



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M37/2021
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Important Information

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BETWEEN:

FRIENDS OF LEADBEATER'S POSSUM INC
Applicant

And

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VICFORESTS
Respondent**REPLY**

1. The Respondent gives two reasons in its Response (**R**) at [2] for asserting that a grant of special leave is not warranted: insufficient prospects of success, and that the proposed grounds of appeal do not raise questions of public importance.
2. As to the latter, the Respondent presents essentially no argument in support of the claim, and simply ignores the reasons given at ASL [37]-[42] as to why this application raises matters of public importance meriting this Court's attention. VicForests says that FLP's submissions do not challenge what it correctly calls the "well-established principles" of statutory construction: R [4]. If such was required for a grant of special leave, then this Court would not hear many appeals.
- 20 3. As to the former, that is a surprising submission in circumstances where the Full Court overturned the carefully reasoned judgment on the issue by the trial judge, who herself was accepting submissions put on behalf of, in particular, the Commonwealth and Victoria. And it is ironic that VicForests now seeks to assert that the constructional choices involved are in effect simple and beyond reasonable dispute when the Full Court referred to VicForests' "apparent inability to articulate a cogent construction of s 38(1)" (FC [26]) and noted its "belated identification of a tenable construction of s 38(1)" which was "not articulated until late in the hearing of the appeal and, only then, in response to questions from the Bench": *ibid*.
- 30 4. VicForests at R [7] refers to the heading of s 38, namely, "Part 3 not to apply to certain RFA forestry operations". That heading raises a question: what RFA forestry operations? The answer is in s 38(1): "Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA". The issue in dispute is what *undertaken in accordance with an RFA* means. Yet the effect of the Full Court's construction is as though those words are just ignored. The effect of its construction is simply that "Part 3 does not

apply to an RFA forestry operation”. VicForests seems to accept that this construction is not consistent with the ordinary meaning of the words: R [8].

5. VicForests says at R [9] that “[t]he primary focus of s 38(1) is on the geographical area the subject of the relevant RFA”. It is hard to discern what textual foundation there is for this claimed primary focus. VicForests’ argument immediately moves to talk of an RFA forestry operation being “conducted in a *region* covered by an RFA” (emphasis in VicForests’ Response): *ibid.* Neither the word *region*, nor anything like it, is found in the section. Yet the Parliament in fact went to the trouble of creating a definition of “RFA region” in s 41 of the EPBC Act. Where *region* was meant, it was used.
- 10 6. Treating half of a short section as superfluous is not consistent with the well-established principles of statutory construction. VicForests says at R [11] that that is not the result, because the words are “shorthand for the list of features required for an agreement to meet the definition of an RFA”. Yet the definitional requirements are captured by the definitions of “RFA” and “RFA forestry operation” in s 4 of the RFA Act, as picked up by s 38(2) of the EPBC Act. It is those provisions which do the defining. Section 38(1) goes further; it requires acting *in accordance with* an RFA, as defined elsewhere.
7. VicForests says at R [15] that the Full Court was right to rely on the extrinsic materials referring to the purpose of s 38(1) being to prevent the application of Commonwealth legislation as they relate to RFA forestry operations where an RFA is in place. No doubt that is indeed the effect of s 38(1), so long as the clearly expressed statutory condition is met. The extrinsic materials do not present a reason to read out the express condition.
- 20 8. VicForests says that “the only way a person could be confident that they could avoid civil or criminal liability under ss 18 or 18A of the EPBC Act is to apply for approval under Part 9 of the EPBC Act”: R [17], see also R [10]. Not so; they simply need act in accordance with the requirements of the RFA.
9. As to the second special leave question – about the meaning and effect of the term “prohibited” in the definition of “RFA forestry operations” in s 4 of the RFA Act – VicForests again says that the “focus of the statutory text is on the geographical area on which the RFA permits forestry operations”: R [18]. The statutory text in question is as follows: “forestry operations (as defined by an RFA ...) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA)”. Once again, the Parliament has separately identified the *region*. The issue
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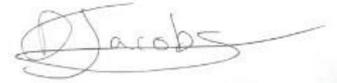
in question is what work the additional words in parentheses – “being land where those operations are not prohibited by the RFA” – have to do. On the Full Court’s construction, the answer is none.

J K KIRK

J D WATSON

P D COLERIDGE

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Signed by Danya Jacobs
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