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LAW AND LITIGATION FOR THE CONSERVATION OF FOREST COMMUNITIES

LAURA SCHUIJERS & LEE GODDEN *

*Australia's natural environment is in decline and under increasing threat. The extent and severity of biodiversity loss is highlighted by the second independent, 10-yearly review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ('EPBC Act'). The Review points to climate change as a critical compounding danger — one to which Australia and its unique flora and fauna are highly vulnerable. In this article, we discuss the role of law in protecting and extending the public interest in nature conservation, with special focus on the forest context. The term 'public interest,' while complex in meaning, typically refers to public or community values, as opposed to private interests such as those of property rights holders. We consider the recent judgments in *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704 ('Leadbeater's Possum') and *Bob Brown Foundation Inc v Commonwealth of Australia* [2021] FCAFC 5 ('Great Forest') with respect to the ongoing function of the Regional Forest Agreements ('RFAs') in exempting the operation of the EPBC Act. In light of the Review's comment that Australia's federal environmental law is not fit for purpose, as well as the gaps and limitations in the law revealed by the two court cases, we conclude that legal reform is needed. Without legal reform, there can be no guarantee that cumulative threats to forest biodiversity will be adequately managed because although the relevant legislation appears to embody principles of ecologically sustainable development on its face, it also prevents key decision-makers and operators from being held to account. The inescapable dependency of humans on nature means the insufficiency of environmental laws fundamentally concern us all.*

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I PEOPLE, PLANET, PROSPERITY

Human-nature dependency was first articulated in international law in 1972 through the *Stockholm Declaration, 'Our Common Future'*.¹ Despite the mounting evidence of conjoined futures between the human and more-than-human world, globally, human development has escalated alongside mounting biodiversity loss. Internationally, as well as within Australia, legal frameworks have failed to stem this loss. Biodiversity loss is a critical factor in unsustainable development trajectories because ecological systems are life support systems. Loss of biodiversity in forests has been a particular concern over past decades, but robust legal measures for forest protection have failed to emerge. In Australia, the national environmental law (i.e., the *EPBC Act*) provides a regulatory exemption for forest activities. Accordingly, and given the dire global situation of biodiversity loss and its acute dimensions in relation to forests within Australia, this article explores the potential for law to better realise a stewardship mandate for biodiversity protection in forests. Any such mandate to secure the interdependencies of human dignity and biodiversity protection must include accessible and tangible measures for concerned communities to take legal action to secure biodiversity futures.

¹ *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1973, adopted 5-16 June 1972) Principle 1.

A Biodiversity Loss and a Diminished Humanity

Development that puts life support systems and so life itself irrevocably at risk is unsustainable development. Research has revealed human dependencies on biodiversity for health, productive agriculture, strong economies, a stable financial system, and liveable cities.² Because biodiversity loss is so significant, scientists have concluded that we have entered into a sixth global mass extinction — experts have signalled the ‘extreme urgency’ of a global response.³ None of the previous five extinction events were caused by one species, as this one is, and in each case although it was possible for life to recover, it took millions of years for diversity to re-establish.⁴ An effective response to this crisis will necessarily involve an aggregation of national and regional-scale actions, including strengthening relevant laws. Similarly, concerted international action is also required, as no one international treaty can solve the problem without local implementation.

A significant barrier to preventing biodiversity loss is that environmental law, a product of the intersection of politico-economic and conservation systems, incorporates a balancing exercise for decision-making. This balancing exercise is premised on a simplistic understanding that biodiversity conservation and socio-economic development present competing priorities.⁵ This understanding fails to recognise the complex interdependencies within social-ecological systems, including the management of natural resources.⁶

In 2021, the World Economic Forum listed biodiversity loss as a principal existential threat for humanity,⁷ a sentiment reiterated in UNEP’s 5th *Global Biodiversity Outlook*,⁸ and a sign that even conventional economic establishments are recognising changing values. Estimates suggest that more than 50% of global GDP is moderately or highly

² UNEP, *Global Biodiversity Outlook 5* (Secretariat of the Convention on Biological Diversity, 2020) <<https://www.cbd.int/gbo/gbo5/publication/gbo-5-en.pdf>>.

³ See, e.g., Gerardo Ceballos, Paul R Ehrlich and Peter H Raven, ‘Vertebrates on the Brink as Indicators of Biological Annihilation and the Sixth Mass Extinction’ (2020) 117 *Proceedings of the National Academy of Sciences* 13596; E O Wilson, *The Future of Life* (Vintage, 2003); K R Shivanna, ‘The Sixth Mass Extinction Crisis and its Impact on Biodiversity and Human Welfare’ (2020) 5 *Journal of Science Education* 93.

⁴ Ceballos (n 3) 13596.

⁵ Jacqueline Peel, ‘Ecologically sustainable development: More than mere lip service?’ (2008) 12 *Australasian Journal of Natural Resources Law and Policy* 34, 35.

⁶ See Barbara Cosens, ‘Resilience and Law as a Theoretical Backdrop for Natural Resource Management: Flood Management in the Columbia River Basin’ (2012) 42 *Environmental Law* 241.

⁷ World Economic Forum, *The Global Risks Report 2021* (16th ed, 2021) 5.

⁸ UNEP (n 2) 8-9.

dependent on nature.⁹ Well-established links between human rights and the environment, recently reiterated by the UN Human Rights Council which recognised a specific human right to a healthy environment,¹⁰ help to support the notion that biodiversity conservation is critical because ecological systems are a basic tenet of human survival. The dependency is not only physiological, but psychological. Emergent scientific scholarship has identified the ‘entanglement’ of humans with the material environment.¹¹ The emotional attachment of people to ‘special natural places’ is well documented in contemporary Australian society.¹² Indeed, the phenomenon of associating emotional wellbeing with the capacity to engage with nature has been long understood in many cultures.¹³ Human dignity is a dimension of our existence that is nourished and revitalized by our capacity to afford living space to other lifeforms; to extend a duty of care to the more-than-human world.¹⁴

B Human influence and the Anthropocene

The notion of the Anthropocene as a geological epoch defined by the pervasive impact of humans as an agent of environmental change, together with the anthropogenic nature of the current mass extinction event, clearly places humans in the role of environmental stewards (willingly or not). Law plays a critical role in managing biodiversity loss. Laws

⁹ See World Economic Forum, *Nature Risk Rising: Why the Crisis Engulfing Nature Matters for Business and the Economy* (January 2020)

<https://www3.weforum.org/docs/WEF_New_Nature_Economy_Report_2020.pdf>. For a discussion of the contribution of nature-based projects to economic stability and post pandemic recovery, see e.g., United Nations Green Climate Fund, *GCF Annual results report - Climate action during the pandemic 2020* (Report, March 2021) 6 <<https://www.greenclimate.fund/sites/default/files/document/gcf-annual-results-report-2020.pdf>>.

¹⁰ *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, UN HRC, 48th sess, Agenda Item 3, UN Doc A/HRC/48/L.23/Rev.1 (5 October 2021).

¹¹ See, e.g., Karan Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007).

¹² Lesley Head, ‘Grief, Loss and the Cultural Politics of Climate Change’ in H. Bulkeley, M. Paterson, and J. Strippel (eds) *Towards a Cultural Politics of Climate Change: Devices, Desires and Dissent* (Cambridge University Press, 1st ed, 2016) 81 <doi:10.1017/CBO9781316694473.006>.

¹³ In Japanese culture, the practice of shinrin-yoku emphasizes immersion in forests as a spiritual and psychological tool to improve wellbeing and reduce stress. Peer-reviewed research has confirmed these benefits: see, e.g., Yasuhiro Kotera, Miles Richardson and David Sheffield, ‘Effects of Shinrin-Yoku (Forest Bathing) and Nature Therapy on Mental Health: a Systematic Review and Meta-analysis’ [2020] (July) *International Journal of Mental Health and Addiction* 1 <doi: 10.1007/s11469-020-00363-4>; Mindfulness and Shinrin-Yoku: Potential for Physiological and Psychological Interventions during Uncertain Times’ (2020) 17(24) *International Journal of Environmental Research and Public Health* 9340: 1-13 <doi:10.3390/ijerph17249340>.

¹⁴ Lee Godden, ‘Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage and Others’ in H. Douglas et al (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 138, 140.

with safeguards of transparency in relation to decision-making and accountability to interests beyond government decision-makers can assist in the prevention of biodiversity loss. Laws that are difficult for the public to challenge through litigation can lock in biodiversity decline as this lack of public challenge is a barrier to legal reform and (hopefully) enhanced legal protections. A range of reports and parliamentary inquiries have found serious deficiencies in the Australian national legal framework for biodiversity protection, particularly with respect to forests.¹⁵

We focus on forests for two reasons. First, as noted, there is an important and concerning exemption from federal environmental law for activities that happen in forests covered by specific forest agreements, which has come to light through recent public interest litigation. Second, the burning of Australia's forests across 2019-2020 resulted in such significant loss of species and their habitat that forest systems — and Australians' concern for and dependency on them — are dramatically changed.¹⁶

II ENVIRONMENTAL LAW AND FOREST CONSERVATION

C The Federal EPBC Act and the Commonwealth-State RFAs

Environmental law in Australia has attempted to further the sustainable development agenda through five principles of ecologically sustainable development ('ESD') since the 1990s.¹⁷ These principles are embedded into statutes and other instruments. They include that conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making (the biodiversity conservation principle); that the present generation should ensure the health and diversity of the environment for future generations (the intergenerational equity principle); and that if there is a threat of serious or irreversible harm, lack of full scientific certainty should not be a reason to

¹⁵ See particularly Legislative Council Environment and Planning Committee, *Inquiry into Ecosystem Decline in Victoria* (Parliament of Victoria 2021) tabled 2 December 2021 <https://www.parliament.vic.gov.au/images/stories/committees/SCEP/Ecosystem_Decline/Report/LCE_PC_59-05_Ecosystem_decline_in_Vic.pdf>, and the *EPBC Act Review Report* which we discuss in Graeme Samuel, *Independent Review of the EPBC Act: Final Report* (Report, October 2020) 16 <<https://epbcactreview.environment.gov.au/resources/final-report>>.

¹⁶ Commonwealth, *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 324.

¹⁷ The Australian ESD principles first emerged in the National Strategy on Ecologically Sustainable Development Australia. Ecologically Sustainable Development Steering Committee, *National Strategy on Ecologically Sustainable Development* (Australian Govt. Pub. Service, 1992) and the *Intergovernmental Agreement on the Environment* (1 May 1992).

postpone measures to prevent environmental degradation (the precautionary principle). The ESD principles might be viewed as a recognition of the public interest in nature conservation — collectively, they serve to impose ecological concerns on the human development agenda, promoting development that is sustainable, from an ecological perspective, and from which present and future generations can benefit.¹⁸ The principles are found both in the *EPBC Act*, and the RFA regimes.¹⁹

The *EPBC Act* is Australia's central piece of federal-level environment legislation. Across well over 500 provisions, it (*inter alia*) provides for threatened species to be documented through listing, critical habitat to be registered, and it creates a strict liability offence for knowingly damaging threatened species' critical habitat without a permit. It binds the Commonwealth and Commonwealth agencies to threatened species recovery plans and threat abatement plans if in place. Yet many more species are listed than have active recovery plans,²⁰ and the critical habitat register has not been updated in 16 years.²¹

Principally, the *EPBC Act* operates in practice as a procedure-oriented statute that calls for impact assessment to be conducted where a proposed project, or 'action',²² is likely to have a significant impact on one of nine protected aspects of the environment. These nine aspects, commonly referred to as matters of national environmental significance, broadly correlate with nine areas in relation to which either Australia has international responsibility (through having signed an international treaty), or the Commonwealth is involved.

¹⁸ There has been compelling critique of how the ESD principles operate in practice, and suggestion that they be replaced with a new societal goal for environmental law that recognises the inherent value of nature: see The Australian Panel of Experts in Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).

¹⁹ In this article, these are our focus, although other laws, particularly state and territory laws, also form an important part of the matrix of environmental law, and many also contain the ESD principles.

²⁰ We note, additionally, the recent intention expressed by the current Federal Government to scrap many active recovery plans: see Lisa Cox, 'Coalition proposes to scrap recovery plans for 200 endangered species and habitats' *The Guardian* (online) 18 September 2021 <<https://www.theguardian.com/environment/2021/sep/18/coalition-plans-to-scrap-recovery-plans-for-200-endangered-species-and-habitats>>.

²¹ Australian Government, 'Amendment to the Register of Critical Habitat pursuant to section 207A of the *Environment Protection and Biodiversity Conservation Act 1999*', *Federal Register of Legislation* (Web page) <<https://www.legislation.gov.au/Details/F2009B00249>> ('*EPBC Act*').

²² 'Action' is defined by ss 523-524A of the *EPBC Act*.

Forests generally are not a matter of national environmental significance under the *EPBC Act*.²³ However the *EPBC Act* can nonetheless be triggered in a forest context. The presence of a listed threatened species or ecological community whose critical habitat is in or near the forest can trigger the *EPBC Act* because listed threatened species and ecological communities are a matter of national environmental significance. Similarly, where the forest serves as a part-time home to a migratory species, the *EPBC Act* may be triggered because listed migratory species are also a matter of national environmental significance. Additionally, the *EPBC Act* may be triggered where the forest is a protected heritage place or houses a protected wetland — World and National Heritage places are each matters of national environmental significance listed in pt 3 too, and so are wetlands listed under the Ramsar Convention. If the *EPBC Act* is triggered, federal ministerial approval under ch 4, pt 9 is required before the action can go ahead. The approval needs to consider an assessment of the relevant likely impacts on any implicated protected matters of national environmental significance, and other specified considerations — including the principles of ESD. Otherwise, significant penalties apply.²⁴

There is an important carve-out. However, if the action is an ‘RFA forestry operation’ within the *Regional Forestry Agreements Act 2002* (Cth) (*RFA Act*), and it will not take place in a World Heritage property or a Ramsar Wetland,²⁵ then the entire assessment and approval requirement is exempt, so long as the forestry operation is conducted in accordance with the relevant *RFA Act*.²⁶ An RFA is an agreement between a state government and the Commonwealth, effectively a long-term forest management plan.

Environmental matters not directly linked with the assessment and approval by the Commonwealth government — in other words, matters that are not considered of national environmental significance by the *EPBC Act* — are entrusted to the regulation of the states and territories. Additionally, through bilateral agreements entered into with the Commonwealth, state, and territory processes that assess environmental impacts on the nine matters of national environmental significance can be accredited at the

²³ The matters of national environmental significance are identified in *EPBC Act* ss 12-24 and ss 18-19 deal with listed threatened species and listed threatened ecological communities. These listings of matters of national environmental significance in pt 3 will form a trigger for impact assessment when there is an impacting action, see above footnote for action definition.

²⁴ See particularly pt 3, s136 of the *EPBC Act*.

²⁵ *Ibid* s 42.

²⁶ *Ibid* s 38

Commonwealth level.²⁷ This means that states and territories are heavily involved in federal decision-making as well as in managing conservation at the state and territory level. The federal and state/territory division of responsibility over the environment, which has been in a state of flux over the course of successive federal governments, was a core issue in the so-called ‘forest wars’ of the 1980s and 1990s. It was in response to the forest wars that it was eventually decided that the states would manage forestry operations, and that the federal government would essentially not intervene. This is reflected in the s 38 exemption, and the *RFA Act*. RFAs were designed to give effect to the vision outlined in the National Forest Policy Statement of 1992. This vision foresaw a complementarity between conservation and commercial objectives²⁸ — much has changed in thirty years to call into question whether complementarity is possible, yet the RFAs have not been significantly updated. Currently, there are 10 RFAs, covering areas of New South Wales, Tasmania, Victoria, and Western Australia.

D EPBC Act-RFA Forest Litigation and the EPBC Act Review

The second and most recent review of the *EPBC Act*, conducted across 2019-2020 and chaired by Prof Graham Samuel, flagged the *Leadbeater’s Possum* case, discussed below, as raising doubt as to whether forestry operations are or are not within the purview of the within its purview (at that stage no judgment had been delivered). The Samuel Review expressed ‘low confidence that the environmental considerations under the *RFA Act* are equivalent to those imposed by the *EPBC Act*’.²⁹ It called for harmony between the RFA provisions and those of the *EPBC Act* through national environmental standards (‘ESD’), to which both the RFAs and *EPBC Act* could, it is implied in the Review’s report, be brought into alignment.³⁰ The low confidence in the RFA model expressed in the Review is echoed by a report which described RFAs as ‘legally uncertain and failing in practice’.³¹ Despite the identified incongruence between the *EPBC Act* and the less stringent RFAs, the *EPBC Act* was not considered by the Review to be setting a particularly high bar. Samuel concluded that the *EPBC Act* is not protecting Australia’s environment,

²⁷ *Ibid* ss 166-177.

²⁸ *National Forest Policy Statement – A New Focus for Australia’s Forests* (Commonwealth of Australia 1992, 2nd ed 1995) 2.

²⁹ Samuel (n 15).

³⁰ *Ibid* ch 1.

³¹ Margaret Blakers and Brendan Sydes, *No longer tenable: Bushfires and Regional Forestry Agreements* (Report, Environmental Justice Australia, 27 March 2020) 4 [6] <<https://www.envirojustice.org.au/wp-content/uploads/2020/03/EJA-report-No-longer-tenable-1.pdf>>.

and that it is essentially not fit for purpose.³² He identified significant environmental loss, and a need to restore this loss,³³ signalling an imperative not only for conservation but for restoration.

Exactly how the proposed national standards would extend conservation and promote restoration under the *EPBC Act* given it is largely applied to project-by-project decision-making, is an important question which requires clarification. One of the greatest challenges with the *EPBC Act* operating one action at a time, is that it is not well equipped to manage impacts that occur on a broad scale, to which individual actions contribute cumulatively. Climate change and biodiversity loss are the two most pertinent examples of cumulative impacts, and in the case of threatened forests, both are compounding; a complex context for forestry operations in forests threatened by climate change and the risk of fire. At the point that an approval decision is made on an individual project, environmental, social, and economic considerations all weigh into the decision.³⁴ The need to achieve specific standards through decision-making that can factor in impacts across space and time could potentially be a required consideration at this decision point, as are the ESD principles. However, the familiar problem arises that there will inevitably be many ways a standard could be achieved.³⁵

Perhaps, national standards could be viewed as giving ESD a specific form. Attributing a form or mechanism to a general values-based imperative or idea can tend to motivate action. The *United Nations Framework Convention on Climate Change* ('UNFCCC') is a pertinent example — the Convention has signalled the need to avoid 'dangerous anthropogenic interference with the climate system' since 1994,³⁶ yet it was not until this

³² Samuel (n 15) 150, 166.

³³ *Ibid* ch 8.

³⁴ *EPBC Act* s 136.

³⁵ There is no formula for how conflicting factors should be weighted and balanced, nor is a significant degree transparency required other than that a 'reasons for decision' is made publicly available. There is no requirement that what is known in the US as the 'no action alternative' be considered, nor the opportunity cost associated with foregoing the economic and social benefits associated with not taking the action that harms the environment. These factors all contribute to the limited accountability to conservation goals under the *EPBC Act*.

³⁶ *United Nations Framework Convention on Climate Change*, opened for signature 20 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 2.

was quantified as a 1.5-2°C increase in global mean temperature above pre-industrial levels via the Paris Agreement, that momentum was rapidly catalysed.³⁷

Two recent court cases have called into question the applicability of the *EPBC Act* where the s 38 exemption is no longer operating. In *Leadbeater's Possum*, Justice Mortimer found that because the Victorian RFA requires application of the precautionary principle to the conservation of biodiversity values (pursuant to the *Code of Practice for Timber Production 2014* (Vic) cl 2.2.2.2), and the precautionary principle was not applied or likely to be applied by VicForests, the *EPBC Act* applied to the forestry operations that were in question in the case. These were, namely, forestry operations in native forests in the Victorian central highlands, critical habitat for the *Petauroides volans* (Greater Glider) and *Gymnobelideus leadbeateri* (Leadbeater's possum) species. Mortimer J found that VicForests had not applied the level of conscientious and careful engagement required of the precautionary principle, rather, its conduct with respect to the conservation of the threatened species was a 'poor compromise in the face of the need to be seen to be doing something'.³⁸ Her decision was overturned on appeal by the Full Federal Court, which agreed that VicForests had not taken an adequately precautionary approach³⁹ but which found that s 38 exempted the forest operations, considering the appeal as turning on a question of statutory construction.⁴⁰ The Court was assisted by the explanatory materials to the legislation (the *EPBC Act* and the *RFA Act*) which it felt supported the purpose of s 38(1) as preventing the application of federal law to RFA forestry operations. In December 2021, the High Court refused Friends of Leadbeater's Possum special leave to appeal.⁴¹

Following Mortimer J's decision at first instance, the Bob Brown Foundation launched an action in the Federal Court against Sustainable Timber Tasmania challenging whether the Commonwealth-Tasmanian RFA was, in fact, an RFA for the purposes of the *RFA Act* and

³⁷ Articles such as Christophe McGlade and Paul Ekins, 'The geographical distribution of fossil fuels unused when limiting global warming to 2°C' (2015) 517 *Nature* 187, cited over 1500 times, played an important role in helping to aid an understanding of what the 1.5-2°C target looks like in the practical context of fossil-fuel-powered economies.

³⁸ *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 604, [937].

³⁹ *Leadbeater's Possum* [2021] FCAFC 66 [161]-[243].

⁴⁰ *Ibid* [19].

⁴¹ High Court of Australia, 'Results of Applications Listed at Canberra Friday 10 December 2021' (10 December 2021) <https://cdn.hcourt.gov.au/assets/registry/special-leave-results/2021/10-12-21_SLA_Canberra.pdf>.

s38(1) of the *EPBC Act*.⁴² The arguments raised by the Foundation in relation to the Tasmanian RFA slightly differed from the position that was argued by Friends of Leadbeater’s Possum. The issue was not whether the proposed operation was in accordance with the RFA, but whether the RFA itself was valid and therefore could be protected by the *EPBC Act* exemption.⁴³ If it was not valid then, the Foundation argued, there was a breach of the *EPBC Act* on account of likely significant impacts to the critically endangered *Lathamus discolor* (swift parrot). The Court also found that the case essentially involved a matter of statutory construction, and that the Tasmanian RFA was an RFA within the meaning of ‘RFA’ in the *RFA Act*.⁴⁴ The High Court rejected the Bob Brown Foundation’s application for special leave to appeal in June 2021.⁴⁵

E Accountability

A significant weakness of the *EPBC Act* broader than the forestry carve-out is that its overarching conservation goals, expressed as ESD, are not justiciable.⁴⁶ Thus, they are not readily enforceable, providing no guarantee as to what will happen in practice.⁴⁷ In accordance with the separation of powers doctrine, recognized within the *Commonwealth of Australia Constitution Act 1900* (Cth),⁴⁸ there is a system of checks and balances between the three arms of the state: the legislature, executive government, and the judiciary. Under this doctrine, the courts have a circumscribed role in oversight of executive government and the policy-making process. Generally, the review avenue available to potential litigants is judicial review, which is where the Federal Court examines whether the decision was made according to law.⁴⁹ Typically the arguments will turn on whether a relevant matter needed to be considered and was not, or an irrelevant factor was considered. The former situation can involve alleged failure to consider an ESD principle. Merits review is generally not open to approval decisions made under the *EPBC Act*. In a merits review, the court examines the substantive merits of the decision, and can decide whether the decision is a ‘good’ one in that it accords with

⁴² *Great Forests* [2021] FCAFC 5, 4 [3]; 12 [29].

⁴³ *Ibid* 4 [2].

⁴⁴ *Ibid* 12-13[33].

⁴⁵ *Bob Brown Foundation Inc v Commonwealth of Australia & Ors* [2021] HCASL 125 H4/2021.

⁴⁶ See Samuel (n 15) ch 9.

⁴⁷ *Ibid* ch 9.

⁴⁸ Ch I-III.

⁴⁹ The grounds for judicial review under the *EPBC Act* reflect the scope in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

the relevant evidence. Effectively, the court would ‘stand in the shoes of the original decision maker’ and remake the decision.⁵⁰ Accordingly, the focus for the judiciary in *EPBC Act* cases is with ensuring that government ministers charged with decision-making powers and responsibilities follow legally mandated processes. Although the legislation directs the government decision-maker to have regard to the ESD principles in making certain decisions, including approval decisions, ministerial discretion tends to be preserved concerning whether and how the principles should influence the approval decision.

Moreover, it is not open to anyone wishing to challenge a decision on the basis that it was made inconsistently with the *EPBC Act* to bring legal action. Although *EPBC Act* standing is considered ‘extended’ compared with the *Administrative Decisions (Judicial Review) Act 1977* (Cth), it is not open; this has been deemed a ‘significant inhibitor’ of effective environmental public interest litigation.⁵¹ An applicant must meet the statutory judicial review ‘special interest test’, including being able to demonstrate that, at minimum, at any time in the two years immediately before the decision, they were engaged in a series of activities to protect, conserve, or research the environment.⁵² Standing operates with respect to applications for injunctions as well as review decisions, which is important in the forest context. Restricted standing remains a barrier to access to the courts for much of the public, as are the associated costs in bringing an action.

There are no specific measures in the *EPBC Act* that enable RFA operations (covered by the respective RFAs) to be legally challenged, either through judicial or merits review. RFA operations covered by the respective RFAs. The absence of a means of specific legal challenge to RFA forestry operations, highlights why the legal actions in the *Leadbeater’s Possum* and *Great Forest* cases adopted specific strategies that sought to work around this exclusion from review for RFA operations. Respectively, the cases challenged firstly the continued implementation of the RFA exemption where there is a breach of the core principles of the *EPBC Act*, and secondly the very legality of any such ‘exemption’ from the otherwise governing provisions of the *EPBC Act*. The judgements are of clear legal significance for the operation of the RFAs under the *EPBC Act*, but more widely the

⁵⁰ See Lee Godden, Jacqueline Peel and Jan MacDonald, *Environmental Law* (OUP, 2018) 144-149.

⁵¹ Chris McGrath, ‘Flying foxes, dams and whales: Using federal environmental laws in the public interest’ (2008) 25 *Environment and Planning Law Journal* 324, 357.

⁵² *EPBC Act* s 487.

outcomes of the legal actions indicate the ad hoc quality of litigation in ensuring the overarching legislative purpose of ESD is achieved.

Over the years, public interest litigation that has sought to enforce environmental protection laws including. The *EPBC Act* has been deemed ‘lawfare’,⁵³ a nod to the discourse of battle that also characterised the ‘forest wars’. Yet, as Samuel recognised, the ability of the public to hold decision-makers to account is fundamental to the foundation of Australia’s democracy.⁵⁴ To characterise these actions as ‘lawfare’ misrepresents the importance of legal review in Australian society.⁵⁵ Chief Justice Preston of the Land and Environment Court of NSW has said, ‘an essential forum for reasserting [public] participation in the governmental process is in the courtroom’.⁵⁶ Conflict language that promotes an ‘us versus them’ mentality therefore overlooks the complexity of the issues at stake, and the multivariate interests of stakeholders.

The Samuel Review identified that ‘a dominant theme in the 30,000 or more contributions received by the Review is that many in the community do not trust the *EPBC Act* to deliver for the environment.’⁵⁷ Samuel noted that access to judicial review is important for both the rule of law and the effectiveness of the *EPBC Act*.⁵⁸ Following significant interest in and litigation responding to approvals relating to the proposed Carmichael coal mine in Queensland, the federal government at the time introduced a bill to further limit the public’s ability to enforce the *EPBC Act*.⁵⁹ The fate of the bill, which ultimately lapsed due to concerted opposition, epitomizes the public’s unmet need to feel heard on environmental matters.

The Review, in acknowledging the weakness of public participation and enforceability measures in the *EPBC Act*, proposed an independent Environment Assurance Commissioner to prove oversight and audit the effectiveness of the *EPBC Act* and its

⁵³ Chris McGrath, ‘Myth Drives Australian Government Attack on Standing and Environmental Lawfare’ (2016) 33 *Environment and Planning Law Journal* 3.

⁵⁴ Bruce Lindsay and Hanna Jaireth ‘Democracy and the environment’ (2016) *Australian Environmental Review* 245.

⁵⁵ Samuel (n 15) 10.

⁵⁶ Brian J Preston, ‘The Role of Public Interest Environmental Litigation’ (2006) 23 *Environment and Planning Law Journal* 337, 337, referring to Joseph Sax, *Defending the Environment: a Handbook for Citizen Action* (Knopf, 1971), xviii.).

⁵⁷ Samuel (n 15) 81.

⁵⁸ See *ibid*.

⁵⁹ Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth); see also Commonwealth, *Parliamentary Debates*, Senate, 14 September 2015, 6722 (Scott Ryan).

operation. This suggestion has not been adopted. But oversight via an independent commissioner might result in better alignment of the *EPBC Act* with a broad public interest, and reduce the need for public interest litigation, while preserving access to justice as a fundamental social right.

III ACKNOWLEDGING CHANGE

The 2019–2020 Australian fires burnt more forest and woodland habitat within a season than any on record, constituting an ecological disaster.⁶⁰ Bushfire exacerbates the impacts of actions in forests such as forestry operations because it decreases the environment's resiliency and its capacity to withstand and adapt. Significantly, in relation to ongoing forestry operations, fire affects the extent of critical habitat for species at risk.⁶¹ The compounded impacts of fire and forestry threaten to be detrimental to species whose critical habitat comprises, for example, old hollow-bearing trees, as well as to the ecosystems of which they are a part. Cumulative threats make the conservation and sustainable management of forests particularly important, underscoring the need for regulation that allows for habitat restoration and regeneration,⁶² as well as for flexibility. Increased environmental fragility as a result of environmental change should be recognised in approval decision making, as part of the context in which a decision is made. It is directly pertinent to considering whether impacts are likely to be significant.⁶³ As Preston CJ noted in the *Bushfire Survivors* case in the NSW Land and Environment

⁶⁰ Commonwealth, *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 324.

⁶¹ James A Fitzsimons, 'Urgent Need to Use and Reform Critical Habitat Listing in Australian Legislation in Response to the Extensive 2019–2020 Bushfires' (2020) 37 *Environmental and Planning Law Journal* 143, 143-4.

⁶² Martin suggests regulation 'should be flexible enough to recognise where and when harvesting should or should not take place': Rhett Martin, 'Victorian Ecological Sustainable Forest Management: Part VI – Identifying Change Mechanisms in Regulation and a New Model for Victorian Forestry Practice' (2020) 37 *Environmental and Planning Law Journal* 18, 20.

⁶³ Context forms part of the way in which the significance of an environmental impact is defined, according to case law: *Booth v Bosworth* [2001] FCA 1453. For a discussion on context and resilience see Laura Schuijers 'Environmental Decision-Making in the Anthropocene: Challenges for Ecologically Sustainable Development and the Case for Systems Thinking' (2017) 34 *Environmental and Planning Law Journal* 179, 198; see also The Hon Justice Brian J Preston, 'Contemporary Issues in Environmental Impact Assessment', Climate Impact Seminar, 'Are Climate Impacts Impacts? Climate Science in the EIA and Judicial Review' (27 February 2020, Helsinki, Finland) <https://lec.nsw.gov.au/documents/speeches-and-papers/Preston_CJ_-_Contemporary_Issues_in_Environmental_Impact_Assessment_27.02.20.pdf>.

Court, threats to the environment change over time, and the law can and must accommodate such change.⁶⁴

The formal conservation documents published by governments detailing the pressures on Australia's threatened species ('Conservation Advices') explicitly recognise the links between fire and species decline, even those that have not been updated since the 2019–2020 fires. These documents must be considered in approval decisions under the *EPBC Act* where the threatened species 'matter of national environmental significance' has been triggered.⁶⁵ Conservation Advices for the Leadbeater's Possum and Greater Glider species were referred to in the *Leadbeater's Possum* original judgment. Mortimer J's decision that VicForests did not apply and would not in future apply the precautionary principle in planning and engaging in forestry activities in the Victorian Central Highlands which had recently been severely impacted by fire was explicitly informed by the advices. On a broader scale, both the State of the Forests and State of the Environment reports recognise the interlinkages between cumulative environmental threats to forests.⁶⁶

The *Leadbeater's Possum* case and its social and environmental context support a contention that, in this time of change, forestry operations in Australian native forests may have lost social acceptance — a social licence to operate.⁶⁷ After the 2019–2020 fires, a survey by the Australia Institute (which has been collecting data on attitudes toward climate change and the environment for well over a decade) reported that an overwhelming majority of Australians felt worried that Australia's native forests and

⁶⁴ *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 ('*Bushfire Survivors*'). That case involved the interpretation of a law governing the NSW EPA and imposing on it a duty of care to protect the environment. The court interpreted the duty as requiring protection of the environment from climate change, given that climate change is presently such a significant threat to the environment: see Laura Schuijers, 'Climate of Change in the Courtrooms' (2021) 84 *Law Society Journal* 78.

⁶⁵ *EPBC Act* s 139.

⁶⁶ See Montreal Process Implementation Group for Australia and National Forest Inventory Steering Committee, ABARES, *Australia's State of the Forest Report 2018* (Report, 2018); Australian Government, Department of the Environment and Energy, *Australia State of the Environment 2016: Overview* (Report, 2017) <<https://soe.environment.gov.au/theme/overview>>.

⁶⁷ See, e.g., Emma Field, 'Native forest logging support low in regional Australia, leaked report shows' *ABC News* (Live Blog, 9 December 2018, updated 15 February 2019) <<https://www.abc.net.au/news/2018-12-09/forestry-survey-rejects-native-forest-logging/10597490>>; on the concept of social licence, see, e.g., Justine Lacey, Peter Edwards and Julian Lamont, 'Social licence as social contract: procedural fairness and forest agreement-making in Australia' (2016) 89(5) *Forestry: An International Journal of Forest Research* 489 <<https://doi.org/10.1093/forestry/cpw027>>.and generally, Paul Martin and Mark Shephard 'What is meant by the social licence?' in P. Martin and J Williams (eds) *Defending the social licence of farming: Issues, challenges and new directions for agriculture* (ProQuest Ebook Central, 2012) 17.

unique wildlife will never be the same.⁶⁸ Support for native forest logging has concomitantly declined.⁶⁹ Native forestry is being phased out in Victoria, toward a total ban by 2030. In the case of the Victorian Central Highlands, most of the felled forest is destined for pulp and paper pursuant to an agreement with a Japanese-owned paper mill, the Wood Pulp Agreement, which is due to expire in that year.⁷⁰ Western Australia is planning an earlier phase-out. Mortimer J's judgement was scathing of VicForests' approach to conservation, and her conclusion that its logging operations were unlawful had widespread impacts. Subsequently, Australian retailer Bunnings announced that it will no longer source native timber harvested by VicForests,⁷¹ in deference to a perception that Bunning's customers' purchasing decisions are motivated by environmental concerns. This reflects an emerging trend, whereby public interest litigation is 'mediatized' and this media exposure is an important driver for change.⁷² As not everybody reads legal scholarship, therefore how the media presents high profile court cases can influence community views on an industry's social licence.

Clearly, a major global shift in attitude toward environmentally destructive activities is underway. A risk to the environment is now often viewed as a concomitant risk to mainstream business, and economic and financial institutions. In turn this stems from a resurgent public interest in conservation and restoration. Following the global Taskforce on Climate-Related Financial Disclosures ('TCFD'), and a small suite of litigation,⁷³ Australian financial and business communities have recognised that investing in activities that impact and will be impacted by climate change carries a serious risk.⁷⁴ A

⁶⁸ Australia Institute, *Polling – Bushfire crisis and concern about climate change* (Report, January 2020) <<https://australiainstitute.org.au/wp-content/uploads/2020/12/Polling-January-2020-bushfire-impacts-and-climate-concern-web.pdf>>.

⁶⁹ Emma Field, 'Native forest logging support low in regional Australia, leaked report shows' *ABC News* (Live Blog, 9 December 2018, updated 15 February 2019) <<https://www.abc.net.au/news/2018-12-09/forestry-survey-rejects-native-forest-logging/10597490>>. Ecologists point to ecological collapse of logged forests in Victoria but these findings are contested, see discussion in Rhett Martin 'Victorian Ecological Sustainable Forest Management: Part VI – Identifying Change Mechanisms in Regulation and a New Model for Victorian Forestry Practice' (2020) 37 *Environmental and Planning Law Journal* 18, 19.

⁷⁰ Ricky French, 'Possum Magic Could Fell an Industry', *The Australian* (Sydney, 19 September 2020).

⁷¹ 'Bunnings Ends Sourcing Timber from VicForests' (Media Statement, 1 July 2020) <www.bunnings.com.au/media-centre>.

⁷² Claire Konkes, 'Green Lawfare: Environmental Public Interest Litigation and Mediatized Environmental Conflict' (2018) 12 *Environmental Communication* 191.

⁷³ See, e.g., *McVeigh v Retail Employees Superannuation Pty Ltd* (Federal Court of Australia, NSD1333/2018, commenced 21 September 2018); *O'Donnell v Commonwealth* (Federal Court of Australia, VID482/2020, commenced 23 December 2020).

⁷⁴ Australian Sustainable Finance Initiative, *Australian Sustainable Finance Roadmap: a plan for aligning Australia's financial system with a sustainable, resilient and prosperous future for all Australians* (Report,

Taskforce on Nature-Related Financial Disclosures (“TNDF”) has recently been established. This trajectory of change is significant for efforts to halt biodiversity loss, and could implicate forestry operations in the same way that the TCFD has affected fossil-fuel intensive industries. These trends suggest that the *EPBC Act* forestry carve-out is out of step with public expectations. Moreover, despite the increasing pressure from public interest forestry litigation, the actual outcomes for biodiversity protection that are achieved, indicate particular limitations to following a litigation pathway—at least while the RFAs survive in the politico-legal sphere. Instead, comprehensive legal reform of forestry-operation exemptions and associated laws at the state level as well as the Commonwealth may better serve the enhanced public expectation of biodiversity conservation that can address the diverse, emergent challenges.

IV CONCLUDING THOUGHTS

Australia’s national environmental law seeks to conserve the environment and protect biodiversity, on which we all depend. Environment protection is an element of human dignity, and we are diminished if we ignore the stewardship responsibility that has arisen from the current crisis. However, the capacity of the general public to ensure that government decisions are made consistently with the legislation’s conservation and protection purposes, and with the principles of ESD is highly constrained. The recent Review of the *EPBC Act* highlighted critical issues within it, including the *RFA Act–EPBC Act* interplay. It concluded that the *EPBC Act* is failing to protect Australia’s natural environment and raised concerns about the biodiversity standards of both the RFAs and the *EPBC Act*. In the *Leadbeater’s Possum* case, expert evidence demonstrated the perilous state of forest biodiversity facing continuing anthropogenic threats. Yet two courts reached different outcomes in interpreting whether the s 38 *EPBC Act* exemption should be regarded as removing RFA mandated forestry operations from legal scrutiny. The High Court unfortunately declined to offer a third interpretation with a refusal of a Special Leave application on the part of the Friends of Leadbeater applicants to the Court in December 2021.

November 2020)

<<https://static1.squarespace.com/static/5c982bfaa5682794a1f08aa3/t/5fcdb70bfe657040d5b08594/1607317288512/Australian+Sustainable+Finance+Roadmap.pdf>>.

Notwithstanding the gathering momentum of forest litigation, Australian environmental laws need to facilitate more transparent decision-making building on the Samuel Review options, and by embedding stronger accountability mechanisms than the current codes that regulate forestry in RFAs. The value of independent review reports and state of the environment reporting is not maximised unless the information found through those processes is fed back via legislative and policy reform. Legal reform of the *EPBC Act* that responds to the biodiversity crisis and to the cumulative threats of climate change and forestry operations is urgently needed. Incorporating the suggestions of the Samuel Review, such as to hold the government accountable to national environmental standards, is an important step. At this critical point in time, augmenting rather than 'rolling back' existing laws, and addressing anomalies such as a major exemption for forestry practices is vital to ecological survival. The biodiversity crisis demands a dignified, comprehensive, and apolitical response.

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