

NOTICE OF FILING

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Details of Filing

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



Dated: 1/05/2018 12:18:49 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 of 2017

FRIENDS OF LEADBEATER'S POSSUM INC
Applicant

VICFORESTS
Respondent

OUTLINE OF SUBMISSIONS OF THE APPLICANT
IN SUPPORT OF APPLICATION FOR INTERLOCUTORY INJUNCTION

Introduction

1. The Applicant seeks interlocutory injunctive relief, which would restrain the Respondent from:
 - 1.1 conducting any further timber harvesting operations in four coupes, 312-002-0006, 462-512-002, 290-525-0002, 288-505-0001 (the **Threatened Coupes**); and
 - 1.1 felling, removing or damaging any trees (whether under-storey, mid-storey or over-storey) or other substantial vegetation within coupe 288-506-0001, or otherwise widening the existing road line within coupe 288-506-0001,in the Central Highlands Regional Forest Agreement Area, until the hearing and determination of the proceeding.

Filed on behalf of (name & role of party)	Friends of Leadbeater's Possum Inc, the Applicant		
Prepared by (name of person/lawyer)	Danya Jacobs		
Law firm (if applicable)	Environmental Justice Australia		
Tel	(03 8341 3100)	Fax	(03) 8341 3111
Email	Danya.Jacobs@envirojustice.org.au		
Address for service	Level 3, 60 Leicester Street		
(include state and postcode)	CARLTON VIC 3053		

[Form approved 01/08/2011]

2. The Applicant relies on four affidavits and an expert report:
 - 2.1 an affidavit affirmed on 15 November 2017 by Stephen Meacher, on behalf of the Applicant (the **Meacher Affidavit**);
 - 2.2 an affidavit affirmed on 15 November 2017 by its solicitor, Danya Jacobs;
 - 2.3 an affidavit affirmed on 23 April 2018 by its solicitor, Danya Jacobs;
 - 2.4 an affidavit affirmed on 1 May 2018 by its solicitor, Danya Jacobs; and
 - 2.5 an expert report of Dr van der Ree dated 23 April 2018 (**Dr van der Ree's Report**).

Background

3. On 13 November 2017, the Applicant commenced a proceeding against the Respondent in this Court in respect of the past logging of 32 coupes, and the scheduled logging of a further 34 coupes, in the Central Highlands Regional Forest Agreement Area.
4. The essential elements of the claim concerned the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**).
 - 4.1 Part 3, Division 1, Subdivision C provides that actions that have a significant impact on vulnerable or critically endangered species are prohibited without approval under the Act.
 - 4.2 Section 38(1) of that Act exempts forestry operations from the controls of the Act if they are conducted “in accordance with a regional forestry agreement”.
 - 4.3 Relevantly, the Applicant alleged that:
 - (a) VicForests’ forestry operations were having, or were likely to have, a significant impact on the Greater Glider (a vulnerable species) and the Leadbeater’s Possum (a critically endangered species); and
 - (b) VicForests was not conducting forestry operations in accordance with a regional forestry agreement because five yearly reviews had not been conducted as provided for in cl 36 of the Central Highlands Regional Forestry Agreement.
5. The proceeding was listed for the hearing and determination of a separate question, which the parties believed would resolve the proceeding.

6. The Commonwealth and the State of Victoria were granted leave to intervene to make submissions on the separate question on 29 November 2017.
7. The separate question was heard on 14 and 15 December 2018.
8. On 28 February 2018, the Applicant foreshadowed to the Respondent and the interveners an intention to amend the Statement of Claim and informed the parties of the substance of the amendment.¹
9. Judgment on the separate question was delivered on 2 March 2018. Relevantly, the trial Judge:
 - 9.1 rejected the Applicant's submission that the failure to conduct the five-yearly reviews meant that forestry operations were not being conducted in accordance with the Central Highlands Regional Forestry Agreement; but
 - 9.2 held that a failure to comply with the Code of Forest Practices for Timber Production was capable of affecting the operation of the exemption in s 38(1): *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178 [149]-[150].
10. On 29 March 2018 the Applicant filed an amended Statement of Claim, which:
 - 10.1 deleted the allegation that VicForests' forestry operations were not in accordance with the Central Highlands Regional Forest Agreement because there had been no five-yearly reviews;
 - 10.2 inserted an allegation that VicForests' forestry operations were not in accordance with the Central Highlands Regional Forest Agreement because VicForests had failed to comply with particular clauses of the Code of Practice for Timber Production 2014; and
 - 10.3 made other amendments as described by the trial judge at [31]-[34] of *Friends of Leadbeater's Possum Inc v VicForests (No 2)* [2018] FCA 532.
11. On 20 April 2018, the Applicant sought an undertaking from the Respondent that the Respondent would not conduct or authorise any further timber harvesting operations within coupes 312-002-0006, 290-525-0002, in which the Applicant had become aware of active logging operations, pending the hearing and determination of the proceeding.

¹ Annexure DJ-58 to the affidavit of Danya Jacobs affirmed 23 April 2018.

The Applicant also requested that the Respondent notify the Applicant of other coupes listed at paragraph 10 of the Amended Statement of Claim, in which timber-harvesting operations were active or intended prior to 11 May 2018. The Respondent refused to give that undertaking and informed the Applicant that it was undertaking, or intended to undertake prior to 11 May 2018, timber harvesting operations within coupes 462-512-0002, 290-527-0004, 288-505-0001 and 288-506-0001.

12. On 23 April 2018, the Applicant brought this application for an interlocutory injunction.
13. On 27 April 2018, the Respondent notified the Applicant that it had completed timber harvesting operations in coupe 290-527-0004 save for “regeneration activities”, and sought confirmation from the Applicant that the Applicant would not seek injunctive relief to restrain those activities. On 28 April 2018, the Applicant sought an undertaking from the Respondent that, in the course of its foreshadowed regeneration activities, the Respondent would not cause further damage to, or destruction of, any retained trees within coupe 290-527-0004. On 30 April 2018, the Respondent offered an undertaking to regenerate Camberwell Junction coupe in accordance with its obligations under s 2.6.1 of the Code of Practice for Timber Production 2014. On 1 May 2018 the Applicant informed the Respondent that it no longer sought any injunctive relief in respect of the Camberwell Junction coupe.

Principles governing the grant of an interlocutory injunction

14. Section 475(1) of the EPBC Act provides for a regime, under which an “interested person” may apply to the Federal Court for an injunction if another person (here, the Respondent) has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of the EPBC Act or the Regulations.
15. Section 475(2) of the EPBC Act provides that such an injunction may operate to restrain the Respondent from engaging in the conduct.
16. Section 475(5) of the EPBC Act provides that the Court, before deciding an application for an injunction, may grant an interim injunction, including an interim injunction which restrains a person from engaging in conduct.
17. The Applicant is an interested person, pursuant to s 475(7) of the EPBC Act, because, during the two years preceding the originating application:

- 17.1 the Applicant's objects or purposes included the protection or conservation of, or research into, the environment; and
- 17.2 the Applicant engaged in a series of activities related to the protection or conservation of, or research into, the environment.²
18. Section 479 of the EPBC Act provides that the Court may grant an injunction irrespective of certain considerations (including whether or not there is a significant risk of injury or damage to human beings or the environment if the Respondent engages, or continues to engage, in conduct of the kind sought to be restrained).
19. However, save for the exclusion of certain considerations in s 479, the EPBC Act is otherwise silent as to the principles that govern the consideration of an application for an injunction. It is submitted that the "ordinary" principles which govern injunction applications are apposite in assessing an injunction application under the EPBC Act.
20. Those principles are well-known, and require the Court to be satisfied of three matters:³
- 20.1 that there is a serious question to be tried or that the Applicant has made out a prima facie case – in the sense that, if the evidence remains as it is, there is a probability that, at the trial of the action, the Applicant will be held entitled to relief;
- 20.2 that the Applicant will suffer irreparable injury, for which damages will not be an adequate compensation, unless an injunction is granted; and
- 20.3 that the balance of convenience favours the granting of an injunction.

Serious question to be tried

21. Insofar as the Applicant's claim relates to the Threatened Coupes, as set out in the Amended Statement of Claim, the claim relies on the following propositions.
22. Section 18(4) of the EPBC Act precludes a person from taking an action which has, will have or is likely to have a significant impact on a listed threatened species included in the vulnerable category. An "action" is not specifically defined, but includes an

² Meacher Affidavit, paragraphs 6-7.

³ *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [13] (Gleeson CJ) and [168] (Kirby J); *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153; *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57 at [19] (Gleeson CJ and Crennan J), [70]-[71] (Gummow and Hayne JJ); but see [138] (Kirby J).

undertaking, and an activity or series of activities.⁴ Timber harvesting activities would, on their ordinary meaning, fall within the meaning of “action”. Scheduling coupes by their inclusion on the Timber Release Plan, may also constitute an “action” or a “proposed action”.

23. The Greater Glider has, since 5 May 2016, been listed as a threatened species in the vulnerable category under the EPBC Act.⁵
24. The Greater Glider has been recently observed in or adjacent to the Threatened Coupes.⁶
25. The timber harvesting activities which have occurred, or which are occurring or proposed, in the Threatened Coupes are actions which are likely to have a significant impact on the Greater Glider species.⁷ Subject to the exemption discussed below, activities having that impact would attract the prohibition in s 18 of the EPBC Act.
26. Section 6(4) the *Regional Forest Agreements Act 2002* (Cth) (the **RFA Act**) and s 38 of the EPBC Act exempt any “RFA forestry operation that is undertaken in accordance with an RFA” from the operation of the relevant prohibition in s 18 of the EPBC Act.
27. The Threatened Coupes fall within areas that are governed by an RFA – namely, the Central Highlands Regional Forest Agreement (the **CH RFA**).⁸
28. In order for forestry operations to be conducted in accordance with the CH RFA, the forestry operations must comply with the *Code of Practice for Timber Production* (see *Friends of Leadbeater’s Possum Inc v VicForests* [2018] FCA 178 [146]-[150]).
29. Clause 2.2.2.2 of the Code requires VicForests to comply with the precautionary principle.
30. The precautionary principle is to the effect that, when contemplating decisions that will affect the environment, there should be careful evaluation of management options so that, wherever practicable, serious or irreversible damage to the environment will be avoided; and there should be proper assessment of the risk-weighted consequences of various

⁴ EPBC Act, s 523.

⁵ Affidavit of Danya Jacobs affirmed 15 November 2017, paragraph 16.

⁶ Affidavit of Danya Jacobs affirmed 23 April 2018, paragraphs 20(f)-20(aa); Dr van der Ree’s report, Attachment 2: excel spreadsheet.

⁷ Affidavit of Danya Jacobs affirmed 15 November 2017, paragraphs 18-21.

⁸ Affidavit of Danya Jacobs affirmed 15 November 2017, paragraphs 13-14; 22-24.

options. When dealing with threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

31. The precautionary principle is engaged or triggered where:
 - 31.1 there is a real threat of serious or irreversible damage to the environment;
 - 31.2 the threat is attended by a lack of full scientific certainty: *Environment East Gippsland v VicForests* (2010) 30 VR 1 at [188].
32. Here that threat is established, on a prima facie basis and having regard to the urgency with which this application has been brought, by:
 - 32.1 the evidence in paragraphs 18-21 of the affidavit of Danya Jacobs affirmed on 15 November 2017; and
 - 32.2 the recent presence of Greater Gliders recorded in the Threatened Coupes.⁹
33. In *Environment East Gippsland v VicForests* (2010) 30 VR 1 at [183]-[184] the Supreme Court of Victoria held that:
 - 33.1 where it is probable or seriously possible that there is a significant threat to endangered species from proposed logging and the scientific evidence is that:
 - (a) evaluation of the threat will be assisted by further surveys to resolve doubt as to the presence and location of the species in the coupe; or
 - (b) Evaluation has the capacity to trigger a material response under the regulatory regime (i.e. action statements or recovery plans or other prescriptions under the regulatory regime) directed to the conservation of endangered species; and
 - 33.2 where a review of aspects of the regulatory regime is underway with respect to the protection of threatened species, and the evidence establishes new records or the need for further surveys likely to affect that process;
 - 33.3 the precautionary principle may require adaptive management procedures.

⁹ Affidavit of Danya Jacobs affirmed on 23 April 2018, paragraph 20; Annexures DJ-36 to DJ-57 to the Affidavit of Danya Jacobs affirmed on 23 April 2018; Expert Report of Dr van der Ree dated 23 April 2018.

34. Drawing on *Environment East Gippsland v VicForests* (2010) 30 VR 1 at [506], the precautionary principle should be applied here to prohibit further logging unless adaptive management procedures are adopted. That is for the following reasons:
- 34.1 there is no action statement or recovery plan for the Greater Glider (despite the duty on the Secretary to prepare under s 19 of the FFG Act arising on the listing of the Greater Glider in May 2016). The burden of the failure to do so should fall on the Government and State owned enterprises and not on the vulnerable species given the protective purpose of the EPBC Act and related legislation;
- 34.2 a review of the regulatory regime with respect to the protection of the Greater Glider is currently underway – an action statement is being prepared and a decision has been made that a recovery plan is required;¹⁰
- 34.3 the evidence here establishes new records and the need for further surveys, which are likely to interact with the action statement and recovery plan. Specifically, the new records of the species detected in the Threatened Coupes:
- (a) may trigger a material response directed to the conservation of the species under the action statement or recovery plan, once made;
 - (b) demonstrates the need for further surveys to resolve doubt as to the presence and location of the species in the coupes;
 - (c) constitutes evidence, which may be considered in the course of preparation of the action statement and recovery plan, and which has the capacity to affect their content.
- 34.4 VicForests does not prescribe any protection specific to the Greater Glider.
- (a) VicForests' stated management for the species is:
 - i. a re-statement of an existing regulatory requirement to prioritise selection of hollow-bearing trees and those most likely to

¹⁰ Annexure DJ-33 to the Affidavit of Danya Jacobs affirmed 23 April 2018, p 648: “*In response to the listing of the Greater Glider, [DELWP] is developing an Action Statement. This is anticipated to be completed in the next 12 - 18 months.*”; Annexure DJ-31 to the Affidavit of Danya Jacobs affirmed 23 April 2018, p 479: “*Recovery Plan required, stopping decline and supporting recovery is complex, due to the requirement for a high level of planning to abate the threats, a high level of support by key stakeholders, a high level of prioritisation and a highly adaptive management process. Existing mechanisms are not adequate to address these needs (3/05/2016).*”

develop hollows in the short term as retained trees. This is a general prescription that is not specific to the Greater Glider;¹¹

ii. a discretion to retain additional habitat trees where possible;

34.5 VicForests does not conduct any detection activity itself and does not act upon reports of detection of Greater Gliders within coupes;

34.6 VicForests has not demonstrated that the threat is negligible;

34.7 The threats can be addressed by adaptive management.¹²

35. Accordingly, VicForests has failed to comply with precautionary principle by not conducting surveys and not putting prescriptions in place, or failing to put adequate prescriptions in place.

36. The failure to comply with the Code means that the forestry operation in the Threatened Coupes is not being “undertaken in accordance with an RFA”. Accordingly, the exemptions in s 6(4) of the RFA Act and s 38 of the EBPC Act do not apply.

37. As a result of the foregoing, the prohibition in s 18 of the EPBC Act applies to the forestry activity being undertaken in the Threatened Coupes.

38. The chain of reasoning set out in paragraphs 21 to 37 above raises a number of clearly serious questions to be tried in respect of the Threatened Coupes (many of which questions will also arise in respect of each of the other coupes the subject of the proceeding). Subject to the Respondent filing any defence (which may narrow the issues in dispute, or raise further issues), the serious questions include:

38.1 whether the forestry operations in the Threatened Coupes are actions that are likely to have a significant impact on the Greater Glider species;

38.2 whether the Respondent has failed to comply with the precautionary principle;

38.3 if the answer to 38.2 is “yes”, whether the statutory consequences urged by the Applicant arise; and

¹¹ See Table 12 of the Management Standards and Procedures, Annexure DJ-29 to the Affidavit of Danya Jacobs affirmed 15 November 2017, p183.

¹² See, for example, Affidavit of Danya Jacobs affirmed 23 April, paragraph 13.

38.4 if the statutory consequences do arise, what appropriate remedy ought be ordered by the Court?

39. As a result of the foregoing, the Applicant submits that the Court should be satisfied that there is a serious question to be tried.

Damages will be inadequate compensation

40. If logging commences or continues on the Threatened Coupes, it is likely that irreversible damage will be done to the forest and Greater Gliders within the coupes.

40.1 Older hollow-bearing trees, on which Greater Gliders depend, will be felled, damaged, isolated or fragmented.

40.2 Mature trees likely to form hollows in the short term will be felled, damaged, isolated or fragmented.

40.3 Older, long-lived under-storey species may be destroyed in the course of mechanical disturbance caused by heavy machinery.

40.4 Habitat loss for the Glider Glider is “catastrophic”.¹³

40.5 Greater Gliders inhabit the Threatened Coupes,¹⁴ and “the species does not cope well with habitat change ... although all animals may not die from the initial impact of [timber harvesting] they will die shortly afterwards”.¹⁵

41. Logging activities form part of “a major threat to large hollow-bearing trees on which the species relies”:

41.1 The Greater Glider is “particularly susceptible to threats because of its slow life history characteristics and specialist requirements for large tree hollows (and hence mature forests)”;

¹³ Affidavit of Danya Jacobs affirmed 15 November 2017, paragraph 18; Conservation Advice for the Greater Glider, Annexure DJ-13 to the Affidavit of Danya Jacobs affirmed 15 November 2017.

¹⁴ Affidavit of Danya Jacobs affirmed 23 April 2018’ paragraph 20; Dr van der Ree’s Report, Attachment 2: excel spreadsheet.

¹⁵ Affidavit of Danya Jacobs affirmed 23 April 2018, paragraph 21; Flora and Fauna Guarantee Act Scientific Advisory Committee final recommendation on a nomination for listing Greater Glider: annexure DJ-15 to the Affidavit of Danya Jacobs affirmed 15 November 2017.

- 41.2 Habitat loss through, among other things, clear-fell logging is recognised as a threat with a “catastrophic” consequence rating that is operating over a moderate to large area.¹⁶
42. The irreversible damage, caused by logging, to the species and to the forest within the Threatened Coupes is damage of a type that is not compensable by an award of damages.

Balance of convenience

43. The same considerations apply as in *Environment East Gippsland v VicForests* [2009] VSC 386 at [98]-[106], where Forrest J granted an injunction against logging in similar circumstances:
- 43.1 Although it is possible that some financial loss may be caused, the asset will be retained and can be logged at a later date;
- 43.2 Other coupes can be logged in the meantime: the Timber Release Plan contains in excess of 2500 coupes, more than 800 of which are in the Central Highlands Area, only five of which are subject to this application;¹⁷
- 43.3 Preservation of threatened fauna is a paramount consideration in the regulatory regime, and accordingly the limited assets of Friends of Leadbeater’s Possum Inc provide no reason not to grant the injunction;
- 43.4 Logging of forests causes irreparable damage. It takes at least 120 years before hollows begin to form in the dominant eucalypts in montane ash forest.¹⁸ Greater Gliders prefer large hollows that may take even longer to form.¹⁹
44. The Applicant has offered the usual undertaking as to damages.²⁰
45. By contrast, as set out above, any logging that occurs in the Threatened Coupes will cause irreversible damage and jeopardise a vulnerable threatened species.

¹⁶ Conservation Advice for the Greater Glider, Annexure DJ-13 to the Affidavit of Danya Jacobs affirmed 15 November 2017.

¹⁷ Affidavit of Danya Jacobs affirmed 23 April 2018, paragraph 18.

¹⁸ Affidavit of Danya Jacobs affirmed on 17 November 2018, p 20.

¹⁹ Conservation Advice, Annexure DJ-13 to the Affidavit of Danya Jacobs affirmed 15 November 2017, p 196.

²⁰ Jacobs Affidavit affirmed 23 April 2018 [23].

Dated: 1 May 2018

Julia Watson

Owen Dixon Chambers West