

## NOTICE OF FILING

### Details of Filing

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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.



## Amended Defence

**(amended pursuant to orders of Justice Horan dated 25 October 2023)**

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 Change Action**

Respondent

The Respondent pleads to the Applicant's amended statement of claim dated 14 August 26 October 2023 (the **Statement of Claim**) as follows.

1. The Respondent admits paragraph 1.
2. The Respondent admits paragraph 2.
3. The Respondent admits paragraph 3.
4. As to paragraph 4, the Respondent:
  - a. says that it is the "land manager" of the Strathbogrie State Forest as defined in s 3(1) of the *Forests Act 1958* (Vic) (the **Forests Act**);
  - b. says that, under s 18 of the *Forests Act*, it shall protect the Strathbogrie State Forest and, subject to the *Forests Act*, has the control and management of it;
  - c. says that, under s 62(2) of the *Forests Act*, it must (despite anything to the contrary in any other Act or law) carry out proper and sufficient work in State

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Filed on behalf of (name & role of party)	Secretary to the Department of Energy, Environment and Climate Action, Respondent		
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forests for the immediate prevention and suppression of fire, and for the planned prevention of fire; and

- d. otherwise denies paragraph 4.
5. The Respondent admits paragraph 5.
  6. As to paragraph 6:
    - a. the Respondent says:
      - i. on a day or days in the period between 1 March 2024 and 31 May 2024, it presently plans to carry out planned burns in the four areas depicted in the burn operations maps in Appendix A to the Statement of Claim (the **2024 Strathbogie planned burns**);

Particulars

        - A. The burn operations maps in Appendix A to the Statement of Claim show, broadly, the four current planned burn areas (the **nominal burn areas**). Particular details of the conduct of the 2024 Strathbogie planned burns are highly likely to change as further information is obtained and the plans refined (including on the day of a burn, to adjust for environmental conditions).
        - B. The Strathbogie State Forest comprises approximately 23,000 hectares. The total size of the nominal burn areas is approximately 2000 hectares. The land that will in fact be subject to planned burning is a subset of the nominal burn areas, determined by specific operational planning and the identification of treatable fuels within each area.
      - ii. a planned burn is the controlled application of fire under specified environmental conditions to a predetermined area and at the time, intensity, and rate of spread required to attain planned resource management objectives;
      - iii. the object of the 2024 Strathbogie planned burns is the reduction of fuel (leaf and bark litter, twigs and like matter), in order to reduce the speed and intensity of bushfires;

- iv. whether and when the 2024 Strathbogrie planned burns go ahead will depend on conditions in Autumn 2024;
    - v. the 2024 Strathbogrie planned burns are part of a State-wide program for the planned prevention of fire;
  - b. the Respondent otherwise denies that paragraph.
- 7. The Respondent admits paragraph 7.
- 8. The Respondent admits paragraph 8.
- 9. The Respondent admits paragraph 9, subject to relying on the terms of the provision for their full force and effect, and says further:
  - a. the prohibition in s 18(3) is subject to other provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**), including s 43B;
  - b. the prohibition in s 18(3) is subject to the Commonwealth Constitution; and
  - c. it refers to and repeats paragraphs 10A-10B below.
- 10. The Respondent denies paragraph 10.
- 10A. Further or alternatively to paragraph 10, the 2024 Strathbogrie planned burns:
  - a. are a lawful continuation of a use of land that was occurring immediately before the commencement of the EPBC Act; and
  - b. in the premises, pursuant to s 43B of the EPBC Act, are permitted to be carried out without an approval under Part 9 of that Act.

#### Particulars

- A. Since at least the inception of the original Forests Commission, being the body established by the *Forests Act 1918* (Vic) to have control and management of State forests, the State of Victoria has practised planned burning in the protection against bushfire.
- B. Since immediately before the commencement of the EPBC Act, the Respondent (including under its predecessor titles)

has been, pursuant to s 62(2) of the Forests Act, relevantly obliged to carry out proper and sufficient work in State forests for the prevention of fire.

- C. Since immediately before the commencement of the EPBC Act, pursuant to that duty, the Respondent (including under its predecessor titles) has carried out a recurrent programme of planned burns, including in the Strathbogie State Forest.
- D. The extent of planned burns in the Strathbogie State Forest since the 1990s is as follows:

	<b>Approx. total area subject to planned burns in Strathbogie State Forest</b>
<b>1990-1999</b>	4,122 hectares
<b>2000-2009</b>	3,987 hectares
<b>2010-2019</b>	3,715 hectares
<b>2020-present</b>	682 hectares

- E. Further particulars may be provided prior to trial.

10B. Further or alternatively to paragraphs 10 and 10A above:

- a. to the extent s 18(3) of the EPBC Act purports to prohibit the 2024 Strathbogie 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; and
- b. in the premises, s 18(3) is invalid:
  - i. in its application to proper and sufficient work pursuant to the Forests Act for the immediate prevention and suppression of fire, and for the planned prevention of fire; or alternatively
  - ii. in its application to the 2024 Strathbogie planned burns.

#### Particulars

- 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 the immediate prevention and suppression of fire and the planned prevention of fire.
- 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.

- 11. The Respondent denies paragraph 11.
- 12. As to paragraph 12, the Respondent denies that the Applicant is entitled to the relief sought or to any relief.
- 13. As to paragraph 13, the Respondent opposes the grant of interlocutory relief, and says that it has not been served with any application for such relief.

Date: ~~8 September~~ 27 October 2023



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Signed by Sophie Osborn, Ashurst  
Lawyer for the Respondent

This pleading was prepared by Frances Gordon, Alexander Solomon-Bridge and Hannah Douglas.

**Certificate of lawyer**

I Sophie Osborn certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~8 September~~ 27 October 2023



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Signed by Sophie Osborn  
Lawyer for the Respondent