

NOTICE OF FILING

Details of Filing

Document Lodged: Notice of a Constitutional Matter under s78B Judiciary Act 1903 - Form 18 - Rule 8.11(2)
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File Number: VID432/2023
File Title: SAVE OUR STRATHBOGIE FOREST INC v SECRETARY TO THE DEPARTMENT OF ENERGY, ENVIRONMENT AND CLIMATE ACTION
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. 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.

The date of the filing of the document is determined pursuant to the Court's Rules.



**Notice of a Constitutional matter
under section 78B of the Judiciary Act 1903**

No. VID432 of 2023

Federal Court of Australia
District Registry: Victoria
Division: General

Save Our Strathbogrie Forest Inc

Applicant

Secretary to the Department of Energy, Environment and Climate Action

Respondent

The Respondent gives notice that the proceeding involves a matter arising under the Constitution or involving its interpretation within the meaning of section 78B of the *Judiciary Act 1903*.

Nature of Constitutional matter

1. The constitutional issue is whether s 18(3) of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* infringes the structural implication recognised in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 in so far as it applies to: (1) fire prevention and suppression works conducted by the Respondent under the *Forests Act 1958 (Vic)*, or (2) the particular upcoming planned burns that are the subject of the proceeding.
2. In particular, the Respondent contends that:
 - a. an essential constitutional function of the government of the State of Victoria is to protect its people and land, including from bushfire;
 - b. it is critical to the State's capacity to function as a government that it have the ability to protect its people and land from bushfire by managing and controlling

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the immediate prevention and suppression of fire and the planned prevention of fire; and

- c. a purported law of the Commonwealth, the effect of which is to prohibit proper and sufficient work for the immediate prevention and suppression of fire and the planned prevention of fire by the government of the State, subject only to the prospect of discretionary permission by a Minister of the government of the Commonwealth, curtails the State's capacity to function as a government.

Facts showing that section 78B Judiciary Act 1903 applies

3. The Parliament of Victoria has enacted s 62(2) of the *Forests Act 1958* (Vic) which relevantly provides that the Respondent must, despite anything to the contrary in any other Act or law, carry out proper and sufficient work in State forests for the immediate prevention and suppression of fire, and for the planned prevention of fire.
4. In Autumn 2024, the Respondent plans to carry out planned burns in four areas in the Strathbogie State Forest in Victoria (the **Planned Burns**).
5. The Applicant has commenced proceedings in the Federal Court under the EPBC Act, seeking to restrain the Respondent from undertaking the Planned Burns.
6. The Applicant alleges in its Statement of Claim that the Planned Burns constitute an action that will have, or is likely to have, a significant impact on the Southern Greater Glider (which is a listed threatened species) and that s 18(3) of the EPBC Act therefore prohibits the Respondent from conducting the Planned Burns.
7. In its Defence, the Respondent denies that the Planned Burns will have, or are likely to have, a significant impact on the Southern Greater Glider. Further or alternatively, the Respondent contends that:
 - a. the Planned Burns are permitted to be carried out without an approval under Part 9 of that Act by reason of s 43B of the EPBC Act; and
 - b. to the extent s 18(3) of the EPBC Act purports to prohibit the Planned Burns, the EPBC Act imposes a special disability or burden on the exercise of powers and fulfilment of functions of the State of Victoria which curtails its capacity to function as a government.
8. The next case management hearing is fixed for 19 October 2023 before Horan J. There is no date yet fixed for the trial, although it is likely to be heard in late 2023.

Date: 14 September 2023



Signed by Sophie Osborn
Lawyer for the Respondent