HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 24 Oct 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S120/2024
File Title:	Forestry Corporation of New South Wales v. South East Forest
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	24 Oct 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN **FORESTRY CORPORATION OF NEW SOUTH WALES**

APPELLANT

AND

SOUTH EAST FOREST RESCUE INCORPORATED INC9894030

RESPONDENT

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

1. ***First***, do persons with a special interest in the subject matter of an action have a "common law right" to institute proceedings for declaratory or injunctive relief in respect of that action unless that right is ousted by legislation?

2. ***Secondly***, does the "principle of legality" apply in respect of any "common law right" the subject of issue 1 such that irresistible clarity must be discerned before a statute abrogates or modifies that right?

3. ***Thirdly***, having regard to the proper construction of the statutory scheme, can persons in the Respondent's position institute proceedings for declaratory or injunctive relief to enforce any duty not to breach an integrated forestry operations approval (**IFOA**)?

PART III: SECTION 78B CERTIFICATION

1. Notice under section 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: CITATIONS OF DECISIONS BELOW

1. *South East Forest Rescue Incorporated INC9894030 v Forestry Corporation of New South Wales* [2024] NSWLEC 7 (**J**).

2. *South East Forest Rescue Inc v Forestry Corporation of New South Wales (No 2)* [2024] NSWCA 113 (**CA**).

PART V: FACTUAL BACKGROUND

1. The Appellant is a statutory State owned corporation under the ***Forestry Act*** *2012* (NSW). The Respondent is an incorporated association with six members, whose objectives broadly concern the protection of native forests from logging. The Respondent commenced proceedings against the Appellant in the New South Wales Land and Environment Court (**LEC**), alleging failure by the Appellant to comply with a condition of a Coastal Integrated Forestry Operations Approval (**CIFOA**) requiring it to undertake a "broad area habitat search" for certain habitat features of three species of gliders. The Respondent alleged that, on what it contended was the proper construction of the relevant condition, the Appellant was failing to comply with the CIFOA. The Respondent sought declaratory relief (in relation to the CIFOA's interpretation) and injunctive relief (restraining the Appellant from conducting any forestry operation

unless broad area habitat searches were undertaken as contended by the Respondent).

2. The Respondent did not rely for its standing to bring the proceedings on any effect that the alleged unlawful conduct had on its own rights. Nor could it rely on the statutory "open standing" provisions that allow proceedings to be brought in the LEC regardless of whether any right or interest of the applicant has been affected – provisions that have been in place at all times since the enactment of the *Forestry Act* (and its predecessor). As is discussed below, those open standing provisions had been expressly disapplied in respect of alleged breaches of an IFOA (s 69ZA of the *Forestry Act*). Rather, the Respondent asserted standing on the basis that it had a "special interest in the subject matter of the action" within the meaning of the principle identified in ***Australian Conservation Foundation Inc*** *v Commonwealth* (1980) 146 CLR 493 at 527.

3. The primary judge (Pritchard J) found that the Respondent did not have standing to bring the proceedings. Her Honour held that, notwithstanding the specific conferral of enforcement functions on the EPA and the express disapplication of the open standing provisions, the statutory scheme allowed private parties to enforce the CIFOA (J[107]-[128]). However, Pritchard J found that the Respondent did not have a sufficient "special interest" to establish standing (J[129]-[140]).

4. The Respondent appealed to the NSW Court of Appeal. The Court of Appeal allowed the appeal, holding that the Respondent had standing to bring the LEC proceedings. The Appellant (the respondent in the Court below) had filed a notice of contention, asserting that the statutory scheme exhaustively identified who had standing to bring proceedings of the present kind, and that the Respondent fell outside the class covered by the statutory scheme. The Court of Appeal dismissed the notice of contention. The appeal to this Court is confined to the issue raised by the notice of contention below.

5. Griffiths AJA gave the leading judgment (Adamson JA agreeing: CA[1]). Basten AJA agreed with Griffiths AJA and gave reasons which "supplement[ed]" and were "not intended to be inconsistent" with Griffiths AJA's reasons (CA[7]). The Court of Appeal presumed that persons with a special interest can bring civil enforcement proceedings unless that presumption is ousted. Griffiths AJA described the relevant issue as "whether, read as a whole, the statutory scheme has [the] effect" of ousting common law standing (CA[112]; see also CA[114]), and went on to consider whether various aspects of the statutory scheme had the effect or intention of ousting or abrogating that standing. Basten AJA acknowledged that the identification of statutory purpose and

intention is best derived from the legislation itself (CA[27]), but in substance took a similar approach of looking for features which were specifically directed to limiting standing under general law (CA[26]-[29]). In reasoning in this way, the Court of Appeal held that "common law" standing principles attracted the principle of legality, such that irresistible clarity was needed before those principles were ousted or abrogated: CA[116]-[118] (Griffiths AJA); see also CA[27] (Basten AJA).

PART VI: SUMMARY OF ARGUMENT

6. The Court below proceeded from an erroneous methodology. The Court below approached "common law" standing as an exogenous and antecedent fact, existing as a fundamental common law right prior to any statutory intervention, such that the relevant question was whether a statutory scheme had ousted that exogenous fact with irresistible clarity. The correct analysis starts with the statutory scheme, construes that scheme in a conventional way, and asks: what class of persons did Parliament intend to have a right to institute proceedings of the relevant kind? Had the correct question been asked, once the statutory text, context and purpose are understood, it was apparent that Parliament had vested responsibility for enforcement exclusively in the EPA and not in any person who happened to have a special interest from time to time. And, even on the Court of Appeal's approach, the statutory scheme did speak with irresistible clarity.

The relevant statutory schemes: history and context

7. The Respondent's suit was a suit to enforce compliance with an IFOA. IFOAs were introduced in 1999 via the *Forestry and National Park Estate Act 1998* (NSW) (**FNPE Act**). A material impetus for their introduction was a desire to limit the range of persons previously able to challenge forestry operations undertaken with prior approval. Prior to 1999, forestry operations carried out by the Appellant's predecessor, the Forestry Commission of New South Wales (and some others), were regulated by Pt 5 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). Under the EP&A Act, "approvals" from a "determining authority"[1] were needed for specified "activities" and, in cases meeting a threshold of significance, there was a requirement for public exhibition of an environmental impact statement.[2] Under that framework, any person could bring proceedings against the Commission under the EP&A Act's

---

1 Which, for the Forestry Commission, was the Minister.

2 EP&A Act, ss 110, 111, 112 (as in force on 31 December 1998, immediately before the commencement of Pt 4 of the *Forestry and National Park Estate Act 1998* (NSW) on 1 January 1999).

open standing provision (then s 123, now to be found in s 9.45). Proceedings seeking orders that the Forestry Commission (or others) be restrained from conducting logging and related activity in State forests were not uncommon under that provision.[3]

8. The FNPE Act introduced IFOAs, and excluded them from the assessment and approval process under Pt 5 of the EP&A Act. Part 4 of the FNPE Act commenced on 1 January 1999 and provided for "integrated forestry operations approvals", the purposes of which included to "provide a framework for forestry operations … that integrates the regulatory regimes for environmental planning and assessment, for the protection of the environment and for threatened species conservation": s 25(b). Approvals granted under Pt 4 could only be granted jointly by writing signed by five separate Ministers, each responsible for different statutory schemes: s 27. The Second Reading Speech referred to the "plethora of regulations, approvals and licences" then affecting forestry operations in State forests or other Crown timber lands, and stated an object to "provide a framework for forestry operations, an approval which is up front, clearly defined and … transparent and reasoned".[4] The Second Reading Speech further explained that it was "the Government's intention that part 5 of the [EP&A Act] will not apply in respect of the carrying out of the forestry operations during any period that an integrated forest operation approval applies to those operations".[5]

9. Section 32(2) of the FNPE Act stated that a "relevant Minister" (being a Minister who was a party to the approval)[6] "may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the conditions of an integrated forestry operations approval". Section 32(4) conferred power on the LEC to "make such orders as it thinks fit to remedy or restrain the breach". Section 36 gave effect to the stated object of exempting IFOAs from the environmental impact statement process.

10. Section 40 of the FNPE Act was the predecessor to what is now s 69ZA of the *Forestry Act*, and relevantly stated in sub-s (1):

> This section applies to the following statutory provisions … (b) a provision of an Act that gives any person a right to institute proceedings in a court to remedy or restrain a breach (or a threatened or apprehended breach) of the Act or an instrument made under the Act, whether or not any right of the person has been or may be

---

3 See, eg, *Kivi v Forestry Commission of New South Wales* (1982) 47 LGRA 38; *Prineas v Forestry Commission (NSW)* (1983) 49 LGRA 402; *Jarasius v Forestry Commission (NSW) (No 1)* (1988) 71 LGRA 79; *Jarasius v Forestry Commission of New South Wales (No 2)* (1989) 69 LGRA 156.

4 Parliament of NSW, Legislative Assembly, *Hansard* (12 November 1998) 9923 (Mr Yeadon).

5 Parliament of NSW, Legislative Assembly, *Hansard* (12 November 1998) 9924 (Mr Yeadon).

6 See s 32(1).

infringed by or as a consequence of that breach.

11. Section 40(2)(b) then stated:

> Proceedings may not be brought under a statutory provision to which this section applies if the breach (or threatened or apprehended breach) to which the proceedings relate is as follows: … (b) a breach of an integrated forestry operations approval (including a breach of the terms of any licence provided by the approval).

12. Section 40(3), like the current s 69ZA(3) of the *Forestry Act*, disapplied s 40(2) where the proceedings were brought by a Minister, the EPA or a member of the staff of the EPA or (for provisions covered by s 40(1)(b)) a government agency or any government official engaged in the execution or administration of the Act.

13. The purpose of section 40 was explained in the Second Reading Speech,[7] as follows:

> A central theme running through th[e] legislation is the provision of certainty for all parties. … Certainty cannot be increased if we continue to allow challenges to the licensing system. Clause 38 [which became s 40][8] removes the rights of third parties to bring proceedings relating to the integrated approval. The compliance regime that will apply to the integrated approval is clear and unambiguous. The agencies which currently have enforcement and compliance powers will continue to have those powers and continue to use them to ensure that the licences are adhered to.

14. In 2012, the *Forestry Act* transferred Pt 4 of the FNPE Act into the *Forestry Act*, such that it became Pt 5B of the *Forestry Act*: see Sch 4, item 16. In the new Pt 5B, the former s 32 became s 69S, and the former s 40 became s 69ZA.

15. In 2018, the *Forestry Legislation Amendment Act 2018* (NSW) omitted the former s 69S and inserted s 69SA. That Act also inserted s 69SB, which stipulated relevantly:

> (1) The Environment Protection Authority has the function of monitoring the carrying out of forestry operations to which this Part applies and the function of enforcing compliance with the requirements of integrated forestry operations approvals.

16. The *Forestry Legislation Amendment Act 2018* (NSW) inserted a new s 13.14A into the ***Biodiversity Conservation Act*** *2016* (NSW), which stated:

> (1) The Environment Protection Authority may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of Part 5B of the *Forestry Act 2012*.
> (2) Any such proceedings may be brought whether or not proceedings have been

---

7 The Explanatory Notes in respect of the *Forestry and National Park Estate Bill 1998* (NSW) said of s 40 that it "excludes certain civil and criminal enforcement proceedings by third-parties under environment protection and other legislation for breaches of the proposed Act or related to the proposed Act".

8 See *Forestry and National Park Estate Bill 1998* (NSW) (first print).

instituted for a native vegetation offence under Part 5B of the *Forestry Act 2012*.

(3) If the Court is satisfied that a breach has been committed or that a breach will, unless restrained by order of the Court, be committed, it may make such orders as it thinks fit to remedy or restrain the breach.

(4) Without limiting the powers of the Court under this section, an order under this section may suspend an integrated forestry operations approval with respect to the forestry operations concerned in the breach.

17. The Explanatory Notes for the corresponding Bill explain that its objects included "to amend the *Forestry Act 2012*, the *Biodiversity Conservation Act 2016* and other Acts to update the regulatory framework for public native forestry and the enforcement role of the Environment Protection Authority". The Second Reading Speech identified the Bill's overall object as being to "provide the sector with regulatory certainty".[9]

18. Sections 69SB and 13.14A – like s 40(4) of the FNPE Act before them – together vested responsibility for enforcement in the EPA. The EPA is constituted by the *Protection of the Environment Administration Act 1991* (NSW) (**POEA Act**): s 6. It is given a range of functions in the public interest, including "ensuring that the best practicable measures are taken for environment protection" (s 7(2)(a)) and "co-ordinating the activities of all public authorities in respect of those measures" (s 7(2)(b)). The overall objects of the POEA Act include "to provide integrated administration for environment protection" (s 4(b)). The EPA is overseen by a Board with broad experience (ss 15, 16) and which is to be advised by a suitable practising Barrister as "Environmental Counsel" (s 17). The evident policy of Parliament's decision to vest enforcement responsibility in the EPA was to ensure that enforcement lay with an expert body, charged with ensuring that environmental laws were implemented in a coherent and stable manner.

The LEC's jurisdiction and power

19. It is convenient also to say something about the statutory sources of the LEC's jurisdiction and power to determine the matter raised by the Respondent. For reasons explained further below, standing, if it existed, was to be sourced in those statutes.

20. Section 69P(2)(b) of the *Forestry Act* provides for IFOAs to "set out conditions subject to which those forestry operations are to be carried out". Section 69SA(1), in turn, makes it an offence for a person to contravene a requirement imposed by an approval.

21. Civil enforcement of IFOAs is regulated by Pt 5B of the *Forestry Act* and Pt 13 of the

---

[9] Parliament of NSW, Legislative Assembly, *Hansard* (16 May 2018) 1703 (Mr Paul Toole).

Biodiversity Conservation Act: see *Forestry Act*, s 69SB. Section 69SA is in Pt 5B of the *Forestry Act* and thus is a "planning or environmental law" within the meaning of s 20 of the ***Land and Environment Court Act*** *1979* (NSW). Under s 20(1)(e) of the *Land and Environment Court Act*, the LEC was invested with "jurisdiction to hear and dispose of …proceedings referred to in" s 20(2). Section 20(2), in turn, states:

> The Court has the same civil jurisdiction as the Supreme Court would, but for section 71, have to hear and dispose of the following proceedings –
>
> (a) to enforce any right, obligation or duty conferred or imposed by a planning or environmental law …
>
> (c) to make declarations of right in relation to any such right, obligation or duty or the exercise of any such function …

22. Section 71(1) of the *Land and Environment Court Act* states that "[s]ubject to section 58, proceedings of the kind referred to in section 20(1)(e) may not be commenced or entertained in the Supreme Court". Accordingly, jurisdiction invested in the LEC under s 20(1)(e) and 20(2) corresponds with the jurisdiction the Supreme Court would have but for s 71(1). The jurisdiction the Supreme Court would otherwise have includes its general jurisdiction invested by s 23 of the ***Supreme Court Act*** *1970* (NSW),[10] its jurisdiction or power to issue injunctions to "restrain any threatened or apprehended … injury"[11] and also, to the extent available, the Supreme Court's jurisdiction to issue writs in the nature of the prerogative writs under s 69 of the *Supreme Court Act*. In this case, the jurisdiction of the LEC to grant the relief sought by the Respondent thus arose from the combined operation of the *Forestry Act*, the *Biodiversity Conservation Act*, the *Land and Environment Court Act* and the *Supreme Court Act*.

Standing to seek injunctions and declarations in "public law"

23. "Standing" is a metaphor, the origins of which may lie in the posture required of advocates.[12] While the system of writs and forms of actions prevailed in England, there was "no need to speak of standing" as a discrete topic:[13] the plaintiff's right (if any) to

---

10 Which vests the Supreme Court with "all jurisdiction which may be necessary for the administration of justice in New South Wales".

11 *Supreme Court Act 1970* (NSW), s 66(1). See also s 66(2): "[s]ubsection (1) applies as well in a case where an injury is not actionable unless it causes damage as in other cases".

12 ***Truth About Motorways*** *Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at [88] (Gummow J).

13 *Truth About Motorways* at [92] (Gummow J).

bring the action inhered in its description.[14] Thus, in the system of strict common law pleading, "the question of [the] plaintiff's standing merged with the legal merits".[15]

24. Chancery took a different approach.[16] In Chancery, "the plaintiff by the bill sought to lay out the facts and circumstances demonstrating the equity to the relief claimed".[17] The equity "might arise … by reason of the inadequacy of legal remedies available to vindicate the plaintiff's legal rights".[18] Those legal rights, in turn, might be derived from a statute which, while conferring rights upon the plaintiff, "provide[d] no remedies or inadequate remedies".[19] Further, and importantly:[20]

> [R]ather than conferring rights upon the plaintiff, statute might impose obligations upon administrators or particular sections of the community, or upon the community at large. Statute might confer franchises or privileges with particular limitations upon them. In either case, the statute might provide no means, or inadequate means, for enforcement of the obligation or to restrain ultra vires activity. This led to the engagement of the equity jurisdiction in matters of public law.

25. Initially, the Attorney-General was treated as the competent party to seek enforcement of the statutory prohibition by equitable remedies.[21] And, as Gummow J explained in *Truth About Motorways*, the "litigious activity did not involve the exercise by a plaintiff of personal rights bestowed upon the plaintiff by statute"; "[r]ather, it involved the use of the auxiliary jurisdiction in equity to fill what otherwise were inadequate provisions to secure the compliance by others with particular statutory regimes or obligations of a public character".[22] Thus, "[e]quitable remedies are available in the field of public law

---

14 *Truth About Motorways* [92] (Gummow J). See also ***Bateman's Bay*** *Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at [43] (Gaudron, Gummow and Kirby JJ).

15 *Truth About Motorways* at [92] (Gummow J), quoting from Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harvard Law Review* 1281 at 1290. See also *Bateman's Bay* at 264 (Gaudron, Gummow and Kirby JJ).

16 The Court of Exchequer also assumed jurisdiction to issue injunctions following the filing of an "English information" by, at least, the Attorney-General. By at least the mid-20th century, that jurisdiction had fallen into desuetude: see Donnelly and Hare, *De Smith's Principles of Judicial Review* (2020, 2nd ed) at 15-044.

17 *Truth About Motorways* at [97] (Gummow J). See also *Bateman's Bay* at [25] (Gaudron, Gummow and Kirby JJ) ("The position is expressed in traditional form by asking of the plaintiff whether there is 'an equity' which founds the invocation of equitable jurisdiction").

18 *Truth About Motorways* at [97] (Gummow J).

19 *Truth About Motorways* at [97] (Gummow J).

20 *Truth About Motorways* at [97] (Gummow J).

21 *Truth About Motorways* at [97] (Gummow J).

22 *Truth About Motorways* at [98] (Gummow J). See also *Smethurst v Commissioner of Police* (2020) 272 CLR 177 at [113] (Gageler J) ("courts administering equity had by the end of the nineteenth century become accustomed to issuing injunctions against public officers and public authorities, where common law remedies were unavailable or inadequate to 'meet the justice of the case'").

precisely because of the inadequacies of the prerogative writs"[23] and "equity has proceeded on the footing of the inadequacy … of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration".[24]

26. By 1903, in ***Boyce*** *v Paddington Borough Council* [1903] 1 Ch 109 at 114, it was said that, in addition to the Attorney-General being competent to sue to enforce public rights, a plaintiff was competent to sue where "the interference with the public right is such as that some private right of his is at the same time interfered with" or the plaintiff "suffers special damage peculiar to himself from the interference with the public right". These have come to be known as *Boyce*'s first and second limbs, respectively. *Boyce* was an action for public nuisance. The plaintiff owned buildings on land abutting some open space controlled by the local council. The windows on the buildings overlooked the open space. The council resolved to erect a hoarding in the open space, with a view to preventing the plaintiff from gaining a prescriptive right to the access of light over the churchyard. The plaintiff sought an injunction to restrain the council.

27. The Court held that the plaintiff had standing either because he was suing to enforce a private right of access to light or because he was suing to enforce a "public right" to say that there should be no buildings on the open land.[25] Buckley J held that neither the private right nor the public right were established, with the result that the claim failed. The public right identified by Buckley J was to "have the open space so kept as to allow the enjoyment by the public of the space in an open condition, free from buildings".[26] That public right was sourced in two statutes, one of which provided that the land was to be held "in trust for the perpetual use thereof by the public for exercise and recreation" and the other of which transferred control to the council "for the purpose of giving the public access" thereto and "preserving the same as an open space accessible to the public".[27] The public right recognised was thus grounded in the words of specific statutory provisions, which in their express terms dealt with rights of the public to open space. Further, the special damage in *Boyce* involved economic loss: it involved interference with a view which, no doubt, can impact the value of property, as this Court

---

23 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [58] (Gaudron J).
24 *Bateman's Bay* at [25] (Gaudron, Gummow and Kirby JJ); see also at [26].
25 *Boyce* at 114.
26 *Boyce* at 113-114, 116.
27 *Boyce* at 110-111.

observed in a modern application of *Boyce* in *Day v Pinglen Proprietary Limited*.[28]

28. The failure of the claim in *Boyce* meant that the statement of general principle at 114 was dicta. Further, on an appeal from the decision, the Court of Appeal "intimated their opinion that it would be better that the Attorney-General should be added as a plaintiff in respect of the rights of the public" and the Attorney was joined.[29] This Court has observed that "the circumstances of *Boyce*, a public nuisance case, provided a somewhat unpromising foundation for the establishment of a general principle".[30] Nevertheless, *Boyce* was approved (but not applied) by the House of Lords in *London Passenger Transport Board v Moscrop* [1942] AC 332 at 344-345. Subsequently, in *Australian Conservation Foundation*, this Court adopted and reformulated the *Boyce* test so that it applied where a person had a "special interest in the subject matter of the action".

29. Returning to *Boyce*, in support of the proposition that those who suffer special damage had standing to sue to enforce a public right, Buckley J cited ***Iveson*** *v Moore*,[31] ***Hart*** *v Basset*,[32] ***Benjamin*** *v Storr*[33] and ***Winterbottom*** *v Lord Derby*.[34] Each of those cases involved an obstruction of the use of common property. In *Hart* and *Benjamin*, standing was found where the obstruction interfered with access to private property.[35] In *Hart*, access to a barn was obstructed, with the result that the "labour and pains [the plaintiff] was forced to take with his cattle and servants … may well be of more value than the loss of a horse".[36] In *Benjamin*, access to the plaintiff's coffee house was obstructed, with the consequence that the takings of the plaintiff's coffee-house were materially lessened.[37] In *Iveson*, where the plaintiff asserted obstruction of access to his profit-making colliery, the Court split 2:2 on whether there was special damage. In *Winterbottom*, special damage was not found, as the plaintiff was obstructed in the same

---

28 (1981) 148 CLR 289 at 300 (Mason, Murphy, Aickin, Wilson and Brennan JJ). In that case, the plaintiff's views of Sydney Harbour were adversely affected by building activities on neighbouring land.

29 *Boyce v Paddington Borough Council* [1903] 2 Ch 556 at 561; see also at 563-564 ("[w]e thought it our duty to say that the Attorney-General ought to be approached"). See also the discussion of the procedural history in *Helicopter Utilities Pty Ltd v Australian National Airlines Commission* [1962] NSWR 747 at 755-756 (Jacobs J).

30 ***Wentworth*** *v Woollahra Municipal Council* (1981) 149 CLR 672 at 680 (Gibbs CJ, Mason, Murphy and Brennan JJ).

31 (1699) 1 Ld Raym 486; 91 ER 1224.

32 (1681) T Jones 156; 84 ER 1194.

33 (1874) LR 9 CP 400.

34 (1867) LR 2 Ex 316.

35 *Hart* at 1195; *Benjamin* at 408-409.

36 At 1195.

37 At 408, 409.

way as any other user of the common property.[38] Each of these cases was a public nuisance case; none was a case with a plaintiff seeking equitable relief to enforce a statutory duty. Where special damage *was* found in those cases, it was found in circumstances where the plaintiff had suffered special damage, measurable in pecuniary terms, in respect of private property. None of those cases recognised some broader basis for intervention, arising from a public interest in due administration of statutes.

30. Understood in that context, as Professor Finn has said, *Boyce* was neither "startling" nor "novel".[39] In *Boyce*, a plaintiff who had suffered pecuniary damage in respect of property arising from alleged breach of statutory duties was found to have standing to assert those breaches. It was developments subsequent to *Boyce* which resulted in its adaptation more generally to public law. This "metamorphosis" of *Boyce* was the result of the "increasingly myopic view of public nuisance" and the changing content of the designation "public right".[40] As to the latter, it was during the 20th century that lawyers came, progressively, to use the language of "public right" to describe a broader set of public benefits.[41] This led to the second proposition in *Boyce* being "generalized and liberated" from the "specific and limited context" in which it formerly operated,[42] and, in Australia, coming to provide "an independent and more liberal basis for individual action to secure compliance with public duties and prohibitions".[43]

31. Three key points arise from the foregoing. *First*, the rationale and occasion for equity's intervention in "public law" was the inadequacy of existing remedies. *Secondly*, the "standing" of private persons to enforce public obligations is not an ancient common law right. Rather, it is a relatively recent innovation, arising in the 20th century out of the law of public nuisance. *Thirdly*, the "right" of a plaintiff to maintain proceedings to restrain and declare breach of public duties is not an individual right,[44] but is instead a

---

38 At 322-323.

39 P.D. Finn, "A Road Not Taken: The Boyce Plaintiff and the Lord Cairns' Act" (1983) 57 *Australian Law Journal* 493 at 500-501. Contrast *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [118] (Gaudron, McHugh and Gummow JJ).

40 Finn (n 39) 501, 502.

41 Finn (n 39) 502. See similarly D Noble, "The Section 75(v) Injunction: History and Principles" (2023) 97 *Australian Law Journal* 35, who cautions against reading terms such as "special damage" with "modern eyes" (at 42, 44).

42 *Neville Nitschke Caravans (Main North Road) Pty Ltd v McEntee* (1976) 15 SASR 330 at 339 (Bray CJ).

43 Finn (n 39) 502.

44 See *Wentworth* at 681 (Gibbs CJ, Mason, Murphy and Brennan JJ) (distinguishing between "the statute which creates a civil cause of action at the suit of an individual … and the statute which stops short of creating personal rights, but enables an individual who satisfies the 'special interest' requirement to seek injunctive or declaratory relief").

mechanism developed by the law to ensure the efficacy of *public* rights.[45] The limitation to persons with a special interest in the subject matter of the action did not reflect the existence of an individual right in those plaintiffs, but was calculated instead to "keep[] at bay 'the phantom busybody or ghostly intermeddler'"[46] and to ensure that courts "decide actual controversies between parties, not academic or hypothetical questions".[47]

32. There is an important difference between the principles (purportedly) derived from *Boyce* and those concerning judicial review of the exercise of public power. The former concern standing to enforce public duties owed by *anyone*, whether or not that person exercises public power. The latter concern supervision of the exercise of public power, including via the constitutional writs (or writs in the nature thereof). Constitutional considerations – at the Commonwealth, State and Territory levels[48] – mean that any consideration of the latter is infused with considerations of the constitutional structure.

33. There is also an important difference between the first and second limbs of *Boyce*. Where the first limb of *Boyce* applies, the plaintiff has a right which, though sourced in statute, is nevertheless a private and individual right.[49] Private, individual rights to access the courts have been said to be "deeply rooted in constitutional principle".[50] But there is a "fundamental distinction" in this respect between public and private rights because "[a] public right is an expression that describes the legal relations involving the public generally rather than any specific person or persons".[51] For enforcement of public rights, Parliament may stipulate an "exhaustive measure" of standing.[52]

The principle of legality and "common law standing"

34. The principle now commonly called the "principle of legality" can be traced to *United*

---

45 See *Liston v Davies* (1937) 57 CLR 424 at 441-442 ("The relator or prosecutor cannot be said to have the ordinary private right to a remedy for the enforcement of the duties owing to him or for the vindication of his own personal rights. The remedy goes in the interests of the public …").

46 *Bateman's Bay* at [34] (Gaudron, Gummow and Kirby JJ). See also *Iveson v Moore* (1699) 1 Ld Raym 486; 91 ER 1224 at 1226 ("an action would not lie for a publick nuisance, without special damage, for avoiding multiplication of suits"), 1228 ("[b]ecause multiplicity of suits is to be avoided").

47 *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 327 (Mason J).

48 Including by reason of section 75(v) and the principles recognised in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

49 See ***Hobart*** *International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519 at [85] (Edelman and Steward JJ).

50 See *Hobart* at [85] (Edelman and Steward JJ), citing *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at [55].

51 *Hobart* at [87] (Edelman and Steward JJ).

52 See *Bateman's Bay* at [48] (Gaudron, Gummow and Kirby JJ). See also *Truth About Motorways* at [2] (Gleeson CJ and McHugh J) ("it is not difficult to understand why, in the case of certain laws, it might be considered in the public interest to provide differently").

States v ***Fisher*** (1805) 6 US 358 at 390.[53] There, Marshall CJ said: "[w]here rights are infringed, where fundamental principles are overthrown, where the general system of law is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects". In each case to which Marshall CJ referred, the apparent rationale for the principle was the assumed empirical improbability of a hypothesised legislative intention.[54]

35. The contemporary rationale for the principle of legality is different. It "exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law".[55] It ought not be extended beyond that rationale.[56] The principle is normative, rather than predictive, and is a mechanism by which courts "recognize and incorporate important values into the legal context in which legislation is drafted and should be interpreted".[57] The principle varies "with the context in which it is applied", and the required clarity increases the more fundamental or important a right is.[58] Further, the principle has at most "limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked".[59]

36. Although *Fisher* treated the three distinct kinds of legislative object referred to in paragraph 34 as attracting an identical presumption, the contemporary rationale for the principle of legality together with substantial changes in the regulatory state since *Fisher* dictate that there is and should be no common formulation of the applicable interpretive presumption as between those three legislative objects.[60] Failure to distinguish between the three legislative objects gives rise to the risk of what Gageler CJ has called

---

53 ***Lee*** *v New South Wales Crime Commission* (2013) 251 CLR 196 at [307] (Gageler and Keane JJ).

54 Similar to the standardised inference from common probabilities of fact referred to by Edelman J in *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* [2024] HCA 16 at [150]-[154] and *Commissioner of Taxation for the Commonwealth of Australia v Tomaras* (2018) 265 CLR 434 at [100]-[103] (Edelman J).

55 *Lee* at [313] (Gageler and Keane JJ).

56 *Lee* at [313] (Gageler and Keane JJ).

57 *R v ADH* 2013 SCC 28 at [25] (Cromwell J) (McLachlin CJ and Fish, Abella and Karakatsanis JJ concurring); see also Cass R Sunstein, "Interpreting Statutes in the Regulatory State" (1989) 103 *Harvard Law Review* 405 at 459-460.

58 *Hurt v The King* (2024) 98 ALJR 485 at [106]-[107] (Edelman, Steward and Gleeson JJ); see also *BMW Australia Limited v Brewster* (2019) 269 CLR 574 at [212] (Edelman J).

59 *Lee* at [314] (Gageler and Keane JJ).

60 See also J Spigelman, "The Common Law Bill of Rights" in *Statutory Interpretation and Human Rights: McPherson Lecture Series*, Vol 3 (2008) 34 at 37 ("There is a clear distinction between legislation which invades fundamental rights etc and legislation which alters common law doctrines").

"unfocussed invocation of the … 'principle of legality'", the eventuation of which risk "weaken[s] its normative force, decrease[s] the predictability of its application, and ultimately call[s] into question its democratic legitimacy".[61] In the foundational modern Australian case on the principle of legality, *Coco v The Queen* (1994) 179 CLR 427, this Court identified the principle by reference to abrogation of a "fundamental right, freedom or immunity",[62] but not mere abrogation or displacement of the common law.

37. The contemporary rationale for the principle of legality does not point towards any need for "irresistible clearness" before the common law is departed from. The "common law" is not (or is not wholly) a set of freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law. "Not every common law rule reflected well on common law courts".[63] Many common law rules reflect the values and the contingencies of the era in which they were first adopted, rather than the values of Australia's system of representative and responsible government. Others – whether anachronistic or not – simply have nothing to do with the values of Australia's system of government.

38. Developments in the regulatory state since *Fisher* also mean that it can no longer be said that Parliament is empirically unlikely to have intended to depart from the common law. There are now few, if any, areas of the common law "which are untouched by statutory regimes reflecting public policy settings".[64] Some 20 years ago, McHugh J said that "nowadays legislatures regularly enact laws that infringe the common law rights of individuals".[65] His Honour was speaking of laws which cut down common law rights, rather than merely depart from the common law. Even in respect of those laws, his Honour's view was that "[g]iven the frequency with which legislatures now abolish or amend 'ordinary' common law rights, the 'presumption' of non-interference with those rights is inconsistent with modern experience and borders on fiction".[66]

39. Almost half a century ago, the House of Lords commented on the "presumption" against

---

61 *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at [88].

62 See at 437.

63 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [35] (French CJ and Gageler J).

64 *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525 at [9] (French CJ).

65 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36]. See also *Lee* at [312] (Gageler and Keane JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [19] (Gleeson CJ); Lord Browne-Wilkinson, "The Infiltration of a Bill of Rights" [1992] *Public Law* 397 at 397.

66 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36].

altering common law principles. In ***Maunsell*** *v Olins* [1975] AC 373, Lord Simon of Glaisdale said that it was "difficult to discern any reason for such a rule – whether constitutional, juridical or pragmatic".[67] The Lords were "inclined to think it may have evolved through a distillation of forensic experience of the ideological attachment to the common law".[68] Lord Simon continued: "However valid this particular aspect of the forensic experience may have been in the past, its force may be questioned in these days of statutory activism".[69] These words are no doubt more true today.

40. Against this background, it was an error for the Court of Appeal to approach the issue of construction on the basis that the "principle of legality" applied, and "irresistible clarity" was needed before "common law standing" was abrogated or modified: see CA[116]-[118]. The Court of Appeal cited no authority supporting that approach. The correct analysis begins with an understanding that the principles governing when a person has standing to seek injunctions or declarations to enforce the statutory obligations of third parties are principles developed, particularly during the 20th century, by the Courts of Chancery. Those principles are not fundamental rights or freedoms which attract the principle of legality. Those principles also do not attract to themselves any rule that "irresistible clarity" (or anything similar) is necessary before Parliament will be taken to have departed from them in the context of a particular statutory scheme.

41. Further, even if there were a common law "right" involved here, it was the "right" of a person to bring civil proceedings to enforce a public right, not a generalised "right to commence proceedings". That was a "right" attracting low tensity protection from the principle of legality, having regard to its relatively recent origin, the fact that it exists for the public good (not the private interest) and the fact that it is inherently a gap-filler, recognised where the statutory scheme provides inadequate remedies.

Statutes and "common law standing"

42. In *Hobart*, Gageler and Gleeson JJ explained at [55]-[56]:[70]

> [55] Within our constitutional system, standing to seek an order from a court is not conceived of as an exogenous and antecedent fact which must be found as a precondition to jurisdiction. That is to say, we do not conceive of standing as necessarily depending on the person being able to establish some "injury in fact"

---

67 At 394.
68 *Maunsell* at 394.
69 *Maunsell* at 394.
70 Cited with approval in *Unions NSW v State of New South Wales* (2023) 97 ALJR 150 at [16] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

to a legally cognisable interest which the order is apt to redress.

[56] Instead, we conceive of standing to seek an order from a court as an aspect of the positive law that defines the jurisdiction of the court to hear and determine the proceeding in which the order is sought. What, if anything, a person must establish to have a right to seek a particular order from a particular court in the exercise of a jurisdiction vested in it by a Commonwealth law depends on what, if anything, the Commonwealth law vesting that jurisdiction in that court expressly or implicitly requires to be established.

43. The last sentence of this passage identifies the issue as one of construction of the law vesting jurisdiction. As such, it falls to be determined in the usual way, by reference to considerations of text, context and purpose.[71] Thus, as this Court has said, the question is whether a "statute … enables an individual who satisfies the 'special interest' requirement to seek injunctive or declaratory relief".[72] And at least where – as in this case – a statutory scheme expressly addresses the topic of standing, the "starting point" is the construction of that scheme "with regard to its subject, scope and purpose".[73] The position is not relevantly different for State courts exercising inherent rather than solely statutory jurisdiction. Where those courts exercise jurisdiction pursuant to a statutory grant, it is the statute that supplies any standing requirements. In all other cases, the "positive law" that "defines" the jurisdiction of those superior courts – and of which standing is an "aspect" – is the constating instrument establishing the court and vesting it with jurisdiction coextensive with that of the courts of Westminster.[74]

44. In undertaking the requisite constructional task, the existence of "common law" principles of standing is not irrelevant. Where a statute is silent on *who* may enforce its norms, the "common law" principles of standing are necessarily part of the context against which the statute is to be construed. However, where a statutory scheme speaks directly to the topic of who may enforce its norms, there is no reason to draw a standardised inference that Parliament intended its scheme to supplement the common law. To draw such a standardised inference sits uncomfortably with a constitutional system which adopts, as a foundational principle, that the common law is subordinate

---

71 ***Allan*** *v Transurban City Link Limited* (2002) 208 CLR 167 at [15]-[16] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

72 *Wentworth* at 681 (Gibbs CJ, Mason, Murphy and Brennan JJ); see also Heydon, "Injunctions and Declarations" in Stein, *Locus Standi* (1979) 43 ("the statute may permit the plaintiff to sue by declaration if a private right is affected or if he suffers special damage").

73 *Allan* at [16] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

74 See, eg, Third Charter of Justice authorised by the *New South Wales Act* [1823] (4 Geo IV c 96) (Imp), as continued by the *Australian Courts Act* [1828] (9 Geo IV c 83) (Imp), *Australian Constitutions Act* [1842] (5 & 6 Vic c 76) (Imp) and *Supreme Court Act 1970* (NSW), s 22.

to statute.[75] In cases like the present – where the relief sought is injunctive and declaratory – any such standardised inference is in tension with the underlying rationale for equity's initial intervention: where Parliament has expressly conferred standing on a facially suitable class of persons, it is difficult to say that there is an inadequacy in the law which requires equity's intervention. Where, as here, there is an interaction between the common law and a statute, analysis starts with the statute (not the common law) and it is the common law (not the statute) which gives way to the extent of inconsistency.[76] And "[i]t is not the function of the common law to seek to improve on a regulatory scheme by supplementing the statutory consequences for its breach".[77] A court of equity has "no general duty to 'enforce the law'".[78] In many cases, where Parliament has expressly addressed who may enforce the norms of a law, the proper inference will be that Parliament intended to "establish a regulatory scheme which gives an exhaustive measure of judicial review at the instance of" identified classes of persons.[79]

The relevant statutory schemes provide an exhaustive measure of standing

45. Text, context and purpose all confirm that s 69SB of the *Forestry Act* and s 13.14A of the *Biodiversity Conservation Act* provide an exhaustive measure of standing – at the instance of the EPA – in respect of civil enforcement of Pt 5B of the *Forestry Act*.

46. As for **text**, those sections expressly confer standing on the EPA, and the Court of Appeal was correct to conclude at CA [113] that at least *one* of the functions of ss 69SB and 13.14A was to ensure that the EPA was competent to bring civil enforcement proceedings. It is telling that those sections do not expressly confer standing on any other person. Parliament turned its mind to who should be competent to bring proceedings for civil enforcement of breaches of integrated forestry operations approvals, and selected the EPA as the appropriate body. It would have been open to Parliament *also* to expressly vest enforcement in "any person aggrieved" by a breach of approvals, but Parliament did not do so. Section 69ZA also expressly disapplies any

---

75 Note *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 487 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); see also *Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia* (2010) 214 CLR 539 at 549 [20] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

76 See, eg, *Electricity Networks Corporation t/as Western Power v Herridge Parties* (2022) 276 CLR 271 at [19]-[33] (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ) (in the context of the duty of care of statutory authorities).

77 *Gnych v Polish Club Limited* (2015) 255 CLR 414 at [73] (Gageler J).

78 ***Ramsay*** *v Aberfoyle Manufacturing Co (Australia) Pty Ltd* (1935) 54 CLR 230 at 239 (Latham CJ).

79 *Bateman's Bay* at [48] (Gaudron, Gummow and Kirby JJ); *Argos Pty Ltd v Corbell* (2014) 254 CLR 394 at [33] (French CJ and Keane J); *Ramsay* at 240-241 (Latham CJ).

provision of an Act that gives a right to institute proceedings in a court to remedy or restrain a breach of Pt 5B approvals. The Court of Appeal described s 13.14A(1) of the *Biodiversity Conservation Act*, which states that "[t]he [EPA] may bring proceedings", as an "enabling rather than limiting provision[]" and "a standard means of conferring on a public authority a function" (CA[25], [113]). But this reduces s 13.14A(1) to mere surplusage. Even absent s 69SB, the EPA would have satisfied the common law test for standing in any proceedings to enforce an IFOA.[80] The express conferral of standing on the EPA has work to do only if s 69ZA operates to displace common law standing. Only then would it be necessary to specify that the EPA "may bring proceedings".

47. As for **context** and **purpose**, nothing in the extrinsic materials suggests that Parliament intended third parties with "common law standing" to have a right to bring proceedings. To the contrary, from the outset, the statutory purpose was to ensure that there was an integrated, coherent and certain approach to forestry operations – an object which is undermined if enforcement power is dispersed, and advanced if enforcement power is vested in a person or persons with expertise and oversight of overall environmental objectives. Indeed, the mischief to which s 69ZA's predecessor was directed – "the rights of third parties to bring proceedings relating to [an] integrated approval", which that provision sought to "remove" – would hardly be addressed by abolishing one form of standing (statutory open standing) only to replace it with another ("common law" standing). The Second Reading Speech is cogent and clear on that point and should be given significant weight.[81] There is no suggestion, for example, that Parliament sought only to *limit* the circumstances in which third parties could bring proceedings.

48. That Parliament did not intend when enacting IFOAs to preserve any common law "right" of third parties to enforce compliance is further borne out by the background against which Parliament was legislating. At all relevant times, enforcement proceedings relating to "approvals" granted by a "determining authority" in respect of "activities" constituting forestry operations (pre-1999) and compliance with IFOAs (from 1999 onwards) have been within the LEC's exclusive jurisdiction.[82] And, during

---

80 The objectives and functions of the EPA are broadly expressed and include "to protect, restore and enhance the quality of the environment in New South Wales" and "investigating and reporting on alleged non-compliance with environment protection legislation for the purposes of prosecutions or other regulatory action": POEA Act, ss 6(1)(a), 7(2)(e).

81 See fn 7 above; *Harvey v Minister for Primary Industry and Resources* (2024) 98 ALJR 168; [2024] HCA 1 at [116] (Edelman J).

82 *Land and Environment Court Act*, ss 20(2), 71.

that entire time, statutory open standing provisions have conferred standing on "any person" to bring proceedings in the LEC for an order to remedy or restrain a breach of relevant legislation.[83] Put simply, "common law standing" has not been a feature of civil enforcement proceedings in the LEC because at all times it had been superseded by open standing.[84] In that context, Parliament's disapplication of statutory open standing when it introduced IFOAs in 1999 is most logically understood as evincing an intention to deny *all* standing to enforce IFOAs to parties other than the EPA (and certain other named parties with specific administrative or enforcement responsibilities for IFOAs). Once "common law standing" was displaced by open standing provisions, it did not "revive" when the open standing provisions were disapplied.[85] Parliament should not be understood by that disapplication to have restored common law standing that was never a feature of the LEC's civil enforcement jurisdiction to begin with.

49. To the extent that the principle of legality was a relevant framework of analysis and there was a systemic interest in protecting "common law standing" against inadvertent alteration,[86] that interest was adequately addressed by Parliament's express advertence to removing third party standing rights and the express provision made by ss 38 and 40 of the FNPE Act and their successors.[87] Indeed, it may be doubted that there is utility in asking whether there was advertence to "common law standing": when the *Forestry Act* was enacted, "common law standing" had been wholly displaced by the pre-existing open standing provisions. Parliament would not be expected to advert to something which was not part of the legal and contextual landscape at the time of enactment.

50. The Court of Appeal was of the view that s 69ZA only disapplied "statutory open-standing provisions": see CA[30], [114]-[116]. That is one of the effects of s 69ZA, but it does not exhaust that provision's operation. The purpose of s 69ZA, like that of its predecessor, s 40 of the FNPE Act, is to ensure *certainty* in the operation of the scheme by removing the right of *third parties* to bring proceedings relating to integrated approvals, and vesting sole responsibility for enforcement in the persons mentioned in

---

83 EP&A Act, s 123 (now s 9.45); *Protection of the Environment Operations Act 1997* (NSW), ss 252, 253.

84 See *F Hannan Pty Ltd v Electricity Commission (NSW) (No 3)* (1985) 66 LGRA 306 at 310-311, 313 (Street CJ); *Sydney City Council v Building Owners and Managers Association of Australia Ltd* (1985) 2 NSWLR 383 at 387 (Mahoney JA; Hope and Priestley JJA agreeing).

85 *Interpretation Act 1987* (NSW), s 30(1)(a); *Majeau Carrying Co v Coastal Rutile* (1973) 129 CLR 48 at 51-52. See also *Marshall v Smith* (1907) 4 CLR 1617 at 1635 (Barton J), 1645 (Higgins J).

86 *Lee* at [313] (Gageler and Keane JJ).

87 See paragraphs 13 to 17 above.

s 69ZA(3). The persons identified in s 69ZA(3) are well placed to exercise enforcement powers in the overall public interest, by reference to whole-of-system objectives and in a coherent and co-ordinated way. To permit ad hoc challenges by third parties – who may lack visibility of such objectives – would undermine the certainty that successive iterations of the statutory scheme since 1999 have been designed to achieve.

51. Section 69ZA operates in accordance with its terms. It applies wherever "a provision of an Act … gives any person a right to institute proceedings in a court to remedy or restrain a breach … of the Act". As was explained in *Hobart* at [54]-[55], standing is not an exogenous or antecedent "common law" fact; rather, it is something determined by what the law vesting jurisdiction in a court expressly or implicitly provides for. The right to institute proceedings is thus sourced in the "provision[s] of [the] Act" (to use the language of s 69ZA) vesting jurisdiction in the Court in which those proceedings are sought to be instituted. The effect of s 69ZA was to disapply (relevantly) those laws vesting jurisdiction in the LEC to the extent that those laws would otherwise confer a right of standing on persons with a special interest. The Court below viewed common law standing as some kind of pre-existing common law right, to be modified or ousted (see, eg, CA[115]-[116]) when the correct position was that "common law standing" was at most a contextual feature against which statutes vesting jurisdiction fell to be construed. In any event, the evident intent was to confirm that persons other than those expressly vested with enforcement responsibility did not have standing to enforce alleged contraventions of the statutory scheme.

PART VII: ORDERS SOUGHT

1. The Appellant seeks the orders set out in the Notice of Appeal: CAB 140.

PART VIII: ORAL ARGUMENT

1. The Appellant estimates it will need 2 hours for oral argument, including reply.

Dated: 24 October 2024

N Hutley SC
5 St James
(02) 8257 2599
nhutley@stjames.net.au

D Hume
6 Selborne
(02) 8915 2694
dhume@sixthfloor.com.au

J Taylor
11 Wentworth
(02) 8023 9027
janetaylor@elevenwentworth.com

C Beshara
11 Wentworth
(02) 8231 5006
cbeshara@elevenwentworth.com

ANNEXURE TO APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2019, the appellant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions

Description	Provision(s)	Version
A. Statutes		
Biodiversity Conservation Act 2016 (NSW)	ss 13.14A, Pt 13	Version for 15 December 2023 to 4 April 2024
Environmental Planning and Assessment Act 1979 (NSW)	Pts 5, 6	As made (No 203 of 1979)
Environmental Planning and Assessment Act 1979 (NSW)	ss 110, 111, 112, 123	Version for 26 November 1998 to 31 December 1998
Environmental Planning and Assessment Act 1979 (NSW)	s 9.45	Version for 1 January 2024 to 30 June 2024
Forestry Act 2012 (NSW)	s 69S, Sch 4.11, Item 16	As made (No 96 of 2012)
Forestry Act 2012 (NSW)	ss 69P, 69SA, 69ZA, Part 5B	Version for 30 October 2023 to date
Forestry and National Park Estate Act 1998 (NSW)	ss 25, 27, 32, 36, 40, Pt 4	As made (No 163 of 1998)
Forestry Legislation Amendment Act 2018 (NSW)	Sch 2, 3	As made (No 40 of 2018)
Interpretation Act 1987 (NSW)	s 30	Version for 9 August 2024 to date

Description	Provision(s)	Version
Land and Environment Court Act 1979 (NSW)	ss 20, 58, 71	Version for 30 October 2023 to 29 February 2024
Protection of the Environment Administration Act 1991 (NSW)	s 6, 7, 15, 16, 17	Version for 24 October 2023 to 24 March 2024
Protection of the Environment Operations Act 1997 (NSW)	ss 252, 253	As made (No 156 of 1997)
Protection of the Environment Operations Act 1997 (NSW)	ss 252, 253	Version for 30 October 2023 to 24 March 2024
Supreme Court Act 1970 (NSW)	ss 22, 23, 66, 69	Version for 27 October 2020 to 30 June 2024