

## **NOTICE OF FILING AND HEARING**

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 10/09/2020 3:54:36 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### **Filing and Hearing Details**

Document Lodged:	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	VID615/2020
File Title:	VICFORESTS v FRIENDS OF LEADBEATER'S POSSUM INC
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Dated: 11/09/2020 3:08:59 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 Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

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.



Form 122  
Rules 36.01(1)(b); 36.01(1)(c)

## Notice of appeal

No. \_\_\_\_\_ of 2020

Federal Court of Australia  
District Registry: Victoria  
Division: General Division

On appeal from the Federal Court

### **VicForests**

Appellant

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

Respondent

To the Respondent

The Appellant appeals from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

**Time and date for hearing:**

**Place:**

**Date:**

\_\_\_\_\_  
Signed by an officer acting with the authority  
of the District Registrar

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The Appellant appeals from orders 1–19, and 21–22 of the Federal Court made in proceeding VID 1228 of 2017 on 21 August 2020 at Melbourne.

In this notice of appeal the following defined terms are used:

<b>113F coupes</b>	The coupes referred to in paragraph 113F of the 3FASOC.
<b>3FASOC</b>	Third Further Amended Statement of Claim dated 3 June 2019
<b>Additional coupes evidence</b>	The affidavit of Jake Ross McKenzie affirmed on 24 March 2019, the affidavit of Hayley Forster affirmed on 24 March 2019, and the affidavit of Andrew Lincoln affirmed on 25 March 2019
<b>Applicant</b>	Friends of Leadbeater’s Possum Inc
<b>CH FMAs</b>	Central Highlands Forest Management Areas, as defined in the Management Standards and Procedures
<b>CH RFA</b>	Central Highlands Regional Forest Agreement dated 27 March 1998
<b>Code</b>	<i>Code of Practice for Timber Production 2014</i>
<b>Department</b>	Department of Environment, Land, Water and Planning (and its predecessor names)
<b>EPBC Act</b>	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth)
<b>Greater Glider</b>	<i>Petauroides Volans</i>
<b>Final orders reasons</b>	<i>Friends of Leadbeater’s Possum Inc v VicForests (No 6)</i> [2020] FCA 1199
<b>Leadbeater’s Possum</b>	<i>Gymnobelideus leadbeateri</i>
<b>Logged Coupes</b>	The coupes listed in paragraph 9 of the 3FASOC
<b>Logged Glider Coupes</b>	Has the same meaning as in the Final orders reasons
<b>Management Standards and Procedures</b>	Management Standards and Procedures for timber harvesting in Victoria’s State forests
<b>May 2019 Harvesting and Regeneration Systems document</b>	Has the same meaning as in paragraph 337 of the Principal reasons
<b>Planning Standards</b>	Appendix 5 to the Management Standards and Procedures
<b>Principal reasons</b>	<i>Friends of Leadbeater’s Possum Inc v VicForests (No 4)</i> [2020] FCA 704
<b>RFA</b>	Regional Forest Agreement
<b>RFA Act</b>	<i>Regional Forest Agreements Act 2002</i> (Cth)
<b>Scheduled Coupes</b>	The coupes listed in paragraph 10 of the 3FASOC
<b>Scheduled Leadbeater’s Possum Coupes</b>	Has the same meaning as in the 3FASOC
<b>Separate Question reasons</b>	<i>Friends of Leadbeater’s Possum Inc v VicForests</i> (2018) 260 FCR 1



<b>SPZ</b>	Special Protection Zone
<b>THEZ</b>	Timber Harvesting Exclusion Zone
<b>TRP</b>	Timber Release Plan

References to paragraphs in square brackets below are references to paragraphs in the Principal reasons, unless otherwise stated.

### **Grounds of appeal**

#### **A LOSS OF EXEMPTION FROM PART 3 OF THE EPBC ACT**

##### **Ground 1**

1. The primary judge erred in holding, at [155], and [193]–[272] of the Separate Question reasons, as incorporated at [4] and [106] of the Principal reasons, that the actual conduct of forestry operations must be undertaken in accordance with the contents of the CH RFA—that is, in compliance with any restrictions, limits, prescriptions, and contents of the Code—in order to secure the benefit of the exemption in cl 38(1) of the EPBC Act.
2. The primary judge ought to have held that, on the proper construction of s 38(1) of the EPBC Act and s 6(4) of the RFA Act, any forestry operations that:
  - a. are forestry operations as defined by an RFA as in force on 1 September 2001; and
  - b. are conducted in relation to land:
    - i. in a region covered by the RFA; and
    - ii. where those operations are not prohibited by the RFAare exempt from the operation of Part 3 of the EPBC Act.

##### **Ground 2**

3. Alternatively to ground 1, the primary judge erred in holding at [790]–[799] and [833] that non-compliance with cl 2.2.2.2 of the Code (being a failure to apply the precautionary principle) will result in the loss of the s 38(1) exemption, and that Pt 3 of the EPBC Act is likely to be engaged.
4. The primary judge ought to have held, consistent with [49]–[51], [175], [186], [196], [208]–[209] and [243] of the Separate Question reasons, that cl 2.2.2.2 of the Code



concerns errors of the erroneous subjective judgment which are not sufficiently clear and capable of practical implementation in a given factual situation, such that non-compliance with cl 2.2.2.2 will not result in the loss of the s 38(1) exemption.

### Ground 3

5. The primary judge erred in holding:

- a. at [720]–[721] that “the harvesting of Forest Products” referred to in paragraph (c) of the definition of “forestry operations” in the CH RFA includes the preparation and promulgation of the TRP; and
- b. at [743], that the Applicant’s pleaded case picks up and relies on the statutory concept of a “forestry operation” at a coupe-by-coupe level, treating each timber harvesting operation (together with all its planning and preparatory phases) as a course of conduct, and at [788] that that the Applicant had alleged that in each, some or all of the Scheduled Coupes and the Logged Coupes VicForests has conducted an RFA forestry operation covering all of VicForests’ activities within that coupe before, during and after harvesting (including its planning for harvesting in that coupe and burning afterwards), as a single course of conduct and a single “RFA forestry operation” for the purposes of s 38(1).

6. The primary judge ought to have held that:

- a. “the harvesting of Forest Products” referred to in paragraph (c) of the definition of “forestry operations” in the CH RFA does not include the preparation and promulgation of the TRP; and
- b. no part of the Applicant’s pleaded case:
  - i. picked up and relied on the statutory concept of a “forestry operation” at a coupe-by-coupe level, treating each timber harvesting operation (together with all its planning and preparatory phases) as a course of conduct, or a single course of conduct, and a single “RFA forestry operation” for the purposes of s 38(1); and
  - ii. contained an allegation that the preparation and promulgation of the TRP constituted a forestry operation within the meaning of the CH RFA.



#### Ground 4

7. The primary judge erred in holding at [789] that if the forestry operation, as pleaded, is not undertaken “in accordance with” the Code as it applies in one respect, then Pt 3 of the EPBC Act applies to that forestry operation as an “action” and the exemption under s 38(1) of the EPBC Act is lost for every aspect of that forestry operation.
8. The primary judge ought to have held that, as the only alleged non-compliance with the CH RFA in respect of the Scheduled Coupes and the Logged Coupes (other than the alleged miscellaneous breaches) related to allegations of non-compliance with cl 2.2.2.2 of the Code in respect of the Greater Glider, any loss of the exemption under s 38(1) of the EPBC Act in respect of those coupes was limited to forestry operations insofar as they affect the Greater Glider, and questions of significant impact in respect of other values (such as Leadbeater’s Possum) do not arise.

#### Ground 5

9. In circumstances where there was no allegation that VicForests’ forestry operations in the Scheduled Coupes would breach the Code insofar as Leadbeater’s Possum is concerned, and having found at [6(d)] and [1178] that VicForests is not likely to apply the precautionary principle to the conservation of the Greater Glider in the Scheduled Coupes, the primary judge erred:
  - a. in holding at [6(f)] and [789] that the exemption under s 38(1) of the EPBC Act is lost not only in respect of forestry operations in the Scheduled Coupes insofar as they may impact on the Greater Glider, but also insofar as those operations may impact upon the Leadbeater’s Possum;
  - b. in finding at [1343] and [1432] that VicForests’ forestry operations in the Scheduled Leadbeater’s Possum Coupes are likely to have a significant impact on the Leadbeater’s Possum.
10. The primary judge ought to have held that, in the absence of any pleaded case against VicForests that its forestry operations in the Scheduled Coupes would not comply with the Code insofar as Leadbeater’s Possum is concerned, the s 38 exemption was not lost in any of the Scheduled Coupes insofar as those operations may impact upon Leadbeater’s Possum.



### **Ground 6**

11. The primary judge erred in holding at [6e] that none of the 66 impugned coupes are subject to the s 38(1) exemption.
12. The primary judge ought to have held that by reason of the grounds of appeal set out in sections A, B and C of this notice of appeal, each of the 66 impugned coupes was subject to the exemption under s 38(1) of the EPBC Act.

## **B THE PRECAUTIONARY PRINCIPLE**

### **Ground 7**

13. The primary judge erred in holding at [831]–[853] that the precautionary principle in cl 2.2.2.2 of the Code is not subject to two conditions precedent, namely a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage.
14. The primary judge ought to have held that the application of the precautionary principle in cl 2.2.2.2 of the Code and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent: first, a threat of serious or irreversible environmental damage; and secondly, scientific uncertainty as to the environmental damage.

### **Ground 8**

15. The primary judge erred in construing, at [626]–[632] and [834], the precautionary principle in cl 2.2.2.2 of the Code as requiring that measures be taken that assist in arresting and reversing the decline, and therefore facilitate the recovery, of the relevant threatened species.
16. The primary judge ought to have held that, properly construed, the precautionary principle in cl 2.2.2.2 of the Code is not directed to the avoidance of all risks.

### **Ground 9**

17. The primary judge erred in holding at [847]–[850] that:
  - a. cl 2.2.2.2 of the Code requires VicForests to take a precautionary approach when it is “dealing” with a situation where there are threats of serious or irreversible damage, irrespective of the source of those threats; and



- b. as a consequence, much of Dr Davey's opinions were of marginal relevance because his analysis assumed that the relevant question was *whether forestry operations in the Logged Coupes* posed a serious or irreversible threat to the Greater Glider.

18. The primary judge ought to have held that:

- a. cl 2.2.2.2 of the Code requires the relevant forestry operation to pose a threat of serious or irreversible environmental damage before the precautionary principle is engaged; and
- b. Dr Davey's opinion that forestry operations undertaken in the Logged Coupes did not pose a threat of serious or irreversible damage to the Greater Glider and thus VicForests' forestry operations did not breach the precautionary principle was directly relevant.

#### **Ground 10**

19. The primary judge erred in finding at [6(d)] and [1178] that, in undertaking forestry operations in the Scheduled Coupes, VicForests is not likely to apply the precautionary principle to the conservation of biodiversity values in those coupes, as required by cl 2.2.2.2 of the Code.

20. The primary judge ought to have found that:

- a. there were no sufficiently advanced proposals to conduct timber harvesting operations in any of the Scheduled Coupes to enable any "threat" to be properly identified and analysed with respect to the Scheduled Coupes such that the conditions precedent to the engagement of the precautionary principle in cl 2.2.2.2 of the Code had not been satisfied;
- b. alternatively, the evidence, when considered as a whole, does not establish a threat of serious or irreversible damage to the Greater Glider by reason of VicForests' proposed forestry operations in the Scheduled Coupes; and
- c. in the further alternative, if the precautionary principle is engaged and the threat is not negligible, that VicForests will carefully evaluate management options in response to the threat such that it will comply with cl 2.2.2.2 of the Code in respect of the Scheduled Coupes.





## Ground 11

21. Alternatively to ground 10 above, the primary judge erred in finding:
- a. at [1037], that VicForests will not use less intensive silvicultural methods in the Scheduled Coupes than has been its historical practice; and
  - b. at [1038], that even if VicForests were to conduct its forestry operations in the Scheduled Coupes using less intensive silvicultural methods, this would not lead to any different or better compliance with cl 2.2.2.2 of the Code.
22. The primary judge ought to have found that:
- a. as foreshadowed in the May 2019 Harvesting and Regeneration Systems document, VicForests will, in some or all of the Scheduled Coupes (depending on an assessment of high conservation values present in those coupes), use less intensive silvicultural methods in the Scheduled Coupes than has been its historical practice; and
  - b. the use of less intensive silvicultural methods will:
    - i. reduce or negate any threat of serious or irreversible damage to the environment; and
    - ii. in any event constitute a careful evaluation of management options in response to any threat to the environment.

## Ground 12

23. The primary judge erred in ruling on 7 June 2019 that the additional coupes evidence was admissible evidence.
24. The primary judge ought to have held the additional coupes evidence was inadmissible on the basis:
- a. that it was not relevant evidence in the proceeding;
  - b. further, that being in the nature of tendency evidence, it did not have significant probative value either by itself or having regard to other evidence adduced or to be adduced by the Applicant; and



- c. alternatively, of the proper exercise of the general discretion under s 135 of the *Evidence Act 1995* (Cth).

### Ground 13

25. Having admitted the additional coupes evidence, the primary judge erred at [1117] in finding that that evidence confirmed her Honour's view that VicForests is unlikely to comply with cl 2.2.2.2 of the Code in the Scheduled Coupes in the foreseeable future.
26. The primary judge ought to have held, in circumstances where there were no sufficiently advanced proposals to conduct timber harvesting operations in any of the Scheduled Coupes to enable any "threat" to be properly identified and analysed with respect to the Scheduled Coupes, that the additional coupes evidence was not rationally capable of affecting the issue of whether VicForests is unlikely to comply with cl 2.2.2.2 of the Code in the foreseeable future.

### Ground 14

27. In circumstances where it was not part of the Applicant's pleaded case, the primary judge erred in holding, at [1369], that VicForests had failed to comply with cl 2.2.2.2 of the Code in the conduct of its forestry operations due to a lack of practical, specific, attention to the difficulties with THEZs highlighted in Professor Woinarski's report.
28. The primary judge ought not to have had regard to that aspect of Professor Woinarski's report in considering whether VicForests had failed to comply with cl 2.2.2.2 of the Code in the conduct of its forestry operations.

### Ground 15

29. In respect of the evidence of Professor Baker, the primary judge erred in finding:
  - a. at [234]–[235], that Professor Baker was not an independent expert; and
  - b. at [463]–[482], that Professor Baker's evidence contained "serious flaws" and should be rejected.
30. The primary judge ought to have:
  - a. found that Professor Baker was an independent expert; and



- b. accepted Professor Baker's evidence that modelling showed that any timber harvesting operations in the Scheduled Coupes would have no discernible impact on total habitat hectares for most coupes, and where it did have an impact it was typically minor and transient.

#### **Ground 16**

31. The primary judge erred in finding at [6(b)] and [943]–[962] that, in undertaking forestry operations in the Logged Glider Coupes, VicForests did not apply the precautionary principle to the conservation of biodiversity values in those coupes, as it was required to do by cl 2.2.2.2 of the Code.
32. The primary judge ought to have found that:
  - a. the forestry operations undertaken in the Logged Glider Coupes did not pose a threat of serious or irreversible environmental damage and thus the precautionary principle was not engaged insofar as those forestry operations were concerned;
  - b. alternatively, if the precautionary principle was engaged by the forestry operations in the Logged Glider Coupes, that in undertaking those operations VicForests did not fail to comply with cl 2.2.2.2 of the Code.

#### **C. MISCELLANEOUS ALLEGED BREACHES OF THE CODE**

##### **Ground 17**

33. The primary judge erred in finding at [1213] that VicForests did not comply with cl 2.2.2.4 of the Code in respect of Tree Geebung Skerry's Reach coupe.
34. The primary judge ought to have found that:
  - a. the evidence did not establish that VicForests did not comply with cl 2.2.2.4 of the Code in respect of Tree Geebung in Skerry's Reach coupe;
  - b. alternatively, that VicForests had substantially complied with cl 2.2.2.4 of the Code in respect of Tree Geebung in Skerry's Reach coupe; and
  - c. the s 38 exemption in the EPBC Act applied to forestry operations in Skerry's Reach coupe.

##### **Ground 18**



35. The primary judge erred in finding at [1247]–[1249] that VicForests had failed to comply with cl 2.2.2.4 of the Code in that it had failed to identify and protect Zone 1A habitat within Blue Vein coupe.
36. The primary judge ought to have found that:
- a. on the proper construction of Table 4 of the Planning Standards, the evidence did not establish the presence of Zone 1A habitat within Blue Vein coupe;
  - b. VicForests had not failed to comply with cl 2.2.2.4 of the Code in the Blue Vein Coupe; and
  - c. the s 38 exemption in the EPBC Act applied to forestry operations in Blue Vein coupe.

#### **Ground 19**

37. The primary judge erred in finding at [1257]–[1259] that VicForests failed to comply with cl 2.2.2.4 of the Code in Hairy Hyde coupe in that it failed to identify a Leadbeater’s Possum colony within Hairy Hyde coupe and did not apply to the Secretary to the Department to create an SPZ for the colony.
38. The primary judge ought to have found that:
- a. the evidence did not establish that a Leadbeater’s Possum colony was within Hairy Hyde coupe before the commencement of harvesting;
  - b. VicForests had not failed to comply with cl 2.2.2.4 of the Code in Hairy Hyde coupe; and
  - c. the s 38 exemption in the EPBC Act applied to forestry operations in Blue Vein coupe.

#### **Ground 20**

39. The primary judge erred in holding at [1270] that cl 5.3.1.5 of the Management Standards and Procedures applied to all timber harvesting operations (and new road alignments) in the CH FMAs.
40. The primary judge ought to have held that, on its proper construction, cl 5.3.1.5 of the Management Standards and Procedures requires a minimum 20 m vegetation buffer



where a new coupe of road is within the foreground (0–500m) of, and may be visible from, a landscape feature listed in table 9 in Appendix 5 to the Planning Standards, with particular emphasis on the sensitive landscape features in table 9.

### Ground 21

41. The primary judge erred in finding at [1271]–[1272] that VicForests had not complied with cl 2.5.1.1 of the Code and cl 5.3.1.5 of the Management Standards and Procedures in all of the Logged Coupes except Blue Vein, Hairy Hyde, Tarzan, Rowles, Bromance, Lovers Lane, Swing High, Golden Snitch, Hogsmeade, Houston and Rocketman coupes.
42. The primary judge ought to have found that:
  - a. the evidence did not establish that VicForests had failed to comply with cl 5.3.1.5 of the Management Standards and Procedures in any of the Logged Coupes;
  - b. VicForests had not failed to comply with cl 2.5.1.1 of the Code in any of the Logged Coupes; and
  - c. the s 38 exemption in the EPBC Act applied to the relevant Logged Coupes.

### Ground 22

43. The primary judge erred in finding at [1285]–[1286] that VicForests failed to comply with cl 2.2.2.1 of the Code and cl 4.1.4.4 of the Management Standards and Procedures in the 113F coupes.
44. The primary judge ought to have found that:
  - a. cl 4.1.4.4 of the Management Standards and Procedures requires VicForests to ensure that there are no gaps greater than 150 m between retained vegetation and hollow-bearing trees, or potential hollow-bearing trees, where such trees are present;
  - b. the evidence was insufficient to establish that there are gaps greater than 150 m between retained vegetation and hollow-bearing or potential hollow-bearing trees that were or are present in any of the 113F coupes;
  - c. VicForests had not failed to comply with cl 2.2.2.1 of the Code in the 113F coupes; and



- d. the s 38 exemption in the EPBC Act applied to the 113F coupes.

#### **D. SIGNIFICANT IMPACT**

##### **Ground 23**

45. The primary judge erred in finding at [1293] that there was a sufficient evidentiary foundation in respect of forestry operations in the Scheduled Coupes to make findings of fact about significant impact on both the Leadbeater's Possum and the Greater Glider.
46. The primary judge ought to have found that, in circumstances where:
- a. there were no sufficiently advanced proposals to conduct timber harvesting operations in any of the Scheduled Coupes; and
  - b. the question whether, and in what manner, such forestry operations would occur was unknown,

it was not open to the Court to make factual findings with a sufficient evidentiary basis as to whether forestry operations in each, some or all of the Scheduled Coupes would have a significant impact on Greater Glider and Leadbeater's Possum within the meaning of the EPBC Act.

##### **Ground 24**

47. The primary judge erred in finding at [1307]–[1309] and [1348]–[1455] that the forestry operations in the Scheduled Coupes, Logged Leadbeater's Possum Coupes and Logged Glider Coupes are likely to have had, or are likely to have, a significant impact on:
- a. the Greater Glider species as a whole; and
  - b. the Leadbeater's Possum species as a whole.
48. The primary judge ought to have found that there was no sufficient evidentiary foundation to find that the forestry operations in the Scheduled Coupes, Logged Leadbeater's Possum Coupes and Logged Glider Coupes had, will have, or are likely to have, a significant impact on either or both of:
- a. the Greater Glider species as a whole; and
  - b. the Leadbeater's Possum species as a whole.



### Ground 25

49. The primary judge erred in finding at [1343]–[1344] that VicForests’ forestry operations:
- a. at an individual coupe level;
  - b. at a geographic coupe group level; and/or
  - c. at the level of the totality of the Logged Coupes or Scheduled Coupes,
- are likely to have had, and are likely to have, a significant impact on both the Greater Glider and the Leadbeater’s Possum.
50. The primary judge ought to have found, on a proper construction of s 18 of the EPBC Act, there was no sufficient evidentiary basis for finding that VicForests’ forestry operations
- a. at an individual coupe level;
  - b. at a geographic coupe group level; and/or
  - c. at the level of the totality of the Logged Coupes or Schedule Coupes,
- had, will have, or are likely to have, a significant impact on either or both of the Greater Glider and the Leadbeater’s Possum.

### Ground 26

51. The primary judge erred at [1457] in finding that VicForests’ forestry operations in Logged Glider Coupes Ginger Cat and Blue Vein are likely to have had a significant impact on the Greater Glider.
52. In circumstances where Dr Smith offered no opinion on the significant impact of forestry operations in those coupes, the primary judge ought to have found that there was no evidentiary basis for a finding that VicForests’ forestry operations in Ginger Cat coupe and Blue Vein coupe had a significant impact on the Greater Glider.

### Ground 27

53. The primary judge erred at [1457] in finding that VicForests’ forestry operations in each of Scheduled Coupes Loch Stock, Junior, Infant, Shrek, Goliath, Bourbon Street,



Louisiana, Home & Away, Surfing, Waves, Diving Spur, Johnny and Turducken are likely to have a significant impact on the Leadbeater's Possum.

54. In circumstances where Professor Woirnarski offered no opinion on the significant impact of forestry operations in those coupes, the primary judge ought to have found that there was no evidentiary basis for a finding that VicForests' forestry operations in each of Scheduled Coupes Loch Stock, Junior, Infant, Shrek, Goliath, Bourbon Street, Louisiana, Home & Away, Surfing, Waves, Diving Spur, Johnny and Turducken will have, or are likely to have, a significant impact on the Leadbeater's Possum.

### Ground 28

55. The primary judge erred at [1457] in finding that VicForests' forestry operations in each of Logged Coupes Guitar Solo, Ginger Cat, Swing High and Skerry's Reach are likely to have had a significant impact on the Leadbeater's Possum.
56. In circumstances where Professor Woirnarski offered no opinion on the significant impact of forestry operations in those coupes, the primary judge ought to have found that there was no evidentiary basis for a finding that VicForests' forestry operations in each of Logged Coupes Guitar Solo, Ginger Cat, Swing High and Skerry's Reach had a significant impact on the Leadbeater's Possum.

### Ground 29

57. Alternatively to grounds 23–28, the primary judge erred at [1436] in adopting findings made in [987]–[1076] to the effect that:
- a. VicForests will not use less intensive silvicultural methods in the Scheduled Coupes than has been its historical practice; and
  - b. even if VicForests were to conduct its forestry operations in the Scheduled Coupes using less intensive silvicultural methods, this will not make any substantive difference on the ground to threats posed to the Greater Glider from timber harvesting.
58. The primary judge ought to have found that:
- a. as foreshadowed in the May 2019 Harvesting and Regeneration Systems document, VicForests will, in some or all of the Scheduled Coupes (depending on an assessment of high conservation values present in those coupes), use less





intensive silvicultural methods in the Scheduled Coupes than has been its historical practice; and

- b. the use of less intensive silvicultural methods will negate, or alternatively reduce, any significant impact to Greater Glider and the Leadbeater's Possum.

**E. RELIEF [only pressed in the event that all of the grounds in sections A–D are rejected]**

**Ground 30**

59. In circumstances where:

- a. no part of the Applicant's pleaded case, nor the case it prosecuted at trial, sought prohibitory injunctive relief pursuant to s 475(2) of the EPBC Act in respect of VicForests' conduct of forestry operations in the Logged Coupes;
- b. the primary judge had determined at [6(a)], [416], [417], [714], [781], [782(d)], [1323] and [1330] to hold the Applicant to its pleaded case; and/or
- c. VicForests proffered a form of undertaking in respect of its conduct of any future forestry operations in the Logged Coupes,

the primary judge erred at [30]–[36] and [71]–[87] of the Final orders reasons in the exercise of the discretion to grant prohibitory injunctive relief pursuant to s 475(2) of the EPBC Act restraining VicForests from conducting any further forestry operations in the Logged Coupes.

60. The primary judge ought to have declined to exercise the discretion to grant prohibitory injunctive relief pursuant to s 475(2) of the EPBC Act restraining VicForests from conducting any further forestry operations in the Logged Coupes.

**Ground 31**

61. The primary judge erred in granting unconditional injunctive relief in respect of the Scheduled Coupes in the terms set out in order (16) of the final orders dated 21 August 2020.



62. The primary judge ought to have ordered injunctive relief in respect of the Scheduled Coupes in the following terms:

*(16) Subject to order 17 below, and on the basis of orders 9, 11 and 14, pursuant to s 475(2) of the EPBC Act, VicForests whether by itself, its agents, its contractors or howsoever otherwise is restrained from conducting forestry operations in the Scheduled Coupes, unless Part 3 of the Act is rendered inapplicable to those forestry operations for whatever reason.*

### **Orders sought**

1. The appeal is allowed.
2. Orders 1–19 and 21–22 of the orders made on 21 August 2020 are set aside, and in their place are substituted the following orders:
  - a. The proceeding is dismissed.
  - b. The Applicant pay the Respondent’s costs of the proceeding, other than the costs of the separate question hearing, to be fixed by way of lump sum.
  - c. In the absence of any agreement between the parties within 28 days of these orders, the question of an appropriate lump sum pursuant to order 2(b) above be referred to a Registrar for determination.
3. The Respondent pay the Appellant’s costs of the appeal.
4. Such further or other order that the Court considers appropriate.

### **Appellant’s address**

The Appellant’s address for service is:

Place: c/- Alex Wolff / Andrew Prowse  
Baker McKenzie  
Level 19, 181 William Street  
Melbourne, Victoria 3000

Email: alex.wolff@bakermckenzie.com  
andrew.prowse@bakermckenzie.com

The Appellant’s address is Level 12, 461 Bourke Street, Melbourne, Victoria 3000.



**Service on the Respondent**

It is intended to serve this application on the Respondent.

Date: 10 September 2020

A handwritten signature in black ink, appearing to read 'Alex Wolff'.

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Signed by Alex Wolff  
Lawyer for Appellant