IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN REGISTRY

VID 1228/2017

BETWEEN:

FRIENDS OF LEADBEATER'S POSSUM INC

Applicant

and

VICFORESTS

Respondent

OUTLINE OF SUBMISSIONS ON BEHALF OF VICFORESTS

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1. Pursuant to paragraph 2 of the orders made on 2 March 2018, VicForests submits that the Court should answer the separate question and make orders in the form annexed.

2. Proposed order 1, dealing with the answer to the separate question, is in a form proposed by the Commonwealth and agreed to by VicForests and the State. Proposed order 2, dealing with the dismissal of the proceeding, is agreed to by the State, while an order to like effect is proposed by the Commonwealth.[1] Proposed order 3 deals with costs. The applicant does not agree to any of VicForests' proposed orders.

Orders 1 and 2

3. Proposed order 1 should be made in preference to the applicant's proposed answer because it is agreed to by all parties and interveners except the applicant. The proposed order makes clear that the answer to the separate question does not extend beyond the applicant's reliance on cl 36 of the Central Highlands RFA, and therefore does not involve the Court providing an opinion on a hypothetical matter.[2] Further, the applicant's proposed order 1 refers to reviews being "required" by clause 36 of the Central Highlands RFA when that

[1] The Commonwealth submits order 2 be amended to "The Originating Application is otherwise dismissed."
[2] *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178 at [6], [278]–[280].

clause is in a part of the RFA expressed not to create legally binding obligations inter-parties.

4. Regarding proposed order 2, as the Court has already observed:

   (a) in its statement of claim, the applicant put forward a specific basis on which it alleged that the exemptions in s 38(1) and s 6(4) did not operate or apply to the identified past or future forestry operations by VicForests;[3]

   (b) the parties submitted, and the Court accepted, that on the basis of facts agreed between the parties for the purposes of s 191 of the *Evidence Act 1995* (Cth), if the question was answered in the affirmative, that answer would require the application to be dismissed;[4]

   (c) the necessary corollary of the answer to the separate question is that the proceeding must be dismissed as the Court cannot grant any of the relief sought.[5]

5. The utility of the separate question procedure was thus predicated on its potential to avoid a lengthy and unnecessary trial in light of the specific basis on which the applicant alleged that the exemptions did not operate or apply. In those circumstances, the applicant ought not now be permitted to amend its pleading to bring a case of a fundamentally different nature.[6] Consistent with the parties' submissions on the utility of the separate question procedure, the proceeding ought now be dismissed. Any new issues which the applicant wishes to have determined ought be dealt with in a fresh proceeding.[7]

Costs

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[3] Ibid, [9].
[4] Ibid, [10].
[5] Ibid, [281].
[6] The amended statement of claim filed 29 March 2018 alleges breaches of different clauses of the RFA and relies on wholly different factual allegations in support of those breaches.
[7] VicForests otherwise adopts and supports paragraphs 13–16 of the Commonwealth's submissions filed 29 March 2018.

6. Section 43 of the *Federal Court of Australia Act 1976* (Cth) provides the Court with the power to award costs. The section confers a broad, general discretion, which must be exercised "judicially, not whimsically or idiosyncratically" and in the ordinary course the Court will make an order to the effect that costs follow the event.[8]

7. The Court has departed from the ordinary rule as to costs on a number of occasions where a proceeding is brought in the public interest.[9] As the Full Court of the Federal Court observed in *Bat Advocacy NSW Inc v Minister for Environment, Protection, Heritage and the Arts (No 2),* the mere categorisation of litigation as having been brought in the public interest is, on its own, insufficient to justify departure from the usual order that costs should follow the event. There must be special circumstances to justify the Court's exercise of a discretion not to make the usual costs order in favour of a successful party.[10]

8. Considerations that constitute "special circumstances" must turn on the facts of each case.[11] In *Northern Inland Council,* Cowdroy J explained that, as often occurs where the Court is afforded a broad discretion, certain factors have been repeatedly referred to when determining whether or not a departure from the ordinary rule is justified. Having reviewed the relevant authorities his Honour said at [8] that such factors include:

   (a) whether an applicant has a personal or financial interest in the outcome of the proceeding;[12]

   (b) the public interest in, and the practical implications of, the outcome of the proceeding on relevant sections of the public;[13]

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[8] *Visscher v Teekay Shipping (Australia) Pty Ltd (No 3)* [2012] FCA 212 at [6].
[9] *Northern Inland Council for the Environment Inc v Minister for the Environment & Anor* [2014] FCA 216, [7].
[10] *Bat Advocacy NSW Inc v Minister for Environment, Protection, Heritage and the Arts (No 2)* (Emmett, McKerracher and Foster JJ) (***Bat Advocacy***), [6]; *Northern Inland Council for the Environment Inc v Minister for the Environment* [2014] FCA 216, [7] (***Northern Inland Council***).
[11] *The Wilderness Society Inc v Turnbull, Minister for the Enivronment and Water Resources* (2007) 98 ALD 651 at [30] (***Wilderness Society***); *Northern Inland Council,* [8].
[12] *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [18].

(c) whether the proceeding concerns novel or difficult questions of law that are of general importance;[14]

(d) whether the application was arguable, and the strength of the applicant's case;[15]

(e) the applicant's conduct of its case.[16]

9. The fact that an applicant sought no financial gain from the litigation is not, of itself, sufficient reason for departing from the usual order as to costs.[17] Moreover, the "public interest" nature of an association's objects and its consequent lack of potential financial gain from the litigation has not, at least generally, been considered a reason to depart from the ordinary rule as to costs.[18]

10. In *Northern Inland Council* Cowdroy J explained that:

> The weight to be afforded to the consideration of whether an applicant has a personal or financial interest in the outcome of the proceeding is in part dependent upon whether the applicant is a community association or a private litigant. The former class of applicant would be expected to pursue proceedings which accord with its objects and, as a community body, would ordinarily not have significant financial interests in such matters as commercial developments. This distinction was explained in Save the Showground for Sydney,[19] where Pearlman CJ found at [21] that the lack of financial motive of a community association was a relevant factor in deciding an appropriate costs order but not one which would justify a departure from the ordinary rule.

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[13] *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 165 FCR 211 (***Blue Wedges***) at [73]; *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815 at [7].
[14] *Blue Wedges* at [73]; *Wilderness Society* at [31].
[15] *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 3)* [2012] FCA 744 (***Buzzacott***) at [24]; *Bat Advocacy* at [23]; *Blue Wedges* at [74].
[16] *Buzzacott* at [22] and [27]; *Blue Wedges* at [74].
[17] *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 237-238 (per Black CJ and French J).
[18] *Save the Ridge Inc. v Commonwealth* (2006) 230 ALR 411 (Black CJ, Moore and Emmett JJ) at [15].
[19] *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1998) 105 LGERA 254.

11. The objects of the applicant are set out in paragraph 3 of the affidavit of Stephen Meacher affirmed on 15 November 2017. It is apparent from that affidavit that the application was pursued in accordance with the applicant's objects, and also that it does not have a financial interest in the outcome of the proceeding. Consistent with *Northern Inland Council,* these factors, although relevant, do not afford any significant weight to the applicant's submission that no costs order should be made.[20]

12. It can be accepted that there is a public interest in the proceeding. One of the practical implications of the proceeding was that, if the applicant was wholly successful on all its allegations, approvals would be required for the logging to continue in the Coupes. But that assumed not only the applicant being successful on the separate question, but also establishing the necessary significant impact on both Leadbeater's Possum and Greater Glider. That latter point does not arise for determination as the proceeding must be dismissed. The necessary absence of any findings concerning significant impact diminishes the public interest in, and the practical implications of, the proceeding.

13. There is no suggestion that any of the parties to the proceeding conducted themselves other than with due expedition and diligence. It can also be accepted that the application raised novel or difficult questions of law concerning the correct construction of the exemptions in s 38(1) EPBC Act and s 6(4) of the RFA Act. Although the applicant's construction was arguable, it was not a strong argument in circumstances where each other party and intervener disagreed with it absolutely, and the Court ultimately rejected it.

14. In all these circumstances, there are insufficient special circumstances to displace the ordinary rule that costs follow the event, such that the applicant ought pay VicForests' costs.

I G WALLER

H L REDD

3 April 2018

[20] *Northern Inland Council*, [12].