the same meaning.
4. The State submitted in writing that the phrase should not be understood, in the context of the EPBC Act, as indicating that “strict compliance” with the terms of an RFA is required. It relied on the case of *Ex parte Hestelow; Re Claye* (1967) 87 WN (Pt 1) (NSW) 184 (Jacobs JA). I do not consider that case to be of great assistance. It concerned an attempt by an objector to compel a Mining Warden to reject an application for mineral prospecting on certain land in NSW, on the basis of a claimed prior interest in the land subject to the application. There was a provision in the *Mining Act 1906* (NSW) (s 70E) which could offer some protection to the objector, provided the objector had lodged a plan “in accordance with the provisions of the *Coal Mines Regulation Act 1912*”. The objector’s plan had not been lodged within the timeframe set out in those regulations. Jacobs JA of the NSW Court of Appeal nevertheless accepted the plan was lodged “in accordance with” the regulations, finding the Act did not require strict compliance with the time limit in the regulations for the plan to be lodged “in accordance with” the regulations. The reasoning of the Court was based on the purpose of the protective provision, which their Honours found was not a purpose that sought to restrict itself to situations only where there had been strict compliance with a time stipulation for the lodging of a plan. *Hestelow* is an illustration of the importance of context and purpose, no more than that. Relating as it did to a time limit, it has no correlation to a wide ranging exemption from a detailed and prescriptive regime, which is the character of s  38(1) of the EPBC Act.
5. In any event, the distinction between strict compliance and conformity was not one which was developed by senior counsel for the State in oral submissions. As I have noted, the only caveat on the State’s agreement with the Commonwealth’s submissions related to which aspects of the “granular” detail of the Central Highland RFA might be engaged by the phrase “in accordance with an RFA”, rather than that none would be engaged. Senior counsel for the Commonwealth’s submissions about the meaning of “in accordance with” was a clear one:

[Counsel was here speaking of s 7 of the RFA Act where he submitted the same phrase had the same meaning] We have that expression “in accordance with” in section 6(4) and exactly the same expression appears in the very next section of the Act, and what it does is to require compliance to the extent that the instrument in question speaks to the subject matter.

1. And, earlier, applying that meaning to a hypothetical situation, senior counsel submitted:

Similarly, a forestry operator could not carry out RFA operations which breach the recovery plan for the Leadbeater’s possum without exposing itself to the triggering effect of the EPBC Act because that would be an operation not in accordance with the RFA, in our submission.

1. The State did not seek to disassociate itself from these submissions. Obviously, this was the same approach the applicant took.
2. Ultimately, there is only so far one can take the meaning of the phrase “in accordance with” without a specific legislative and factual context in which to apply it, as the decision in *Hestelow* shows. To return to an earlier example (and one that VicForests at least in principle seemed to embrace), the absolute prohibition in Attachment 1 of the Central Highlands RFA from timber harvesting of rainforest is not something susceptible to “substantial” compliance. If rainforest is logged, the prohibition in the Central Highlands RFA is contravened, and it is difficult to see how that logging (as an action and a forestry operation) could be “in accordance with” the Central Highlands RFA. In contrast, there may be management prescriptions about exclusion zones on the discovery of individuals of a listed threatened species which, in a concrete case of a forestry operation, may be satisfied even if the exclusion zone is a metre, or three metres, less than the exact measurement set out in the management prescription. As the State submits, these are in the realms of hypotheses, but I give the examples only to illustrate that just because the Court determines that “in accordance with” in the context of s 38(1) means “in conformity with” or “compliant with”, not every irregularity or inconsistency between what an RFA (and the substitute State regime) require for the conduct of forestry operations and what occurs in the undertaking of a forestry operation will remove the benefit of the s 38(1) exemption. Each situation will need to be considered on its own facts.
3. In all these examples, the meaning which is given to “in accordance with” is one which requires the content of the document, or regulation, or rule to be ascertained, and then for the conduct to be measured against that content. That is the essential distinction between the meaning for which VicForests contends, and the meaning for which the applicant and the interveners contend.
4. The contentions of the applicant and the interveners are also more consistent with the context of s 38(1), as one of several exceptions and exemptions in Pt 4 of Ch 2. As I have set out above, throughout Pt 4 of the EPBC Act, where the scheme uses the phrase “in accordance with” it does so as a method of picking up, by a cross-reference, the content of another document or agreement. It is in that other document or agreement where all of the protections which are otherwise provided by the scheme of controlling provisions in Pt 9 of the EPBC Act are found. How actions are regulated is set out in those other documents or agreement. By using the technique of requiring actions to be “in accordance with” those other documents or agreements, the Parliament is picking up the content of those other documents or agreements, insofar as (and only insofar as) they regulate the taking of an action. In that way, the EPBC Act allows for the substitute of its own approval processes with other processes (generally at State level), those processes having been approved and accredited as ones which can themselves regulate the taking of actions. No general or lasting immunity from having to take an action in a way that complies with whatever scheme of environmental regulation has been chosen is given.
5. Once that meaning is given, then like the other instances of its use in this scheme, Parliament’s use of that phrase is a textual indication that it intends those who carry out actions to comply with whatever substitute regime is nominated by a particular provision.
6. Unless the context and purpose suggest otherwise, it would generally be the case that the same meaning should be ascribed to a phrase used throughout a single legislative scheme. Although there should be no rigidity in this approach, the Court can assume – especially with a phrase regularly used in legislative drafting – that if the phrase is repeatedly used, Parliament intends the same meaning to be conveyed each time it is used. Especially so in a scheme which regulates conduct, including by the imposition of prohibitions and both civil and criminal consequences for their contravention.
7. Two further textual observations about the phrase “in accordance with” in the legislative scheme of the EPBC Act may be noted. Not so much because they should be given great weight in any constructional choice, but rather because they are confirmatory of what I consider to be the correct construction.
8. First, Parliament has chosen phrases other than “in accordance with” where a meaning other than “in conformity with” or “in compliance with” is intended. The text of s 139 of the EPBC Act can be used as an example. Section 139 is contained in Pt 9 of Ch 4 – the Part dealing with ministerial approvals of controlled actions. It is one of the several provisions in Div 1 of Pt 9 which set out additional conditions governing the Minister’s approval of controlled actions, each dealing with a specific matter of national environmental significance. Section 139 deals with threatened species and communities. Section 139(1) provides:

**139 Requirements for decisions about threatened species and endangered communities**

(1) In deciding whether or not to approve for the purposes of a subsection of section 18 or section 18A the taking of an action, and what conditions to attach to such an approval, the Minister **must not act inconsistently with**:

(a) Australia’s obligations under:

(i) the Biodiversity Convention; or

(ii) the Apia Convention; or

(iii) CITES; or

(b) a recovery plan or threat abatement plan.

(Emphasis added.)

1. It is clear that a statutory imperative to act “not inconsistently with” is intended by Parliament to be to some extent a softer requirement than an imperative to act “in accordance with”. The intention is to give the responsible Minister more flexibility to impose conditions which, for example, may not be the subject of Australia’s obligations under any of the three international conventions to which s 139 refers, but are nevertheless conditions that are “not inconsistent with” those obligations.
2. Second, outside Ch 2, there are numerous other examples where the phrase “in accordance with” can also be understood to have a meaning of “in conformity with” or “in compliance with”. For example:

* a requirement imposed on the responsible Minister that in requesting an action be referred for Ministerial approval under Pt 9, the Minister “must act in accordance with the regulations (if any)”: s 70(2);
* a power given to the Minister to determine an action should be referred if “the requested person has not referred the proposal to the Minister in accordance with the request”: s 70(3);
* in a power given to the responsible Minister to request the referral of a larger action of which the existing action under consideration is a part, that the natural justice provisions in ss 73 and 74 of the EPBC Act “do not apply to a referral that has not been accepted in accordance with subsection (1)”: s 74A(3); and
* in the offence provision dealing with taking an action before a decision has been made in relation to whether to refer the action for assessment, one of three criteria for an exception to the offence, being that notice a person gave to the Minister “was given in accordance with any applicable requirements of the regulations”: s 74AA(2)(c).

1. These examples were taken from the first few pages of the provisions in Ch 4 of the EPBC Act. They are not the only examples of the use of that phrase within those pages. The EPBC Act uses this phrase frequently and so far as I am able to see, consistently.

## Context

1. I have already set out my conclusions about much of the context of s 38(1), in terms of its place in Pt 4 of Ch 4 of the EPBC Act, and its relationship to s 6(4) of the RFA Act.
2. An RFA is not unique in this scheme in being an intergovernmental agreement. The scheme of the EPBC Act is premised upon a variety of different arrangements between the Commonwealth and others, to ensure the protection of Australia’s environment, and the conservation of its biodiversity. Bilateral agreements and conservation agreements are two other kinds of agreements, for which exceptions or exemptions from the prohibitions in Pt 3 and the controlled action provisions exist, but which may also be intergovernmental agreements. While there may be aspects of these agreements enforceable only between the parties to them, what the scheme demonstrates is that such agreements are also regulatory mechanisms for all those who engage in conduct that constitutes an “action” for the purposes of the EPBC Act and which may affect a matter of national environmental significance. Those regulatory mechanisms are designed to provide equivalent protections through other means to matters of national environmental significance. They are, as the Commonwealth submitted, substituted regimes. The fact that those regimes occur through a mechanism of agreement does not detract from that character. The Act gives those agreements regulatory force.

## Purpose

1. I already noted the singular emphasis in the objects of the EPBC Act. The methods by which these projects are to be achieved emphasise the important role of State regulatory scheme and intergovernmental cooperation. None of those nominated methods suggest the regimes which may be substituted for the approvals process in Pt 9 are intended to be less rigorous, nor that the substituted regimes are intended to permit conduct contrary to the intent of the prohibitions in, amongst other provisions, s 18 of the EPBC Act. Nor is there any indication in the legislative scheme that the substituted regimes are intended to deliver some kind of immunity from the operation of those prohibitions to actions likely, or which may be likely, to have a significant impact on matters of national environmental significance.
2. The exceptions and exemptions in Pt 4, textually and contextually, evince an intention that there were be parallel, but not lesser regimes which can take the place of the controlled action approval process by the Commonwealth under Pt 9. The overall scheme reflects the need for high levels of cooperation in a federal system to ensure environmental protection, sustainability and biodiversity conservation. The scheme also reflects the need for flexibility in how that is achieved: what I mean by that is flexibility in the methods or processes by which protection and conservation are achieved. There is nothing in the range of processes for which Pt 4 provides, and of which s 38(1) forms a component, which indicates that there are varying levels of protection, or that some processes do not need to pursue the objects of the EPBC Act to the same extent, or that some processes are intended to allow for significant impacts of the kind prohibited by Pt 3. Quite the contrary. While Pt 4 of Ch 2 contemplates a wide range of processes, there is nothing to indicate it establishes different levels of protection and conservation. Uniform language is used throughout. Most if not all of the processes require accreditation or some other kind of schematic approval by the responsible federal Minister. The scheme intends to leave the States, in defined circumstances, with freedom to create their own decision making processes over actions that will or are likely to have an impact on matters of national environmental significance, but subject to compliance with the objects and purposes of the EPBC Act and subject to Ministerial approval that those processes achieve the requisite level of protection and conservation. No carte blanche is given to States, or those carrying out actions pursuant to State authority, to take actions which in their effects on one or more matters of national environmental significance defeat the intention of the prohibitions in Pt 3.
3. It is true that the language in some of the exceptions and exemptions, in terms of the criteria governing Ministerial approval, is different. Section 33(3)(c) for example empowers the Minister to make a declaration covering a management arrangement if satisfied actions taken after approval under such an arrangement will not have “unacceptable or unsustainable impacts” on a matter of national environmental significance. That is distinct from the language of “significant” impact in Pt 3. However, it may in fact be a broader threshold, not a narrower one.

### The scheme of the EPBC Act

1. The Commonwealth makes the following submissions about the scheme of the EPBC Act:

A consideration of all of these provisions makes clear that the ‘carve-outs’ effected by them are consistently expressed to operate by reference to 2 factors: **first**, the relevant agreement, arrangement, process or plan must be operative (that is, in force); **secondly**, the particular action in question (here, ‘an RFA forestry operation’) must be taken ‘in accordance with’ the relevant agreement, arrangement, process, or plan (or declaration relating thereto). The second of these factors requires only that *the particular action* be undertaken ‘in conformity with’ or ‘consistently with’ the relevant agreement, arrangement, process, plan or declaration relating thereto.

(Footnotes omitted).

1. It will be apparent that I accept that submission. Senior counsel for the Commonwealth put it in more detail during oral submissions:

Now, we accept that one first finds that prescription in the State framework or perhaps the Commonwealth framework which makes provision for the delegated instruments to come into being which then have to be complied with. But the important thing is that the RFA and section 6(4) and section 38 aren’t simply saying comply with the State framework. They’re saying comply with it, and so long as you do, your operations will attract a carve-out, but if you’re not going to conduct yourself in accordance with a state framework, as required by the RFA, then your operation will not attract the carve-out. There is real traction there, your Honour.

….

Now, your Honour, part of the purpose of me taking you through those provisions was not simply to answer your Honour’s query from yesterday but to demonstrate what we say is the vice in the approach of VicForests because VicForests says, “No, you don’t need to go to the content of the RFA. You simply apply the definition, and if a forestry operation is an RFA forestry operation, that’s good and sufficient.”

….

with respect, we would say it’s not only an unpalatable outcome, but it’s one which does not accord with the structure and plain language of the definition provision and the terms of section 6(4) and section 38, and it doesn’t give any real work to do to the obvious effort that has been put into these regional forestry agreements to actually set out a compliance regime that would be understood by operators and would be capable of being assessed and applied by them so as to allow them to ask and answer the specific question contemplated by section 6(4) and section 38, is what I am about to do at the granular operational level consistent with the RFA, including everything that the RFA picks up by way of the State framework, the primary pieces of legislation, the regulations, the delegated instruments thereunder and anything additional to that, including additional listings that happen under the State legislation and the action statements that have to ultimately be brought into being.

1. There was then the following exchange between me and senior counsel for the Commonwealth:

HER HONOUR: So not just the promulgation of the action statement or the recovery plan, to go back to one of the examples you took me to. You don’t – your submission is you don’t construe that obligation which I think was the one about the Leadbeater’s possum that there be a recovery plan. You don’t construe that as only an obligation to make the plan but actually that the forestry operation has to comply with the contents of it.

MR HOWE: Exactly so, your Honour. That is what we say is the regime that emerges with unmistakable clarity from both the second reading speech and the explanatory memorandum because what the Parliament was straining to do by reference to these RFAs was to give them some legislative force and effect in light of the fact that the Commonwealth and the States had invested millions of dollars in working up over many years these RFAs which the legislature said or assessed or determined could operate as a substitute regime for the EPBCA, the EPBC Act, so long as what a forestry operator did was compliant with that substitute regime which did - - -

HER HONOUR: Yes, it really is on this argument a surrogate protection regime, not an open slather carve-out.

MR HOWE: Absolutely not.

1. The Commonwealth’s approach to s 38(1), and its place in the legislative scheme, should be accepted.

## Consequences

1. A common judicial technique in considering constructional choices is to look to the consequence of competing interpretations. The fact that an interpretation which produces unreasonable, capricious, absurd, unfair or patently inconvenient consequences may be an indication that construction is not the one intended by Parliament. As the various justices in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; 147 CLR 297 made clear, reasoning by reference to consequences may assist where there is more than one construction that is open, it is not a method of avoiding what is, in reality, an unambiguous provision or one that is intractable in its meaning: see *Cooper Brookes* (Gibbs CJ)at 305; (Stephen J) at 310; (Mason and Wilson JJ) at 320-321. As the judgment of Mason and Wilson JJ in *Cooper Brookes* best reveals, judicial minds will differ over the degree to which consequentialist reasoning is helpful in making constructional choices.
2. Of course, propositions about the usefulness of consequential reasoning are put at a level of generality, and will always involve, as Mason and Wilson JJ noted in *Cooper Brookes* at 321, questions of degree. In *Esso Australia Resources Ltd v Federal Commissioner for Taxation* [1998] FCA 1655; 83 FCR 511 at 518-519, Black CJ and Sundberg J (Finkelstein J agreeing at 565-6) cautioned about consequential reasoning in the following terms:

In our opinion the plain language of the sections is confirmed by the only directly relevant extrinsic material, which shows that Parliament intended the consequence that is said by the appellant to be anomalous. Especially when different views can be held about whether the consequence is anomalous on the one hand or acceptable or understandable on the other, the Court should be particularly careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention, and choice, of the Parliament.

1. This aspect of the Full Court’s reasoning was not the subject of any criticism by the High Court in overturning the Full Court’s conclusions. It was cited with approval by the Full Court in *Connect East Management v Federal Commissioner of Taxation* [2009] FCAFC 22; 175 FCR 110; at [41].
2. Accordingly the matters I set out below are not responsible for my conclusions, but they are nevertheless consistent with the view I have reached. There are consequences of VicForests’ construction which have contributed to my rejection of it, just as there are consequences of the applicant’s construction which have contributed to my rejection of that construction.
3. What the matters which follow also indicate is that the construction I adopt is the one which best advances the purposes of the EPBC Act, as I have set them out. Reasoning by reference to consequences can be seen as another way of testing various constructional choices against the identified purpose of the provision in question, read in the context of the purposes of the legislative scheme as whole. Reasoning by reference to consequences may also help elucidate the situation to which Gleeson CJ referred in *Carr v Western Australia* [2007] HCA 47; 232 CLR 138 at [5]-[6]: namely that statutes involving comprises or striking balances between competing interests may not be susceptible to an assumption that the scheme has a singular purpose. Sometimes, teasing out the consequences of various constructions can assist in determining whether the provision in issue is one of those where there are competing interests and a balance to be struck, and how the statute strikes that balance. Indeed, it seems to me that s 38(1) is such a provision, as the competing arguments on the separate question reveal. Both by examination of the consequences of various arguments, as I set out below, and by recourse to the place of s 38(1) in the overall statutory scheme of the EPBC Act, read with the objects of that scheme, these consequential matters assist in confirming the construction I consider appropriate.

### Consequences of VicForests’ construction

1. The most obvious consequence of VicForests’ contentions is that it may permit an action to be taken that has a significant impact on a listed threatened species, with the exemption in s 38(1) operating to prevent not only those persons such as the applicant with standing, but also the responsible Federal Minister, from being able to take any steps pursuant to the enforcement regime in the EPBC Act to prevent that occurring, or continuing. Senior counsel for VicForests frankly admitted as much during oral submissions.
2. Another consequence of VicForests’ approach is that the CAR Reserve System and management prescription systems in existence at the time an RFA was concluded, and only those expressly referred to in an RFA as imposing specific prohibitions are what VicForests says govern the conduct of forestry operations. While it is true that the State systems and processes for environmental protection and biodiversity conservation as they exist at the time an RFA is concluded are what is “accredited” by the Commonwealth, that does not render the protections static. The clauses concerning the Baw Baw Frog in the Central Highlands RFA to which I have referred above are a good example. There is no evidence whether there is now an action statement and a recovery plan for this species. It would appear VicForests’ construction suggests that any contravention of such an action plan or recovery statement in timber harvesting of particular areas within the Central Highlands RFA would have no effect on the exemption given by s 38(1), because those requirements were not expressly inserted into the Central Highlands RFA. That is, with respect, an approach which locks down the federal system of environmental protection and biodiversity conservation at a date which may already be 20 years past, as it is for the Central Highlands RFA. I do not accept that was Parliament’s intention with the EPBC Act. Rather, the scheme as I have described it earlier in these reasons is intended to be dynamic, adaptive and responsive. Threatened species as a matter of national environmental significance are a good example. As the evidence reveals about the circumstances facing the Leadbeater’s Possum, changes in habitat availability, and other impacts on a species can mean a species can move into a more threatened category and require greater levels of protection. The purpose of listing species such as the Leadbeater’s Possum and the Greater Glider, both affected by forestry operations because of their dependency on hollow bearing trees and forest habitat, could be negated if adjustments responsive to the new threat levels (in management prescriptions outside dedicated reserves and incorporating the contents of action statements and recovery plans) were not considered to form part of the controls on RFA forestry operations, through Victoria’s management prescriptions for forestry operations.

### Consequences of the applicant’s construction

1. A matter raised by VicForests, correctly, is the bifurcation that results from the applicant’s construction in terms of the responsibilities of those undertaking forestry operations and those on whom an RFA may be said to impose obligations. What precisely is the person or entity taking the action supposed to do? The consequence of the applicant’s construction in the present case (and assuming in its favour proof of the alleged significant impact) is that VicForests, as the entity responsible for undertaking forestry operations on public land in Victoria, not only cannot undertake any further forestry operations in the identified coupes, but is exposed to the enforcement regime in respect of its past forestry operations in identified coupes. Yet, as the applicant appeared to accept, VicForests as a statutory agency with particular functions, has no control over the State’s conduct in pursuance of cl 36 of the Central Highlands RFA, even if (although it is unclear on the evidence) it could be suggested it may have some input into the cl 36 reviews. Compliance may take a period of time over which, again, the forestry operator has no control and yet it must conduct its forestry operations without certainty about the application of s 38(1) to those operations. Historical non-compliance with a clause such as cl 36 will remain a fact, no matter what is done prospectively – and on the applicant’s construction, the State’s failures to comply with obligations such as those in cl 36 would render past forestry operations that have had the requisite significant impact unlawful, even though at the time of the forestry operation VicForests were not aware of those failures and had no control over them.
2. These kinds of consequences do not attend the construction which I consider to be correct. On that construction, the person undertaking the action (here VicForests) must ensure that its forestry operations are compliant and consistent with the requirements of the RFA, where they exist: the prohibition on timber harvesting in rainforest areas being a straightforward example. Compliance or consistency with the requirements from time to time of management prescriptions, action statements and recovery plans being another example that would need to be understood in the concrete situation of a particular challenge. Those are matters for which VicForests as the entity undertaking the forestry operations is responsible, and can control. The environmental protection and conservation requirements are in writing, in identifiable and well-known sources such as in timber release plans, and in the Victorian Code of Practice for Timber Production: see Tate JA in *MyEnvironment* *Inc v VicForests* [2013] VSCA 356; 42 VR 456 (Warren CJ, Tate JA and Garde AJA) at [32], [36] and [42]. VicForests is not reliant on any conduct of the State of Victoria, nor the discharge of any direct responsibilities under the RFA by the State of Victoria, to ensure that in conducting its forestry operations it complies with these requirements.
3. I emphasise again that the specifics of what would be required for compliance in any given situation are not the subject matter of this proceeding.

## Why clause 36 is not a compliance clause

1. I accept the applicant’s submissions about the importance of the five-yearly reviews required by clause 36 to the scheme of the Central Highlands RFA, and indeed more broadly to the scheme of RFAs. The values protected by the CAR Reserve System are not static, and any system of environmental protection and conservation needs to be responsive to new or changed threat levels, and needs also to be adaptive in the way protection and conversation objectives are achieved. A good example of the need for responsiveness and adaptation is the one given by the applicant (taken from the Conservation Advice for the Leadbeater’s Possum, which was in evidence) – the catastrophic effects of the 2009 fires in the Central Highlands region which were found to have burnt 34-36% of potential Leadbeater’s Possum habitat and 45% of the best habitat within montane ash forest. A static CAR Reserve System, including static harvesting prescriptions, would be unable to address an event like this, which on any view is likely to affect the sustainability of the population of Leadbeater’s Possum.
2. I also accept that Parliament has recognised the importance of the reviews through the requirement in s 10(6) of the RFA Act that they be tabled.
3. Finally, it is an agreed fact for the purposes of the determination of the separate question that none of the first, second or third reviews were carried out during the periods stipulated in the Central Highlands RFA. In other words, non-compliance with cl 36 is an agreed fact. As senior counsel for VicForests submitted, to admit that fact does not go so far as to admit that the State of Victoria has not undertaken any reviews of the RFA at all, outside the time periods specified in the Central Highlands RFA.
4. Nevertheless, for the purposes of the separate question, the important agreed factual proposition is that there is admitted, and clear, non-compliance with cl 36 of the Central Highlands RFA.
5. The difficulty I see in the applicant’s argument is the absence of a sufficient connection between the conduct of forestry operations and the alleged non-compliance. As I explain elsewhere in these reasons, when it is recalled that the undertaking of forestry operations is the “action” for the purposes of s 523 of the EPBC Act, and for the purpose of all the relevant provisions of the EPBC Act, the operation of s 38(1) is properly restricted to an examination of those parts of an RFA which regulate the undertaking of forestry operations. If those operations are in compliance with the scheme of regulation established by the RFA (in express terms and by picking up the Victorian regulatory scheme), then the exemption applies.
6. Clause 36 is a requirement imposed by the Commonwealth on the State of Victoria, and to which Victoria agreed, as part of the accreditation process of the RFA. As I have attempted to explain above, it has a critical role in preserving the currency, appropriateness and effectiveness of the measures required by the RFA to ensure that forestry operations are undertaken in a sustainable way which does not have significant impacts on any matter of national environmental significance, included listed threatened species. However it is not in itself a measure governing the undertaking of forestry operations.
7. It is not in the same category as the clauses of the RFA which set out, for example:

* geographical boundaries of areas in which no logging can occur;
* prohibitions on logging certain kinds of forest such as rainforest;
* the requirement for forestry operations to be regulated by management prescriptions outside CAR reserves, including by the terms of Victoria’s Code of Practice for Timber Production.

1. Further, I do not accept the applicant’s submission that the regulatory contents of the Central Highlands RFA only look forward five years. As I have attempted to show, by picking up a changing and adaptive system of State regulation, the Central Highlands RFA contemplates that “on the ground” prescriptions will regulate forestry operations so as to protect the environment and conserve biodiversity, and will be adaptive and responsive to changing circumstances of – for example – the protection of threatened species.

## Does *Brown* compel a particular answer to the separate question?

1. All parties and interveners relied on the Full Court’s decision in *Brown*. The view I take of the Full Court’s decision is that advanced by the Commonwealth and the State, which in large part aligns with the submissions of the applicant.
2. *Brown* was a proceeding concerning the Tasmanian RFA and forestry operations in a state forest in Tasmanian, called Wielangta. The applicant sought to restrain the conduct of the forestry operations in certain areas of Wielangta on the basis that those operations would contravene s 18 of the EPBC Act in relation to three listed threatened species; the swift parrot, the broad tooth stag beetle and the Tasmanian wedge-tailed eagle. The appellant had contended at trial (and on appeal) that the exemption in s 38(1) did not apply to the impugned forestry operations because those operations were not “in accordance with” the Tasmanian RFA and in particular were not in accordance with cl 68 of the Tasmanian RFA. Clause 68 was contained in Pt 2 of the Tasmanian RFA, which like Pt 2 of the Central Highlands RFA, was expressed not to impose binding obligations on the parties to the RFA. At the time of trial it provided:

The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System or by applying relevant management prescriptions.

1. All three species were listed in Attachment 2.
2. The Tasmanian RFA was amended after the trial judge gave judgment for the applicant at first instance and while the appeal by Forestry Tasmania was on foot. It was amended on 23  February 2007. Clause 68 was amended: see *Brown* at [80].
3. The amended cl 68, at the time the matter came before the Full Court, 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.

1. There were a series of other amendments to clauses which featured in the trial judge’s reasons, but they need not be set out here.
2. The Full Court held at [69] and [80] that the amended cl 68 “more clearly says what we think it means in its original form”. In other words, the Full Court did not find that the amendments had changed the meaning of cl 68.
3. The applicant submitted, and I accept, that the Full Court’s conclusion on the arguments on the appeal about the effect of cl 68 of the Tasmanian RFA is expressed at [59] of the joint reasons for judgment:

The respondent successfully contended before the primary judge that s 38 of the Act did not exempt the appellant from the requirement to obtain an approval before taking action covered by s 18 of the Act, because cl 68 of the RFA required the State to in fact protect the three species and CAR does not in fact protect them. The question is whether cl 68 does require the State to protect the species in this way. In our view it does not. Clause 68 does not involve an enquiry into whether CAR effectively protects the species. Rather it is the establishment and maintenance of the CAR reserves that constitute the protection.

1. VicForests and the interveners, and also the applicant, pointed to subsequent passages in the Full Court judgment as also being integral to its reasoning. All agreed that [63] was critical:

The fact that the State’s obligations under Part 2 of the RFA are expressed to be unenforceable points against the view that by cl 68 the State warrants that CAR will in fact protect the species. It follows that satisfactory performance of the State’s obligations can only be measured by the parties, the sanction for inadequate performance by the State (in the Commonwealth’s opinion) being termination of the agreement under cl 102.

1. VicForests also emphasised the Court’s overall conclusion at [68]:

For the foregoing reasons we are of the view that the only basis propounded in ground 8 in the amended application, namely that s 38 does not exempt the appellant from Pt 3 of the Act because in breach of cl 68 of the RFA the State has not in fact protected the species in Wielangta, fails. The second limb of cl 68 should be construed in the same manner as the first.

1. I accept the following propositions put by the Commonwealth in relation to the Full Court decision in *Brown* (using the language used in the Commonwealth’s written submissions):
   1. “The reasoning of the Full Court in *Brown* stands against the RFA Act being directed to the mischief of a **State’s** non-compliance with one or more non-binding provisions of an RFA (noting, of course, that it was Sch 1 to the RFA Act which inserted the current terms of s 38 into the EPBC Act).” (my emphasis added)
   2. “The reasoning of the Full Court in *Brown* stands against the proposition that, in enacting s 6(4) and s 38, the legislature overlooked, through inadvertence, expressly dealing with the legal effect of a State’s non-compliance with any non-binding provisions of an RFA. In *Brown*, the Full Court held that *advertent* features of the statutory scheme were that (i) performance of parties’ obligations under RFAs would be sorted out by them (including, potentially, by resort to termination as the only sanction for non-performance); and (ii) non-compliance by a State with any non-binding obligation under an RFA would not defeat the carve-out effected by s 38 (subject, of course, to any termination by the Commonwealth).”
   3. In *Brown* the Full Court at [68] rejected the argument that, if the State of Tasmania was in breach of a non-binding obligation under the Tasmanian RFA, s 38 did not exempt the operations of a third party (Forestry Tasmania) from Pt 3 of the EPBC Act.
2. I consider the State’s written submissions at [53] – [56] make the same points.
3. The applicant’s written submissions on *Brown* were as follows:

38. Properly understood, *Forestry Tasmania* is not authority for the proposition that breach of a clause of an RFA is irrelevant to whether s 38(1) of the EPBC Act or s 6(4) of the RFA Act will supply an exemption from Part 3 of the EPBC Act. Any suggestion that [63] of the Full Court’s reasons (where the Court said that “unsatisfactory performance of the State’s obligations can only be measured by the parties”) might support the respondent’s argument in this case should be rejected on the basis that the Full Court’s proposition must be read in the context of the Court’s reasons.

38.1. That context indicates that the Court was stating that the effectiveness of the CAR system in achieving protection of the protected species was a matter that could only be measured by the parties. That is to say, the effectiveness of the mechanisms chosen to protect flora and fauna were matters for the parties to determine.

38.2. The Full Court did not say that breach of a clause of an RFA was irrelevant to the operation of s 38(1) of the EPBC Act or s 6(4) of the RFA Act.

38.3. On the facts of that case, the Full Court found that there was no breach of the relevant clause of the RFA.

39. The construction of cl 68 of the Tasmanian RFA is entirely irrelevant to the present case. The applicant’s case is simply that the terms of the RFA regime, once agreed by the parties, must be complied with in full in order to attract the exemption in s 38(1) of the EPBC Act and 6(4) of the RFA Act.

40. That submission is in fact supported by *Forestry Tasmania*. As the Full Court said:

… the [EPBC] Act … does not apply to forestry operations in RFA regions … the regime applicable in those regions is found in the RFAs themselves.

41. The Court did not say that the individual provisions of a relevant RFA were applicable to RFA forestry operations – it said that the RFA regime was applicable in those regions.

(Footnotes omitted.)

1. I consider those submissions do not give appropriate weight to the Full Court’s emphasis on the importance of the identified obligation in the Tasmanian RFA being an obligation imposed on the State, which was expressed to be non-binding.
2. Those parts of the Full Court’s reasoning were critical to its conclusion and as a single judge I consider I should follow them, without necessarily having to spend a great deal of time exploring whether they are properly characterised as part of the ratio of the decision, or “seriously considered dicta”. There is no doubt they are well within the latter category on any view. VicForests and the Commonwealth in particular referred the Court to the High Court’s decision in *Farah Constructions Pty Ltd and others v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at [134] and [135]. Paragraph [135] of that decision expressly concerns the obligations of intermediate appellate courts (there, the NSW Court of Appeal) not to depart from “decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong”. In *Farah*, the Court referred to the decision in *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; 177 CLR 485 at 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ), which concerned the Corporations law, hence the reference to “uniform law”.
3. However, I accept that the High Court’s statement at [134] was more broadly expressed:

It is true that those statements were dicta in the sense that the case was decided on the second limb of *Barnes v Addy.* But, contrary to the Court of Appeal’s perception, the statements did not bear only “indirectly” on the matter: they were seriously considered dicta.

1. This statement, made in relation to dicta of the High Court and its treatment by the NSW Court of Appeal, does support the proposition put by the Commonwealth.
2. The core reasoning of the Full Court presents a significant impediment to the applicant’s arguments because of the nature and content of clause 36 of the Central Highlands RFA and its fundamental similarity with cl 68 of the Tasmanian RFA, in particular that neither of those clauses concerned the actual conduct of forestry operations.
3. In contrast, I consider that the construction of s 38(1) and s 6(4) which I prefer is not inconsistent with the Full Court’s approach in *Brown*. The arguments were put on a different basis in this proceeding, and as is apparent, I consider the position adopted by the Commonwealth in the current proceeding, when the Commonwealth also intervened in *Brown*, to be of significance.
4. One observation by the Full Court in *Brown* (at [61] of the reasons) on which VicForests in particular relied related to a passage from the Explanatory Memorandum to the Environment Protection and Biodiversity Conservation Bill 1998 (at pp 38-9 [113]):

The object of this subdivision recognises that in each RFA region a comprehensive assessment is being, or has been, undertaken to address the environmental, economic and social impacts of forestry operations. In particular, environmental assessments are being conducted in accordance with the Environment Protection (Impact of Proposals) Act 1974. In each region, interim arrangements for the protection and management of forests are in place pending finalisation of an RFA. The objectives of the RFA scheme as a whole include the establishment of a comprehensive, adequate and representative reserve system and the implementation of ecologically sustainable forest management. *These objectives are being pursued in relation to each region. The objects of this Act will be met through the RFA process for each region and, accordingly, the Act does not apply to forestry operations in RFA regions.*

(Emphasis added).

1. Having emphasised the last sentence of the explanatory memorandum, the Full Court expressed the following opinion:

In our view the emphasised passage indicates that the Act does not apply to forestry operations in RFA regions, and the way in which the objects of the Act will be met in relation to those operations is to be ascertained by reference to the relevant RFA.

1. That statement cannot be read literally because, of course, s 38 itself is in the EPBC Act, and must be given effect, as must s 42. There may well be other parts of the EPBC Act which still apply to forestry operations – the offence provisions in Subdiv B of Pt 13 are an example, if the forestry operations are undertaken in a Commonwealth area. This Court’s jurisdiction, arising under s 475, is still applicable.
2. Rather, I understand this statement of the Full Court to mean that the controlled action provisions and the entire Ministerial approval regime in Pt 9 of Ch 4 of the Act are not applicable, and further that the prohibitions in Pt 3 of Ch 2 are also not applicable, ***provided*** the exemption in s 38 is engaged. That is the way that the applicant and the interveners submitted the passage should be construed, and I agree.
3. Similarly, both parties and the interveners relied on the following passage from the Court’s reasons at [62], where the Court expressed its conclusion on the meaning of the Explanatory Memorandum to the RFA Act:

Again, the message is that the Act (ie the *Environmental Protection and Biodiversity Conservation Act)* does not apply to forestry operations in RFA regions, and that the regime applicable in those regions is found in the RFAs themselves.

1. For the same reasons, this statement by the Full Court cannot be read literally, or too broadly. I reject VicForests’ submissions that this passage (and the earlier one at [61] of the Full Court’s reasons) should be taken to mean that the Full Court in *Brown* held that the conduct of RFA forestry operations was in all circumstances immune from the provisions of the EPBC Act (including the responsible Minister’s own powers of regulation).
2. Both parties and both interveners agreed that this passage confirmed that the regulatory regime established by an RFA was intended to be a substitute regime for that in the EPBC Act. They differed on the extent of that substitution and its consequences. These passages from the Full Court reasons simply do not address that question, as the Full Court in *Brown* did not need to do so.

## Is there any different effect between s 38(1) and s 6(4)?

1. The separate question identifies the construction issue by reference to both s 38(1) and s 6(4). Their terms are identical. For the reasons of legislative history that I have set out above, their purpose is identical. The context for the current form of s 38(1) is not entirely derived from the RFA Act, since s 38(1) existed at the time the EPBC Act was enacted. However, there is no inconsistent or different context arising from the enactment of s 6(4): rather, its effect was to recognise the full effect of the implementation of the RFA strategy across Australia, as contemplated by the NFPS.
2. My conclusion on the correct construction of s 38(1) of the EPBC Act applies to s 6(4) of the RFA Act. No party or intervener sought to give s 6(4) any additional or different work to do from s 38(1). The applicant’s statement of claim referred to both provisions, which is why the parties put both into the separate question. Senior counsel for VicForests explained during oral argument that this inclusion has no practical effect:

We say that they are duplicative. They stand or fall together, and that’s why it’s appropriate that the separate question has referred to both of them.

# Conclusion

1. I noted at the start of these reasons that my conclusion means that the separate question cannot be answered favourably to the applicant, but that the answer needs some qualification. I now explain why that is so.
2. During the case management process concerning the agreed statement of facts, the applicant made the following written submission:

Central to the exercise of judicial power is that a judicial determination “includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy”. Because of the requirement that judicial power must finally determine a controversy between the parties, a Court will not answer separate questions in the absence of a sufficient factual foundation. To do so may otherwise result in the court answering a hypothetical question or providing an advisory opinion, both of which are antithetical to the exercise of judicial power.

1. In support of that submission, the applicant relied on *Bass v Permanent Trustee* [1999] HCA 9; 198 CLR 334 at [45], [47] and [51] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). VicForests did not dispute the correctness of the submission made.
2. I consider that the facts as agreed provided a sufficient basis to determine the controversy between the parties about whether the agreed non-compliance with cl 36 of the Central Highlands RFA, is capable of rendering the exemption in s 38(1) inapplicable to the undertaking by VicForests, in the past and in the future of forestry operations in the identified coupes within the Central Highlands RFA region. That controversy can be determined without any agreed facts about whether those forestry operations will, or are likely to have, a significant impact on the Leadbeater’s Possum or the Greater Glider. I considered the facts as agreed were also sufficient to determine the controversy between the parties on this matter as to VicForests’ past forestry operations in the identified coupes.
3. What I do not consider the agreed facts can support, on a proper construction of s 38(1) of the EPBC Act, is a determination that VicForests’ past and proposed forestry operations in the identified coupes have the benefit of the exemption in s 38(1) on the basis that those operations have been, and will be undertaken in conformity with the Central Highlands RFA in the sense I have explained in these reasons that s 38(1) requires. There are no agreed facts about that issue because it is not raised by the applicant in this proceeding. A determination by the Court, which purports to bind the parties, would concern a hypothetical matter. As the State submitted, it is simply not raised in this proceeding.
4. In *Bass* at [49], the majority said:

As the answers given by the Full Court and the declaration it made were not based on facts, found or agreed, they were purely hypothetical. At best, the answers do no more than declare that the law dictates a particular result when certain facts in the material or pleadings are established. What those facts are is not stated, nor can they be identified with any precision. They may be all or some only of the facts. What facts are determinative of the legal issue involved in the question asked is left open. Such a result cannot assist the efficient administration of justice. It does not finally resolve the dispute or quell the controversy. Nor does it constitute a step that will in the course of the proceedings necessarily dictate the result of those proceedings. Since the relevant facts are not identified and the existence of some of them is apparently in dispute, the answers given by the Full Court may be of no use at all to the parties and may even mislead them as to their rights. Courts have traditionally declined to state - let alone answer - preliminary questions when the answers will neither determine the rights of the parties nor necessarily lead to the final determination of their rights. The efficient administration of the business of courts is incompatible with answering hypothetical questions which frequently require considerable time and cause considerable expense to the parties, expense which may eventually be seen to be unnecessarily incurred.

1. An answer to the separate question which extended beyond the applicant’s reliance on cl 36 of the Central Highlands RFA as the source of non-entitlement to the exemption in s 38(1) would be incompatible with the Court’s judicial function. The Court’s answer to the separate question as stated must, in my opinion, reflect this distinction. The parties and the interveners will be given an opportunity to address how the question might be answered to reflect this conclusion.
2. It would seem to me, although I will hear the parties and interveners on this, that the answer to be given nevertheless means that the application must be dismissed because, with an answer to the separate question unfavourable to the applicant, the Court cannot grant any of the relief sought.
3. The parties will be given an opportunity to confer and, based on the Court’s reasons for judgment, to make submissions on what form a qualified answer should take.
4. If either party, or either of the interveners, wish to make submissions in relation to my conclusion that a qualified answer is necessary, they have leave to include those matters in the submissions that are filed.
5. The Court will also give the parties and the interveners an opportunity to make submissions on the question of costs, in the absence of any agreed position being put to the Court.

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| I certify that the preceding two hundred and eighty-three (283) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 2 March 2018