**Bob Brown Foundation Inc v Commonwealth of Australia [2021] FCAFC**

On 3 February 2021, the Federal Court of Australia handed down its decision in ‘The Great Forest Case’. The Court rejected the Bob Brown Foundation’s arguments and held in favour of the three Respondents.

**Background**

The Great Forest Case was heard in the Federal Court of Australia between the Bob Brown Foundation (‘the Applicant’) and the Commonwealth of Australia, State of Tasmania and Sustainable Timber Tasmania (‘the Respondents’). The Bob Brown Foundation brought the case, arguing that the Tasmanian Regional Forest Agreement is not a Regional Forest Agreement (‘RFA’) for the purposes of two key pieces of legislation - the *Regional Forests Agreement Act 2002* (Cth) (‘RFA Act’) and s 38 (1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (‘EPBC Act’).

Regional Forest Agreements are agreements made between the Commonwealth and State governments for the management of forestry operations and the promotion of the forest industry. They lay down guidelines, tasks and responsibilities for forest management, anchored to what was a popular concept in the late 1990s called “sustainability”. The Tasmanian RFA was entered into in 1997 and there are currently RFAs in 10 regions across Australia. The *RFA Act*, introduced in 2002, aims to improve stability and certainty in the forest industry by ensuring that Commonwealth governments will not materially alter the conditions negotiated in RFAs. Importantly, it provides the definition of an RFA, which is used in Acts such as the *EPBC Act.*

The *EPBC Act* is the Australian parliament’s central piece of environmental legislation. The *EPBC Act* protects matters of national environmental significance, including threatened species. Under s 18, a person must not take an action that ‘has or will have a significant impact on a listed threatened species’. However, this does not apply if the person has been granted an environmental approval for taking the action. Gaining an environmental approval is often a complex and stringent process. Part 4 of the *EPBC Act*, however,allows someone in certain circumstances to take an action that will impact a threatened species *without* an environmental approval. Forest operations undertaken in accordance with RFAs are listed under Part 4. This means that even if logging is impacting threatened species, it does not need to go through the Commonwealth environmental approval process if it is done in accordance with an RFA.

One impetus for bringing forth the Great Forest Case is that the critically endangered Swift Parrot is losing its habitat to logging. The species is on the brink of extinction, yet the logging activity is exempt from Australia’s premiere environmental law and main form of protection for threatened species. However, only those logging operations undertaken in accordance with an RFA which is within the definition of ‘RFA’ in the *RFA Act* are exempt. The Bob Brown Foundation argued, for several reasons, that the Tasmanian RFA does not fall within this definition.

**Arguments**

The question that the Court was asked to determine was:

Is the Tasmanian RFA an ‘RFA’ for the purposes of the *Regional Forest Agreement Act 2002* (Cth) and s 38 (1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)?

The Bob Brown Foundation argued that the Tasmanian RFA is not within the definition of ‘RFA’ in the *RFA Act*, and, because of this, logging activities undertaken in Tasmania (even if carried out in accordance with the Tasmanian RFA) should not be exempt from Commonwealth environmental approval under the *EPBC Act*. In other words, Forestry Tasmania is required to seek the necessary approvals under the *EPBC Act* because its forestry operations are not exempt from approval under the EPBC Act by the *RFA Act*.

The Bob Brown Foundation gave two reasons to support this argument:

1. An RFA must impose *legally enforceable obligations*. The Tasmanian RFA is not an ‘RFA’ because the provisions relating to the CAR Reserve System and which require ecologically sustainable forest management (ESFM)\* are not intended to create legally binding relations.
2. To meet the definition of ‘RFA’, matters material to the CAR Reserve System and ESFM cannot be subject to unilateral amendment by one of the parties at their own discretion at any time. Thus, the RFA is not an ‘RFA’ because Tasmania can vary its legislation, policies, codes and practices at any time.

**\***The CAR Reserve System and ESFM are the methods through which the RFAs commit to safeguarding biodiversity, old-growth forests, wilderness and other natural and cultural values. CAR stands for Comprehensive (full range of vegetation communities), Adequate (reserve is large enough to maintain species diversity) and Representative (conserving diversity, including genetic diversity). The CAR Reserve System is made up of a series of reserves, including national parks and special protection zones in State forests.

**The Decision**

The Court identified the issue before it as one of statutory construction. That is, ascertaining the meaning of the language of the statute. The established process for determining the meaning of words in a statute is to consider the text itself, the context (this includes the whole Act rather than just the specific provision, and can also include supporting documents, such as a Second Reading Speech), and the purpose of the Statute (which will often be explicit, but not always, and there may be more than one purpose). The Court held that its task was not to look at the construction of the Tasmanian RFA, but rather the definition of ‘RFA’ in the *RFA Act*.

The Court addressed each question separately.

Legal enforceability

The Bob Brown Foundation made four main submissions. Each were rejected by the Court.

1. **BBF:**

An RFA is defined as an ‘agreement that is in force’. The ordinary meaning of the word ‘agreement’ in the *Oxford English Dictionary* is an ‘arrangement (typically one which is legally binding)’. Had Parliament wanted to adopt a more elastic meaning, it could have used broader terms, such as ‘understanding’. The words ‘in force’ are also ordinarily defined as ‘operative or binding at the time’ (*Oxford English Dictionary*). The two phrases, ‘agreement’ and ‘in force’ indicate strongly that the RFA is a legally binding agreement.

**Court:**
The Court emphasised that an RFA is an *intergovernmental agreement*. Whether an agreement between two governments is legally binding depends on the circumstances and courts must be careful not to enter a domain that does not belong to them – namely undertakings that are political in nature. An RFA deals with subject matters of both a legal and political nature. The Court held that the words ‘agreement’ and ‘in force’ do not necessarily suggest that the terms of an agreement must be legally binding.

1. **BBF:**

The *context* of the *RFA Act* also indicates that the agreement is intended to be legally binding. Other provisions in the Act impose legally enforceable obligations on the Commonwealth regarding termination and compensation, and these provisions refer to the RFA ‘as in force’. The meaning of the words ‘in force’ as used in these provisions should be used consistently throughout the Act, including in the definition of RFA.

**Court:**

While the words ‘in force’ are used in certain provisions to suggest legal enforceability, these provisions are confined in their scope and operation. In the *RFA Act*, the words ‘in force’ are neutral as to whether or not particular terms of the agreement are legally binding. Further, the Court made it clear that not every clause of an agreement must be legally binding for the agreement itself to be ‘in force’.

1. **BBF:**

The Second Reading Speech also indicates that an ‘RFA’ is a legally binding agreement. The Minister referred to the States’ obligations and the Commonwealth’s rights.

**Court:**

The legislative history, context and purpose suggests an RFA is not intended to be legally binding. The RFA Bill makes clear that the purpose of the *RFA Act* was never to be the sole source of measures to protect Tasmania’s native forests or threatened species. There is a broader suite of protective measures, outlined in ‘Tasmania’s Forest Management System: An Overview (2017)’.

1. **BBF:**

The *purpose* of the *RFA Act* also suggests that, to be an RFA, an agreement must impose legally enforceable obligations on a party in relation to the CAR Reserve System and ESFM. If the Act’s primary obligations are unenforceable, then the purpose of the Act cannot be fulfilled.

**Court:**

Environmental protection certainly forms one of the purposes of the *RFA Act*. But legislation rarely pursues a single purpose at all costs. The Act deals with a number of different and potentially competing policy considerations. The *RFA Act* does not pursue a particular purpose (such as environmental protection) at all costs.

The Federal Court also held that exemption from the *EPBC Act* is not dependent on all terms of an RFA being legally enforceable. Additionally, when enacting the *RFA Act*, the Commonwealth Parliament did so upon the assumption that the existing RFAs (including the Tasmanian RFA) constituted an ‘RFA’ as they pre-dated the *RFA Act*. It is highly unlikely that Parliament intended to require all terms relating to the CAR Reserve System and ESFM to be legally enforceable before an agreement could constitute an ‘RFA’.

Unilateral Amendment

The Bob Brown Foundation argued that the Tasmanian RFA does not ‘provide for’ the CAR Reserve System nor for ESFM because it leaves the features and objectives of those systems to be determined unilaterally, at the discretion of Tasmania.

The Court disagreed. There is nothing in the definition of an RFA which expressly, or implicitly, prohibits unilateral amendment to the agreement. In any case, the terms were agreed between the Tasmania and the Commonwealth and there are consequences in place for unilateral action (e.g. any attempt to displace the system of land categorisation requires ‘the consent, in writing, of both parties’). It was accepted by both parties that aspects of Tasmania’s Forest Management System would be amended from time to time.

**Conclusion**

The Court found in Favour of the Respondents, holding the RFA is an ‘RFA’ within the meaning of the *RFA Act* and *EPBC Act.*