

FEDERAL COURT OF AUSTRALIA

Friends of Leadbeater's Possum Inc v VicForests (No 4) [2020] FCA 704

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at www.fedcourt.gov.au together with this summary

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is a federal law enacted to implement Australia's international environmental obligations in the way chosen by the Commonwealth Parliament. As its name suggests, its subject is the protection of the environment and the conservation of biodiversity, and it regulates a wide range of conduct, including activities which may affect what are called in the EPBC Act "matters of national environmental significance". These matters include: World Heritage properties; National Heritage places; wetlands of international importance; listed threatened species and communities; listed migratory species; marine environment and the Great Barrier Reef Marine Park.

This proceeding concerns forestry operations in 66 specified forest "coupes" (a forestry term for areas of forest planned to be logged) in the Central Highlands region of Victoria. It concerns the alleged effect of those operations on two native species of possum, the Greater Glider and the Leadbeater's Possum. The Greater Glider and Leadbeater's Possum are both listed as threatened species under the EPBC Act. The Greater Glider is listed as "vulnerable", which means it is facing a high risk of extinction in the wild in the medium-term future. The Leadbeater's Possum is listed as "critically endangered", which means it is facing an extremely high risk of extinction in the wild in the immediate future. Some of the 66 coupes have already been logged, and some have not. Thus, the proceeding concerns both past and proposed forestry operations.

The case has been brought by Friends of Leadbeater's Possum Inc, an environmental group, against VicForests, a Victorian statutory agency responsible for the management and sale of timber resources in Victorian State forests.

VicForests' conduct of forestry operations in the Central Highlands is regulated by a forest management system established under Victorian legislation. However, its forestry operations are also subject to regulation under the EPBC Act. The EPBC Act recognises that across Australia the Commonwealth has entered into a series of intergovernmental agreements with the States about the conservation and management of their native forests, which are called "Regional Forest Agreements" (**RFAs**). RFAs acknowledge that native forests are important community property, and need to be conserved and managed to accommodate values including economic, cultural, social, and biodiversity values. The Central Highlands RFA between the Commonwealth and Victoria applies to the area in which VicForests conducts its forestry operations in the Central Highlands.

Under s 38 of the EPBC Act, forestry operations that are conducted "in accordance with" an RFA are exempt from provisions in the EPBC Act that otherwise control actions that have, or are likely to have, a significant impact on matters of national environmental significance (including listed threatened species). One such controlling provision is s 18, which provides that a person must not take an action that has, will have or is likely to have a significant impact on a listed threatened species.

In early 2018, shortly after this proceeding was commenced, the parties proposed that the Court determine some questions of law by way of what is known as a "separate question" process. On 2 March 2018, after written and oral arguments by the parties and by the Commonwealth and the State of Victoria as interveners, the Court held that whether an RFA forestry operation was undertaken *in accordance with* an RFA for the purposes of s 38(1) of the EPBC Act depended on whether it was undertaken *in compliance* with the Victorian system of forest management and regulation, which the Commonwealth had approved and accredited in the Central Highlands RFA as a substitute regulatory system for the regime that would otherwise exist in the EPBC Act. The Victorian forest management system includes the *Victorian Code of Practice for Timber Production 2014*. The proceeding was then scheduled for trial on this basis.

The applicant's case at trial had two main parts. First, it argued that VicForests' past and future forestry operations in the 66 coupes were not, or would not be, conducted "in

accordance with” the Code and therefore the exemption in s 38(1) of the EPBC Act did not apply. Second, the applicant contended those operations had, or were likely to have, a significant impact on the Greater Glider and/or the Leadbeater’s Possum and therefore contravened s 18 of the EPBC Act. It contended the Court could stop future forestry operations occurring unless and until the federal Minister gave approval for them; and also that the Court could grant other kinds of relief in relation to past forestry operations which had a significant impact on either or both species. VicForests disputed all of the allegations made by the applicant.

The Court has upheld the applicant’s arguments on cl 2.2.2.2 of the Code, which requires VicForests, in planning and conducting its forestry operations, to apply the precautionary principle to the conservation of biodiversity values. The Glossary to the Code provides:

‘precautionary principle’ means when contemplating decisions that will affect the environment, careful evaluation of management options be undertaken to wherever practical avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various 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.

In this part of the case, the applicant’s arguments focused on the threats of serious damage to the Greater Glider which it said arose from VicForests’ forestry operations. The applicant also made arguments about what are called in the Court’s reasons the “miscellaneous breaches” of other provisions in the Code, concerning matters such as a failure to screen forestry operations from public view, and a failure to protect listed flora species, such as Tree Geebung. The Court has upheld almost all of these arguments. Non-compliance with these mandatory parts of the Code means that VicForests’ past forestry operations in 26 coupes were not conducted “in accordance with” the Central Highlands RFA and its future forestry operations in 41 coupes not yet fully logged are not likely to be conducted “in accordance with” the Central Highlands RFA. One coupe is partially logged and therefore counted in both categories. Thus the exemption in s 38(1) of the EPBC Act does not apply and the Court has found that VicForests’ forestry operations in all 66 coupes are exposed to the ordinary operation of the controlling provisions in the EPBC Act, relevantly s 18 and the prohibitions on actions having a significant impact on listed threatened species.

The Court’s findings about why VicForests has not complied with the Code provisions relied on by the applicant are complicated, and not easily susceptible to a short summary. The Court has given considerable weight to the opinions of the two experts called on behalf of the

applicant: Dr Andrew Smith and Professor John Woinarski. It has accepted their evidence, and the evidence of witnesses for the applicant, that the 66 impugned coupes contain high quality habitat critical to the survival of both species, and that one or both of the species have been detected in or around all of the 66 impugned coupes.

In relation to VicForests' obligation to apply the precautionary principle to the conservation of biodiversity values (the specific value here being the Greater Glider), the Court has found that VicForests has not engaged, and is not likely to engage, in a careful evaluation of management options to avoid wherever practical the very real threats of serious damage to the Greater Glider which are posed by its forestry operations in the Central Highlands. The Court has found those threats are recognised by official sources such as the Conservation Advice issued under the EPBC Act for the Greater Glider, and the draft Recovery Plan for the species.

The Court has found that in planning and conducting its forestry operations and in the choice of which native forest should be logged, and how it should be logged, VicForests' consideration and application of management options pays insufficient regard to matters such as the high quality of the habitat for the Greater Glider in the impugned coupes, the detections of Greater Gliders in fact using and occupying the forest in and around those coupes and the effects of wildfire on Greater Glider habitat in reserves and national parks. Instead, the Court has found VicForests relies on "desktop" and other theoretical methods, which the Court has found to be flawed, such as VicForests' habitat mapping. The Court has found that the development and content of policies such as the Interim Greater Glider Strategy could not be properly described as a careful evaluation of management options but rather were defensive documents, with content suggesting VicForests felt obliged to have a policy addressing further protection for the Greater Glider, but was reluctant to implement it.

The Court has found VicForests has not considered developing its own comprehensive in-forest survey system prior to logging, preferring to rely on other agencies like DELWP, even though DELWP has insisted the responsibility for such matters lies with VicForests, as the Court has found it does under the Code. Coupe planning for forestry operations is seldom modified to accommodate detections of Greater Glider, or to avoid logging high quality Greater Glider habitat. VicForests relies on the absence of a specific management prescription in the Central Highlands region for the Greater Glider, but the Court has found

that this position simply ignores its obligations under cl 2.2.2.2, which are quite independent of, and additional to, the existence of any such management prescription.

Despite VicForests' stated policy that it intends to move towards less intensive silvicultural practices, in order to secure accreditation for its forest products by the Forest Stewardship Council, the Court has found that, first, it is not persuaded on the evidence that VicForests will do so in the impugned coupes which have not yet been logged. Secondly, even if it did, the Court's view is that those practices will not result in VicForests applying the precautionary principle in the planning and conduct of its forestry operations in order to conserve the Greater Glider.

On the second part of the applicant's case – whether the prohibitions in s 18 have been contravened – the Court has found that VicForests' past forestry operations in those coupes that have been logged have had a significant impact on the Greater Glider, or the Leadbeater's Possum, or both. It has also found that VicForests' proposed forestry operations in those of the 40 coupes not yet logged and one coupe not yet fully logged are likely to have a significant impact on the Greater Glider, or the Leadbeater's Possum, or both.

The Court has found that existing forest management prescriptions have not been effective to arrest the decline of the Greater Glider and the Leadbeater's Possum. This includes accepting the expert opinion of Professor Woinarski that the protection zones created for Leadbeater's Possum are not effective. Further, VicForests has not reliably complied with the existing forest management prescriptions. Neither VicForests' past approach, nor its proposed less intensive silvicultural practices, avoid significant impact on the two species. That is primarily because of the impact forestry operations have on the species' habitat, and the long lasting effects of that impact. Not only do VicForests' forestry operations damage or destroy existing habitat critical to the survival of the two species, they also prevent new areas of forest from developing into such habitat in the future. Although suitable habitat may be found in reserves already protected from logging, the Court has accepted the experts' opinions that the increasing risks (in frequency and intensity) posed by wildfire to these reserves renders habitat in the impugned coupes all the more important, especially because of the overwhelming evidence, not challenged by VicForests, that both species in fact use and occupy these coupes.

The Court will give the parties an opportunity to agree on the appropriate orders the Court should make, given the conclusions it has reached. If there is no agreement, the parties will

be able to file short submissions on appropriate orders. It will then determine what final orders should be made, including whether ongoing injunctions should be issued against VicForests to prevent any forestry operations in any of the coupes not yet logged.

MORTIMER J

27 May 2020