



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

What the case was about

This case examined the alleged effect of forestry operations by VicForests on two native species, the Greater Glider and the Leadbeater's Possum in 66 specific forest "coupes" (areas of forest in which timber harvesting is planned to occur or has occurred) in the Central Highlands region of Victoria – 22 were harvested between 2014 and 2018, and 44 were planned to be harvested in the future. The case was brought by Friends of Leadbeater's Possum Inc (FoLP).

The decision only applied to these specific coupes. It did not have any effect on forestry operations by VicForests in any other coupes, and cannot be used as the basis for general claims about harvesting by VicForests.

How native forestry is regulated

The Commonwealth Government manages Australia's international environmental obligations through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). This includes the management of activities that are of national significance, including activities that might affect specific threatened species.

VicForests is regulated through a forest management system established under Victorian legislation. Through Regional Forest Agreements, the Australian and Victorian governments have agreed that the Victorian system appropriately manages environmental risks in specific forest areas. The Central Highlands is one such forest area. This means that forestry conducted under the Victorian system in areas covered by a Regional Forest Agreement are managed under the Victorian legislative and regulatory system instead of the Commonwealth environmental approval system.

This does not mean that forestry operations in State forests do not need to comply with environmental laws – in fact, the legal requirements for forestry operations in Victoria are very strict and include the need to comply with a comprehensive set of rules designed specifically for timber harvesting, all overseen by the Victorian Chief Conservation Regulator.

On the issue of the law that applied

VicForests argued in this case that the agreement between the Commonwealth and Victoria means that activities conducted in an area of the forest covered by the agreement are regulated through the Victorian regime.

Justice Mortimer of the Federal Court instead decided that any breach of certain obligations under the Victorian system means that the activity is not being conducted "in accordance with" the agreement between the Commonwealth and Victoria, and that, if the activity would have a significant impact on a listed threatened species and no approval had been granted by the Commonwealth Minister, forestry operations would be unlawful.

The effect of this would be that VicForests would be in breach of the EPBC Act because it had not sought approval through the Commonwealth system before conducting forestry operations. VicForests had not sought approval through the Commonwealth because it is not the intent of the Australian or Victorian governments that it should do so.

On the issue of whether VicForests was meeting its obligations to manage risks

VicForests argued it had in any event acted in accordance with the rules set by the Department of Environment, Land Water and Planning (DELWP) to manage threats to the Leadbeater's Possum and had developed its own interim protections for the Greater Glider while DELWP developed its action statement and prescriptions to manage threats to that species. This includes specific requirements to provide large buffers around any tree where any Leadbeater's Possum is detected, and guidance about preserving habitat for Greater Gliders.

These measures were not, in the opinion of Justice Mortimer, sufficient.

The effect of this would be that VicForests cannot rely on compliance with the formal rules set by the Victorian regulator or the policies of the Victorian Government to demonstrate that it is complying with Victorian law.

The Court preferred the evidence of experts called on behalf of FoLP about the potential effect of harvesting activities and wildfire and did not consider that the steps taken by VicForests were sufficient to manage these threats or “arrest the decline of the Greater Glider and the Leadbeater’s Possum”.

Since this case was heard, VicForests has implemented a new comprehensive habitat assessment system and a new approach to harvesting that better protects habitat for threatened species. This means that VicForests retains an average of 50% of habitat for threatened species in areas it harvests.

Our new approach focuses on retaining habitat to support the persistence of any colonies in or near areas to be harvested and to support future colonisation should the numbers of these species increase.

The outcome of the appeal – VicForests v Friends of Leadbeater’s Possum Inc [2021] FCAFC 66

In May 2021, the Full Court of the Federal Court upheld VicForests’ appeal and set aside all orders made by Justice Mortimer other than 1 order about the costs of a separate preliminary hearing which VicForests won as Justice Mortimer had effectively dismissed FoLP’s original case. This included the Full Court overturning all declarations made by Justice Mortimer about harvesting by VicForests. The Court also dismissed FoLP’s case. This means that VicForests’ appeal was entirely successful.

This decision was on the basis that Justice Mortimer did not have jurisdiction to make these orders as the EPBC Act regime did not apply, with the Court finding:

“the appeal must be allowed on the basis that, on the proper construction of s 38(1) of the EPBC Act, the forestry operations conducted by VicForests were undertaken in accordance with the contents of the CH RFA and were therefore exempt from the operation of Pt 3 of the EPBC Act.”

As all findings by Justice Mortimer that VicForests’ operations were conducted unlawfully were based on her incorrect finding that the EPBC Act applied, any continued suggestion that this case has found that VicForests’ activities are unlawful have no legal foundation.

On the issue about the grounds that were unsuccessful

VicForests presented 23 grounds for appeal.

Ground 1, which was about the construction of the EPBC Act was the main ground and most of the time spent in arguing the appeal was on this ground alone. As VicForests’ submitted to the Full Court upon opening of the hearing, if the Full Court were to find for VicForests on ground 1 that would decide the whole appeal. Success on this ground led to the Full Court’s decision to set aside Justice Mortimer’s decision.

All remaining 22 grounds were argued as alternatives in case VicForests was not successful on the primary ground concerning the EPBC Act. It is inaccurate to suggest that all of these grounds inform upon the lawfulness of VicForests timber harvesting operations. Of these:

- 2 grounds weren’t decided by the Court of Appeal as they were only relevant if VicForests wasn’t successful (being about costs)
- 12 were about the interpretation of the law (particularly the Victorian Code of Practice) and the application of legal precedent
- 4 were about whether Justice Mortimer was entitled to make findings about future conduct
- 4 concerned arguments about findings of fact in relation to past conduct.

Public claims that VicForests was only partially successful because the Full Court did not “reverse the trial judge’s 21 other factual findings” misrepresent the nature of the appeal and the findings of the Court.

There were 22 additional grounds – and only 4 related to findings of fact on past timber harvesting by VicForests.

While VicForests was unsuccessful on these 4 grounds, it is important to note that very little time was spent in court arguing these grounds and there is a very high threshold to persuade a Court to overturn a Judge’s finding of fact. Further, the Full Court itself noted that because of its decision to uphold the appeal on the basis of ground 1, the remaining grounds of appeal were dealt with in a summary way only.

Ultimately, VicForests’ failure to succeed on the alternative 22 grounds is not relevant to the outcome of the appeal.