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Details of Filing

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File Title:	VICFORESTS v FRIENDS OF LEADBEATER'S POSSUM INC
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

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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
Victorian Registry

No. VID 615/2020

VicForests
Appellant

Friends of Leadbeater's Possum Inc
Respondent

RESPONDENT'S SUBMISSIONS ON COSTS

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A INTRODUCTION

1. On 10 May 2021 the Court gave judgment for the appellant (**VicForests**): *VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66 (**J**). These submissions are filed in support of the respondent's (**FLP's**) proposed order for costs.

2. FLP submits that the appropriate order as to costs is that VicForests pay FLP's costs of the hearing below (excluding the separate question hearing) and 50% of FLP's costs of the appeal. In the alternative, FLP submits that the appropriate order is that there be no order as to the costs of the trial or of the appeal (and, needless to say, there may also be intermediate positions which could be appropriate).

B RELEVANT PRINCIPLES

3. Appellate courts regularly depart from the usual order as to costs where the successful party succeeds on a point not argued before a lower court: see eg, *Malick v Lloyd* (1913) 16 CLR 483 at 492; *National Australia Bank Ltd v KDS Construction Services Pty Ltd* (1987) 163 CLR 668 at 679-670; *Centronics Systems Pty Ltd v Nintendo Co Ltd* (1992) 39 FCR 147 at 192.

4. In such cases, it has been said that the "generally prevailing" rule is instead that the successful party will not be allowed its costs: *Great Gulf Company v Sutherland* (1873) 4 AJR 164 at 164. This countenances not only an order that the successful appellant not be allowed its costs of the appeal but also, in an appropriate case, that it not be allowed its costs at first instance: see eg, *Siminton v Australian Prudential Regulation Authority* (2006) 152 FCR 129 at 148 [82]; *Nassif v Fahd* [2007] NSWCA 308. Alternatively, where the appellant has succeeded on a point taken for the first time on appeal, but the first instance proceedings raised other issues that were resolved or settled in the appellant's favour, a Court may deny the appellant its costs of the appeal and allow it only "appropriate costs" of the first instance proceedings: *Centronics* (1992) 39 FCR 147 at 192.

5. The Court's discretion to award costs is also "sufficiently wide to support an order [for] costs against a successful party, where circumstances make that appropriate": *Nassif* [2007] NSWCA 308 at [1]. Thus, in *Miller v Miller* (1978) 141 CLR 269, the High Court ordered that an appellant who had succeeded on a ground of appeal added at the commencement of the hearing of the appeal pay the respondent's costs of the day: at 276-277 per Barwick CJ.

6. Public interest proceedings brought under broad standing provisions can also justify departure

from the usual order as to costs, particularly where they resolve important and finely balanced questions of construction: *Bob Brown Foundation Inc v Commonwealth (No 2)* [2021] FCAFC 20 at [7]-[9], [15]-[16].

C APPLICATION

7. There are four overlapping reasons why the Court should make the order sought by FLP.

8. First, FLP was overwhelmingly successful at trial and on appeal. At trial, FLP succeeded on all relevant issues, legal and factual. The majority of the costs of the trial were incurred litigating questions of fact that were resolved in FLP's favour. This reflects the fact-intensive nature of the proceedings at first instance: "the primary judge's findings were made after a 12-day hearing, involving voluminous documentary evidence, in addition to the oral evidence of seven witnesses and a view of some of the relevant forest regions in the Central Highlands": J [6].

9. On appeal, VicForests identified 31 grounds of appeal in its Amended Notice of Appeal. VicForests abandoned eight grounds at or shortly before the hearing of the appeal: J [93]-[94]. This was only after FLP had prepared written submissions in respect of seven of those grounds. VicForests also belatedly abandoned other arguments in support of the grounds it did press: J [274]. All but one of the grounds pressed failed (leaving aside two, relating to the nature of the relief, which did not need to be decided).

10. The Full Court described other of VicForests' grounds as "misconceived", "untenable", and doing "no more than argu[ing] for a different result based on the same evidence which the primary judge carefully evaluated with the benefit of a lengthy hearing": J [203], [204], [209], [217]-[218]. Indeed, the Full Court said that VicForests' submissions did "not come close to satisfying the requisite standard for appellate correction of any fact finding error by the primary judge": J [204]. Importantly, the Full Court did not overturn any of the trial judge's factual findings which were challenged on appeal and which had occupied so much of the trial.

11. The only ground on which VicForests did succeed involved a "technical question of statutory construction": whether the actual conduct of forestry operations must be undertaken in accordance with the contents of the CH RFA in order to secure the benefit of the exemption in s 38(1) of the *EPBC Act*: J [19], [98].

12. Secondly, the specific basis on which VicForests succeeded on appeal (the construction of s 38 of the *EPBC Act*) arose for the first time on appeal: J [26]. Even then, VicForests' submissions

on that question of construction "remained opaque until clarified on questioning and prompting by the Bench late in the hearing of the appeal": J [274], notably in reply and requiring the Respondent be permitted a rejoinder, yet "[t]o a large extent, VicForests' submissions about construction of s 38(1) of the *EPBC Act* were unhelpful and, no doubt, the same circumstance prevailed before the primary judge": J [26]. In fact, VicForests conceded in its closing submissions at trial that non-compliance with the Code was capable of depriving an entity of the exemption in s 38(1) of the EPBC Act: *FLP (No 4)* at [109]. Had VicForests identified a "tenable construction" of s 38(1) of the EPBC Act before the trial judge – for instance, at the separate question hearing – the substantial cost of the trial and of the appeal might have been avoided. The first instance proceedings raised no other issue in respect of which VicForests should be entitled to "appropriate costs" below: see, *Centronics* (1992) 39 FCR 147 at 192.

13. Thirdly, in terms of the actual result of the litigation, it is significant that the trial judge found that VicForests contravened State legislative instruments with respect to endangered species and their habitat, and that those findings were upheld on appeal. In light of the Court's construction, those contraventions do not sound in federal law. But by no means can it be said that VicForests can claim success in the result in a substantive sense. Indeed, as a government agency following the rule of law, and as a model litigant, there is reason to expect VicForests to moderate its behaviour in light of the findings of Mortimer J, as upheld by the Full Court.

14. Fourthly, the matter was litigated by FLP in the public interest. It has no financial or other such interest in seeking to injunct the logging at the centre of this case. It has acted in pursuit of objectives of protecting two threatened fauna species in particular (and their forest habitat), one of which is vulnerable and the other of which is critically endangered. FLP relies on the affidavit of its president, Mr Meacher, affirmed 15 Nov 2017 and filed upon commencement of the proceeding, to evidence the public interest aim and objects of FLP which the litigation was brought to pursue. The case concerned interpretation of important provisions for the protection of species at a high risk of extinction. Further, VicForests is a statutory agency which has a broader interest in the issues that arose in the proceeding being resolved, and gains a broader benefit for all of its operations in light of the Court's construction.

15. For these reasons, it is appropriate that the Court make the order sought by FLP.

17 May 2021

J K Kirk **J D Watson** **P D Coleridge**