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SUBMISSIONS OF THE COMMONWEALTH

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
Division: General **No VID 1228 of 2017**

FRIENDS OF LEADBEATER'S POSSUM INC
Applicant

VICFORESTS
Respondent

COMMONWEALTH OF AUSTRALIA
Intervener

STATE OF VICTORIA
Intervener

SUBMISSIONS OF THE COMMONWEALTH ON THE ANSWER TO THE SEPARATE QUESTION AND COSTS

Filed on behalf of the Intervener, Commonwealth of Australia

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PART I SUMMARY

1. The Commonwealth submits that the separate question should be answered as follows:

> The exemptions in s 38(1) of the *Environment Protection Biodiversity Conservation Act 1999* (Cth) and s 6(4) of the *Regional Forest Agreements Act 2002* (Cth) are not rendered inapplicable to logging of the coupes (as described in the separate question) by the failure to carry out reviews of the performance of the Central Highlands Regional Forest Agreement within the relevant time, as contemplated by cl 36 of the Central Highlands RFA.

2. The Commonwealth further submits that the Court should order that the Originating Application be dismissed.

3. The Court granted the Commonwealth leave to intervene on the condition that it bear its own costs of the intervention. The Commonwealth is not aware of any party proposing to seek costs against it, would oppose such orders if they were sought, and submits that the Court should not make such orders if sought without the Commonwealth being heard in response to such an application.

PART II THE ANSWER TO THE SEPARATE QUESTION

4. In the Reasons for Judgment delivered on 2 March 2018,[1] her Honour found that the separate question should be answered unfavourably to the Applicant but that the answer required qualification due to the particular interpretation given to s 38(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (the **EPBC Act**) and s 6(4) of the *Regional Forests Agreements Act 2002* (the **RFA Act**).[2] That particular interpretation was advanced by the Commonwealth and the State of Victoria.

5. Having considered the text, context and purpose of ss 38(1) and 6(4), the Court found that the EPBC Act contemplated the approval of substitute regimes, through the negotiation of RFAs (among other things), that are intended to meet the objectives of the EPBC Act to protect matters of national environmental significance by regulating the conduct of actions undertaken by way of forestry operations.[3] Sections 38(1) and 6(4) therefore focus attention on the "action(s)" of forestry operations which are regulated by RFAs in this way, and require that such forestry operations be "in accordance with" the relevant RFA. Thus, the benefit of the exemptions for an actor such as VicForests is dependent on ***its forestry actions*** being in accordance with those particular aspects of the RFA, including any systems of forest management accredited by the RFA.[4]

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1 *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178 (**Judgment**). The Commonwealth notes that the signed Judgment commences at paragraph [2]. References to paragraph numbers in these submissions are to those in the signed copy of the Judgment provided to the parties and interveners by the Court.

2 Judgment at [6].

3 Judgment at [221] to [222].

4 Judgment at [175] and [236].

Obligations *inter partes* such as those in cl 36 do not affect the operation of the exemptions.[5]

6. The Court clearly summarised this view at paragraphs [198] and [199] of the Judgment:

> Once the focus is set on the taking of an action (the undertaking of forestry operations), then the meaning of the substantive limb of s 38(1) becomes clear – the taking of the action (that is, the actual conduct of the person or entity) must be "in accordance with" the RFA. The correlation to be found is between what the RFA requires by way of regulation of the taking of actions, and the conduct of the person or entity concerned. There is no additional correlation between what the RFA requires of the parties to it, or by way of policy or planning, and the taking of the action.
>
> As the Commonwealth submits, aside from the very character of an RFA, there is nothing in the text of s 38 which directs the reader to the state of compliance with RFA obligations as between the State concerned, and the Commonwealth. Rather, the reader is directed to how the forestry operations are to be undertaken, by whomsoever is to undertake them.

7. This interpretation was further confirmed by consideration of extrinsic material,[6] the consequences of alternative constructions,[7] and the decision in *Brown v Forestry Tasmania* (2007) 167 FCR 34 (***Brown***).[8]

8. In light of its interpretation of ss 38(1) and 6(4), the Court found that an unqualified answer to the separate question would be inappropriate as it would suggest that all action undertaken and to be undertaken by VicForests was in accordance with the Central Highlands RFA where the agreed facts could not support that finding.[9]

9. Considering the above, the Commonwealth submits that the answer to the separate question should clearly state that the statutory exemptions in the EPBC Act and the RFA Act are ***not rendered inapplicable*** to the logging of the coupes, as defined, by the failure to carry out five-yearly reviews within the time contemplated by cl 36 of the Central Highlands Regional Forest Agreement (**Central Highlands RFA**). Put another way, the exemptions continue to operate notwithstanding any failure to comply with cl 36 of the Central Highlands RFA.

10. This is the clearest, most articulate answer that best accords with the Judgment.[10]

    10.1. The proposed answer focuses on the effect of non-compliance with cl 36 of the Central Highlands RFA as this forms the ***only*** basis for the Applicant's allegation that VicForests did not have the benefit of the exemptions in ss 38(1) and 6(4).[11]

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5 Judgment at [242] to [243].

6 Judgment at [59] to [64].

7 Judgment at [228] to [237].

8 Judgment at [246] to [271].

9 Judgment at [278] to [280], relying on *Bass v Permanent Trustee* (1999) 198 CLR 334.

10 Emphasis has been added in the quotes in the subparagraphs below.

11 Statement of Claim at paragraph [112].

10.2. Similar language was used by her Honour in summarising the position at [277] of the Judgment: "…the controversy between the parties [is] about whether the agreed non-compliance with cl 36 of the Central Highlands RFA, ***is capable of rendering the exemption in s 38(1) inapplicable*** to the undertaking by VicForests, in the past and in the future of forestry operations in the identified coupes within the Central Highlands RFA region."[12]

10.3. As further stated by the Court at [6] of the Judgment: "…the operation of those exemptions is ***not affected by*** the failure to carry out reviews of the performance of the Central Highlands Regional Forest Agreement, as contemplated by cl 36 of the Central Highlands RFA."

10.4. Intergovernmental terms, such as cl 36, are not part of the conduct of forestry operations and therefore non-compliance with those terms "***have no effect on*** the availability of the exemption" in ss 38(1) and 6(4).[13]

10.5. As the Court noted, an answer to the question that extended beyond the Applicant's reliance on cl 36 would be incompatible with the Court's judicial function in that neither the agreed facts nor the allegations made by the Applicant would form a sufficient basis for such an answer.[14]

11. Reference should be made in the answer to s 6(4) of the RFA Act as well as s 38(1) of the EPBC Act. The separate question referred to both provisions and the Court found no distinction in their construction.[15]

PART III CONSEQUENT ORDERS

12. The Court should also order that that Originating Application be dismissed.

13. The Applicant's Statement of Claim ***wholly relies*** on alleged non-compliance with cl 36 of the Central Highlands RFA to make good the proposition that VicForests' forestry operations are not in accordance with that RFA and therefore not exempt from the application of Part 3 of the EPBC Act.[16] The agreed facts concerned compliance with cl 36 of the Central Highlands RFA.[17] Accordingly, the Court's interpretation of ss 38(1) and 6(4) is fatal to the Applicant's case (as set out in paragraph 10 above). Compliance or non-compliance with cl 36 is irrelevant to the application of the exemptions. The entire basis for the Applicant's case has fallen away by reason of the Judgment and as a result the Court cannot provide the relief it seeks.

14. Accordingly, the Applicant would have to bring an entirely new case if it wanted to allege that the logging of the coupes was and will not be in accordance with the Central Highlands RFA. Further, the Applicant would need to make wholly new allegations against

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12 See also Judgment at [28] and [151].

13 Judgment at [156].

14 Judgment at [280].

15 Judgment at [273].

16 Statement of Claim at paragraphs [112] to [113].

17 Statement of Agreed Facts at paragraphs [24], [26] to [28].

VicForests itself for its alleged non-compliance in the conduct of specific forestry operations – whereas its case was run on the basis of alleged non-compliance by the Commonwealth and State of Victoria only. Depending on the nature of any new claims based on VicForests' non-compliance, this will involve complicated allegations going to the ***timing*** of any non-compliance, the ***fact and extent*** of any non-compliance, the ***effect*** of any non-compliance and at what point, if at all, the exemptions in ss 38(1) and 6(4) are inapplicable. These matters do not form a part of the current Statement of Claim. Essentially, a whole new case would need to be run, and a new Statement of Claim filed.

15. Allowing the Applicant to continue the proceeding in a completely new guise would lead to increased cost and delay.[18] The more appropriate course would be for the Applicant to bring a new proceeding – particularly where, as here, the Applicant invited an adjudication of the separate question on the basis that, if answered adversely to it, that answer would resolve the proceedings.

16. The primary purpose of pleadings is to provide adequate notice to an opposing party of a claim or case that has to be met.[19] Although the Applicant does not require leave to amend its Statement of Claim,[20] as a result of the Judgment, any new pleading would be a completely different case involving new allegations based on the currently unknown actions of VicForests and, potentially, the intervenors. There is an important distinction between an amendment that allows any defect in the pleadings to be cured and for the real questions to be properly agitated on one hand, and seeking by amendment to set up a wholly new case on the other.[21]

17. In those circumstances, it is appropriate for the Originating Application to be dismissed, as her Honour stated was her preliminary view.[22]

Date: 29 March 2018

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18 See *Brown* at [104].

19 *J & A Vaughan Super Pty Ltd (Trustee) v Becton Property Group Pty Ltd (No 3)* [2014] FCA 1380 per Pagone J at [6].

20 Rule 16.51(1) of the *Federal Court Rules 2011*.

21 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 per French CJ at 185 [14].

22 Judgment at [7] and [281].