

28 September 2012



Law
Institute
Victoria

*The Honourable Peter Walsh MP
Minister for Agriculture, Food Security, and Water*

Dear Sir,

Introduction

1. The Law Institute of Victoria's Young Lawyers' Law Reform Committee (**LRC**) wish to bring to your attention the comments of His Honour Justice Osborn in his recent judgement of *MyEnvironment v VicForests*¹ (**MyEnvironment Case**), in which concern was expressed for the impact of the 2009 Victorian bushfires on Leadbeater's Possum habitat.
2. The LRC believes that His Honour's calls for reform require urgent attention from Government.

Background

3. The Leadbeater's Possum (*Gymnobelideus Leadbeateri*) is Victoria's faunal emblem and is found only in the Central Highlands region of Victoria.
4. It has become apparent that this species is severely endangered, with estimates suggesting that there could be as few as 500 remaining in the wild.² In Victoria, Leadbeater's Possum is listed as a threatened taxon under Schedule 2 of the *Flora and Fauna Guarantee Act 1988*. Federally, the Leadbeater's Possum is listed as a threatened species under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).³
5. The bushfires occurring throughout Victoria in early 2009 severely depleted Leadbeater's Possum habitat.
6. This issue is a matter of significant community concern, and has been covered extensively by the media in recent months.⁴ It is vital that the Victorian government reviews the strategies currently in place to deal with the conservation of the species.

¹ *MyEnvironment Inc v VicForests* [2012] VSC 91.

² See, e.g., Rosslyn Beeby, "Leadbeater's Possum faces 'managed extinction' without action", (March 27 2012) *The Age*.

³ Australian Government Department of Sustainability, Environment, Water, Population and Communities, "EPBC Act List of Threatened Fauna" <<http://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl>> accessed at 13 August 2012.

⁴ See, e.g., Bridie Smith, "Making Himself Extinct: 'absolute disgrace' prompts Leadbeater's possum scientist to quit", (September 12 2012) *The Age*.

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Law Council
OF AUSTRALIA

Law Institute of Victoria Ltd

ABN 32 075 475 731

Ph (03) 9607 9311 Fax (03) 9602 5270

Email lawinst@liv.asn.au

470 Bourke Street Melbourne 3000 Australia

DX 350 Melbourne GPO Box 263C Melbourne 3001

Website www.liv.asn.au

The MyEnvironment Case

7. On 14 March 2012, Justice Osborn handed down his judgment in the *MyEnvironment* case (a summary drafted by his Honour is **attached**). His Honour found, amongst other things, that:

*...the evidence called by MyEnvironment demonstrates a strong case for the overall review of the adequacy of the reserve system intended to protect Leadbeater's Possum habitat within the Central Highlands Forest Management Area. The 2009 bushfires have materially changed the circumstances in which the existing system was planned and implemented and there is, on the evidence, an **urgent need to review it** (our emphasis).*

8. Below we:
 - set out the policy and legislative framework underpinning His Honour's concerns; and
 - suggest action that should be undertaken by Government as a matter of urgency.

The Government's Obligations

9. On 27 March 1998, the Commonwealth and State of Victoria entered into a "Regional Forest Agreement" for the Central Highlands of Victoria (**The RFA**). The RFA commits both governments to ensure "effective conservation, forest management and forest industry outcomes."⁵ Clause 39 provides that management must be "a fully integrated and strategic forest management system capable of responding to new information."⁶
10. In the LRC's opinion, the 2009 bushfires and the continued decline in Leadbeater's Possum numbers constitute "new information". As a result, both Victoria and the Commonwealth have an obligation to heed His Honour's call for review.

The current CAR Reserve System is inadequate

11. A key element of Victorian forest management is the Comprehensive, Adequate and Representative Reserve System (**CAR Reserve System**). Its purpose is to ensure the conservation and protection of areas with environment and heritage value.⁷ CAR reserves include both formal reserves (such as national parks) and informal reserves (areas set aside for conservation purposes that are otherwise production forests, such as special protection zones in State forests).⁸
12. Presently, the Central Highlands RFA, which provides for the conservation of areas identified under the CAR Reserve System, is not capable of adapting to new information. Accordingly, the RFA has failed to respond to the increased threat to the Leadbeater's Possum because of the destruction of habitat caused by the 2009 bushfires.

⁵ *Victorian Central Highlands Regional Forest Agreement* (February 1997) p.1.

⁶ *Victorian Central Highlands Regional Forest Agreement* (February 1997) Cl 39.

⁷ *Victorian Central Highlands Regional Forest Agreement* (February 1997) Cl 60.

⁸ Attachment 1, *Victorian Central Highlands Regional Forest Agreement* (February 1997).

13. It is vital that the Victorian government urgently review the CAR Reserve System in the Central Highlands Forest Management area in light of the 2009 bushfires and the decline in the Leadbeater's Possum population. The CAR Reserve System must expand to protect remaining Leadbeater's Possum habitat, including areas identified as comprising important future habitat.

Central Highlands Forest Management Plan

14. The Central Highlands Forest Management Plan (**FMP**) includes protection of biodiversity as a key concern, including the establishment of a comprehensive system for retaining Leadbeater's Possum habitat.⁹ The FMP provides for Special Protection Zones (**SPZs**) that exclude or limit logging of Leadbeater's Possum habitat.¹⁰ The FMP Management Prescription promises a review following the completion of modelling of suitable Leadbeater's Possum habitat.¹¹
15. The LRC believes that a SPZ review should be conducted in the Central Highlands. Such a review should expand the area of state forest to protect more Leadbeater's Possum habitat and/or more areas of forest that have been identified as valuable Leadbeater's Possum habitat.

The Leadbeater's Possum Action Statement

16. The Leadbeater's Possum Action Statement¹² was produced in 1995 and has not been reviewed since. In our view, it must be reviewed and updated.
17. The Action Statement provides that management action should be "dynamic and subject to continuing review. New information on the biology, ecology and distribution of the species..." should drive and direct "an adaptive approach to the species' management."¹³
18. In light of the material change to Leadbeater's Possum habitat as a result of the 2009 bushfires, and the recognised decline of the species, the Action Statement ought to be reviewed and amended to provide for more appropriate protections where the Leadbeater's Possum is found. This may be achieved by:
 - implementing mandatory protection areas where individual Leadbeater's possum specimens are detected;
 - strengthening habitat identification and protection by prohibiting logging of any state forest which is, or is likely to be, inhabited by the Leadbeater's Possum; and
 - expanding the definition of "hollow-bearing trees" considered for the purpose of habitat identification to include any tree with a hollow.

⁹Department of Natural Resources and Environment, *Central Highlands Forest Management Plan* (May 1998) p.vi.

¹⁰Department of Natural Resources and Environment, *Central Highlands Forest Management Plan* (May 1998) pp.47, 21.

¹¹Ibid 23.

¹²The State of Victoria, Department of Sustainability and Environment, *Flora and Fauna Guarantee Action Statement 62: Leadbeater's Possum* (2003).

¹³Ibid p.5.

Critical Habitat Determination

19. The *Flora and Fauna Guarantee Act 1988* (Vic) enables the Secretary to the Department of Sustainability and Environment to make a “critical habitat determination”.¹⁴
20. As part of any inquiry into Leadbeater's Possum habitat, Government should consider the use of this power to further protect the Leadbeater's Possum. The LRC understands that this mechanism is rarely used and is of the opinion that it should have a greater role in species protection in Victoria.

The Sustainable Forests (Timber) Act

21. The LRC also has grave concerns in relation to the *Sustainable Forests (Timber) Act 2004* (Vic). The LRC reminds the Government that in making decisions under this Act, and in particular when making allocation orders to VicForests, consideration of the guiding principles of ecologically sustainable development set out in section 5(4) must be considered. Those principles include:
 - that decision making processes should effectively integrate both long-term and short-term economic, environmental, social and equity considerations;
 - if there are 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; and
 - the need to consider the global dimension of environmental impacts of actions and policies.
22. The LRC considers that a review of the *Sustainable Forests (Timber) Act* is required, with the aim of ensuring that threatened or endangered species are better protected. In particular, the LRC suggests the Government consider amending the Act:
 - to include environmental protection and the protection of threatened and endangered species in the objectives contained in section 5;
 - to require VicForests to take environmental protection and the protection of threatened and endangered species into account when preparing each Timber Release Plan; and
 - to require the Minister to take environmental protection and the protection of threatened and endangered species into account when approving a Timber Release Plan.

Conclusion

23. The range of laws, plans and agreements that regulate logging in Victoria's Central Highlands do not adequately protect the habitat of the Leadbeater's Possum. It is vital that the Victorian government urgently review the relevant law and take action as soon as possible to save this emblematic species.

¹⁴ See *Flora and Fauna Guarantee Act 1988* (Vic) s.20.

24. As we have outlined, this action can be achieved by:

- reviewing the CAR Reserve system in light of the 2009 Victorian bushfires and implementing a scheme to adapt to material changes in Victorian forests;
- conducting a zoning review of the Central Highlands to include any Leadbeater's Possum habitat within the special protection zone;
- updating the Leadbeater's Possum Action Statement to include more appropriate protections for the species;
- considering the use of critical habitat determinations and interim protection orders to protect Leadbeater's Possum habitat; and
- amending the *Sustainable Forests (Timber) Act 2004 (Vic)* to more appropriately reflect conservation aims.

Yours sincerely,

Amanda Storey
LIV Young Lawyers Section President

MyEnvironment Inc v VicForests

Summary

MyEnvironment has brought proceedings seeking to permanently restrain the logging of three timber harvesting coupes north-east of Toolangi in the Central Highlands of Victoria. Logging in the first of these coupes, named Gun Barrel, commenced last year but was restrained by order of the Court pending the outcome of this proceeding. Logging in the two remaining coupes, named Freddo and South Col, has not commenced. In these coupes, timber harvesting remains at the stage of final planning and no coupe plans have been completed which would resolve the extent, configuration and mode of logging.

MyEnvironment claims that any further logging of the three coupes will be unlawful, first because it will breach specific conservation conditions relating to Leadbeater's Possum (LBP) habitat imposed pursuant to the Timber Release Plan which gives in principle approval for the harvesting of the coupes. Alternatively, it claims that logging of the coupes will breach the precautionary principle unless a series of further management procedures are carried out.

For the reasons I explain in my written judgment, I have concluded:

- 1 That the Leadbeater's Possum Action Statement (LBP AS) made under the *Flora and Fauna Guarantee Act 1988* does not stipulate a prescription for the creation of exclusion zones to protect LBP habitat independently of the Forest Management Plan (FMP) which governs the area.
- 2 That, in any event, the LBP AS applies the density of hollow-bearing trees (HBT) criteria of exclusion zone 1A to mature living montane ash HBT and not all living montane ash HBT as MyEnvironment contends.

- 3 That the FMP prescribes the density of HBT criteria which govern the creation of
exclusion zone 1A by reference to mature or senescing montane ash trees only.
- 4 That the initial logging of Gun Barrel which has occurred and the variable
retention harvesting now proposed for further portions of Gun Barrel do not
breach this prescription.
- 5 That the proposals to log Freddo and South Col have not progressed to the
stage where it can be said that they will breach the zone 1A prescription.
- 6 The case based on the exclusion zone 1A provisions therefore fails.
- 7 The alternative case based on the precautionary principle must also fail.
MyEnvironment has not established that the very limited logging now proposed
within Gun Barrel by way of variable retention harvesting constitutes a threat of
serious or irreversible damage to the environment. Likewise, the proposals to
log Freddo and South Col have not been defined in a way which enables the
Court to say the precautionary principle will be breached.
- 8 Further, the adaptive management measures which MyEnvironment contends
for are not sufficiently responsive to, or proportionate to, any threat which might
be hypothesised to result from the reformulated proposal to log Gun Barrel.
- 9 This said, the evidence called by MyEnvironment demonstrates a strong case for
the overall review of the adequacy of the reserve system intended to protect LBP
habitat within the Central Highlands Forest Management Area. The 2009
bushfires have materially changed the circumstances in which the existing
system was planned and implemented and there is, on the evidence, an urgent
need to review it.