

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Submissions
File Number:	VID1228/2017
File Title:	FRIENDS OF LEADBEATER'S POSSUM INC v VICFORESTS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 3/04/2018 2:07:37 PM AEST

A handwritten signature in blue ink that reads 'Warwick Soden'.

Registrar

### Important Information

As required by the Court's Rules, 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.

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Federal Court of Australia  
 District Registry: Victoria  
 Division: ACLHR

No. VID 1228/2017

## **FRIENDS OF LEADBEATER'S POSSUM INC**

Applicant

and

## **VICFORESTS**

Respondent

### **Submissions on Answer to, and Costs of, Separate Question**

#### **Introduction**

1. The trial judge has requested submissions on the following matters:
  - 1.1. how the separate question should be answered, given the reasons delivered by her Honour on 2 March 2018;
  - 1.2. what orders should be made as to costs;
  - 1.3. what further orders should be made in the proceeding.

#### **How the separate question should be answered**

2. The parties are not agreed as to how the separate question should be answered. The applicant submits that the appropriate answer is as follows:

Failure to carry out reviews of the performance of the Central Highlands Regional Forest Agreement required by clause 36 of the Central Highlands RFA within the periods stipulated by that clause does not operate to deny to the logging of the Logged Coupes and the proposed logging of the Scheduled Coupes (as described in the stated question) exemption from the application of Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), pursuant to s 38(1) of the EPBC Act.

Filed on behalf of (name & role of party)	Friends of Leadbeater's Possum Inc, the Applicant		
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3. The applicant submits that the above answer clearly captures the factual basis on which the separate question was determined and the Court's conclusion as to the operation of s 38(1) of the EPBC Act.

#### **Costs of the separate question**

4. The parties are not agreed as to what orders should be made for the costs of the hearing of the separate question.
5. The applicant submits that the Court should make no order as to costs either:
  - 5.1. on the basis that neither the applicant nor the respondent was the successful party on the separate question; or
  - 5.2. because the proceeding has been brought in public interest.

#### *Neither the applicant nor the respondent was the successful party*

6. Under s 43(2) of the *Federal Court of Australia Act 1976* (Cth), the award of costs is at the discretion of the Court. The usual rule is that a successful party is entitled to its costs. Subject to the exercise of the Court's discretion, that rule is applicable to the determination of separate questions: *Foster's Australia Limited v Cash's (Australia) Pty Ltd* [2013] FCA 730 at [5].
7. On the separate question, neither the applicant nor the respondent could be regarded as the successful party in the determination of the separate question. The Commonwealth, supported by the State of Victoria, succeeded in persuading the Court to adopt its construction of s 38(1) of the EPBC Act – a construction that differed from the competing constructions advanced by each of the applicant and the respondent.
8. Further, although it was originally envisaged that the substantive proceeding would be decided if the applicant were not successful on the separate question, the applicant has, consequent on and consistently with the reasons delivered by the Court on the separate question, amended its Statement of Claim. The result is that the proceeding can now continue, with a critical legal issue having been answered in a manner favorable to the Applicant's Amended Statement of Claim.
9. In those circumstances, the applicant submits that the appropriate course is for the Court to make no costs order on the separate question, so that the parties will bear their own costs.

*Public interest*

10. The discretion in s 43 of the *Federal Court Act 1976* (Cth) permits the Court to refrain from ordering costs against an unsuccessful moving party where the proceeding is brought in the public interest. The following circumstances weigh in favour of an unsuccessful moving party when the court comes to consider the question of costs:<sup>1</sup>
  - 10.1. the public interest in, and the practical implications of, the outcome of the proceeding;
  - 10.2. that the proceeding concerns novel or difficult questions of law that are of general importance;
  - 10.3. that the moving party has no personal or financial interest in the outcome of the proceeding;
  - 10.4. that the proceeding was arguable; and
  - 10.5. the applicant's conduct of its case.
11. The applicant submits that that discretion should be exercised in favour of the applicant for the following reasons.

Public interest

12. The proceeding was brought in the public interest, to ensure that forestry operations in State forests, being areas of public land, are conducted by VicForests in accordance with the law.
  - 12.1. VicForests' submissions revealed that it has been operating on the basis of a mistaken apprehension of the law – that is, that the exemption in s 38(1) of the EPBC Act would operate where conduct could be characterised as a forestry operation in an RFA region, and where there was no express prohibition against the conduct in the relevant RFA: *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178 at [32].
  - 12.2. That broad submission was rejected in favour of the construction advanced by the Commonwealth: *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178 at [44].

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<sup>1</sup> *Northern Inland Council for the Environment Inc v Minister for the Environment* [2014] FCA 216 at [8].

12.3. The result is that VicForests is now aware that the forestry operations that it conducts are subject to a greater range of controls under the RFA regime. That result serves the public interest, and would not have been achieved if the applicant had not brought these proceedings.

Novel and difficult questions of law of public importance

13. The separate question involved a novel and difficult question of public law – the difficulty of the question was evident from the range and detail of the submissions put to the Court by the parties and the intervenors (each of whom could fairly be said to have been represented by senior legal practitioners); and the importance of the question was evident from the intervention of the Commonwealth and the State of Victoria.

No personal or financial interest

14. The applicant has no personal or financial interest in the outcome of the proceedings.

The applicant’s position was clearly arguable

15. The applicant’s case was clearly arguable, and parts of that argument were accepted: for example, *Friends of Leadbeater’s Possum Inc v VicForests* [2018] FCA 178 at [24]. Although the obligation identified by the applicant was ultimately not found to be critical to the exemption in ss 38(1) and 6(4), other obligations in the RFA regime were found to be essential to the operation of that exemption.

The applicant’s conduct of its case

16. The trial of the separate question was brought on quickly – a process in which the applicant (as well as the respondent and the intervenors) co-operated. Detailed, clear and carefully formulated written submissions were filed on behalf of the applicant. The hearing proceeded over two days. The applicant, the respondent and the intervenors presented their arguments efficiently. The observation of Besanko J in *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 3)* [2012] FCA 744 at [22]<sup>2</sup> can be applied to the hearing on the separate question in the current proceeding. Just as in that case,<sup>3</sup> the applicant’s conduct of its case is a factor that weighs in favour of the Court exercising its discretion against an order for costs.

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<sup>2</sup> “The hearing itself was conducted efficiently and with commendable discrimination. By that I mean that the arguments were carefully formulated and put to the Court.”

<sup>3</sup> *Buzzacott (No 3)* [2012] FCA 744 at [27].

**Further orders to be made in the proceeding**

17. The applicant submits that, now that the Amended Statement of Claim has been filed, the matter should be listed for a case management hearing.

**Dated:** 3 April 2018

PETER HANKS

JULIA WATSON

Counsel for the Applicant