

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 27/05/2021 4:15:12 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Submissions
File Number:	VID615/2020
File Title:	VICFORESTS v FRIENDS OF LEADBEATER'S POSSUM INC
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 27/05/2021 4:15:39 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Federal Court of Australia  
Victorian Registry

No. VID 615/2020

**VicForests**  
Appellant

**Friends of Leadbeater's Possum Inc**  
Respondent

### RESPONDENT'S SUBMISSIONS IN REPLY ON COSTS

1. FLP makes the following short points in reply to the submissions of VicForests filed on 24 May 2021.
2. The fact that FLP amended its case is not a factor in favour of VicForests obtaining its costs of the trial – the amendment simply resulted in the proceeding continuing rather than the commencement of a new, separate proceeding, which the trial judge considered was preferable to the commencement of new proceedings: cf VS [5]-[6], [9]; *Friends of Leadbeater's Possum Inc v VicForests (No 2)* [2018] FCA 532 [62]. Where FLP relied on this construction to continue its case, FLP had no interest in appealing the construction reached by the trial judge: cf VS [6].
3. What is relevant is that the trial proceeded on a construction that was favourable to FLP's amended case, and that VicForests did not take a formal position that the construction was wrong, but embraced the construction of the trial judge and FLP amended its pleadings consistently with that construction, being that advanced by the State and the Commonwealth – the parties to the RFA itself. Contrary to VS [7], the appeal was not the first opportunity for VicForests to challenge the primary judge's construction – it could and should have adopted a formal position in the trial that that construction was wrong. In circumstances where both parties embraced the trial judge's construction of s 38, there was no logical reason for FLP to abandon the federal court proceeding and commence in the Supreme Court of Victoria: cf VS [6].
4. The fact that VicForests' submissions at the separate question hearing were consistent with the construction ultimately adopted by the Full Court is of no moment: cf VS [8]. While they may

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lead to the same outcome, VicForests did not advance submissions that could persuade the trial judge to adopt what the Full Court has decided is the correct construction of s 38.

5. There is no basis on which this Court can accept that VicForests advanced a cogent construction of s 38 at the separate question hearing: VS [9]. This Court found it was unable to do so on appeal, when the case should have been more refined. The brief extract from the trial judge's reasons does not substantiate that proposition. It should be rejected.
6. Perhaps most importantly, as emerges with clarity from VicForests' submissions, the construction of s 38 was not in issue in the trial because VicForests conceded the point. Thus FLP succeeded on all matters that were in contest in the trial, and none of the matters in contest in the trial have been disturbed on appeal. It is only the premise on which the case was able to engage the EPBC Act that has been disturbed, and as the Full Court has stated, the basis on which that premise was disturbed only emerged late in the appeal and in response to questioning from the Court.

**27 May 2021**

**J K Kirk**

**J D Watson**

**P D Coleridge**