

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 7/08/2019 3:46:23 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:	VID1228/2017
File Title:	FRIENDS OF LEADBEATER'S POSSUM INC v VICFORESTS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 7/08/2019 3:46:27 PM AEST

A handwritten signature in blue ink, reading 'Warwick Soden'.

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.

98. If the exemption in s 38(1) were lost in respect of the Logged Glider Coupes, it would be because the conduct of the past forestry operations did not comply with cl 2.2.2.2 of the Code in respect of the Greater Glider. But the exemption would continue to apply to other forestry operations in the Logged Glider Coupes that are undertaken in accordance with the RFA.

99. Therefore, subject to the miscellaneous allegations, any loss of the exemption contained in s 38(1) of the EPBC Act in respect of the Logged Coupes is limited to forestry operations insofar as they affect the Greater Glider. Questions of significant impact in respect of other values (such as Leadbeater's Possum) do not arise.

B.3.3. The preparation of the TRP

100. As has been noted, in oral closing submissions, counsel for the applicant submitted that, in listing the Scheduled Coupes on the TRP “for the designated silviculture methods without any system in place that takes into account the vulnerability of the Greater Glider”, VicForests has undertaken a forestry operation in breach of the Code and thus lost the exemption from Part 3 of the EPBC Act.⁷⁹ The submission was advanced on the basis that the listing of the Scheduled Coupes on the TRP was “the managing of trees before they are harvested” and thus a “forestry operation” within the meaning of the CH RFA. Even assuming that to be the case, for the reasons set out below, the Code is not concerned with the preparation of a TRP, and thus no part of the Code can be breached by the preparation of a TRP.

101. First, the legislative scheme makes clear that the Code is concerned with the management of timber harvesting itself, and not the management of timber resources in the preparation of a TRP. Put another way, the legislative scheme is inconsistent with an intention that the Code is to apply to the preparation of a TRP.

102. Power to make a Code of Practice is given by Part 5 of the CFL Act. The Code is a Code of Practice within the meaning of Part 5 of the CFL Act and is a prescribed legislative instrument in Schedule 2 of the *Subordinate Legislation (Legislative Instruments) Regulations 2011* (Vic).⁸⁰

⁷⁹ T 736:43; T 746:34.

⁸⁰ [Legislation & Authorities, item 24].

103. Compliance with a Code of Practice is not required unless the Code of Practice is incorporated in, or adopted by, either a relevant law or a condition specified in an authority given under a relevant law: CFL Act, s 39.
104. The phrase “relevant law” is defined in s 3(1) of the CFL Act to relevantly include an Act specified in Schedule 1. The SFT Act is an Act specified in Schedule 1.
105. Division 1 of Part 6 of the SFT Act titled “Management of timber harvesting” deals with Codes of Practice. By that division VicForests must comply with any relevant Code of Practice relating to timber harvesting (s 46), and the Minister may ask an appropriately qualified person to audit compliance with such a Code (s 47).
106. But the provisions of the SFT Act dealing with the preparation and publication of a TRP (ss 37–44) are dealt with in a different part of the Act, being Part 5 titled “Management of timber resources by VicForests.” Thus, the structure of the SFT Act draws a distinction between conduct constituting the management of timber resources (Part 5) and conduct constituting the management of timber harvesting (Part 6). The Code concerns only the latter conduct, and its sphere of operation does not extend into preparatory works such as the preparation of a TRP.
107. Secondly, this construction is supported by the text of the Code itself. On its face, there are no provisions in the Code that refer to the TRP. The only reference to a TRP is in the definition of “coupe” on p 11, with a corresponding definition of TRP itself on p 19. Rather, the Code is concerned with timber harvesting operations, or, to use the language of the CH RFA, “the harvesting of Forest Products”⁸¹ together with activities ancillary to that harvesting.
108. The background set out on p 21 states that the Code has streamlined “the environmental framework for harvesting managers, harvesting entities and operations conducting and planning *timber harvesting operations*.”
109. Clause 1.2.2 of the Code explains that its purpose is to provide direction to timber harvesting managers, harvesting entities and operators to deliver sound environmental

⁸¹ See subparagraph (c) of the definition of **Forestry Operations** in the CH RFA p 5 [CB 6.12].

performance when planning for, and conducting, commercial timber harvesting operations. “Timber harvesting operation” is defined on p 18 of the Code:⁸²

‘**timber harvesting operation**’ means any of the following kinds of activities carried out by any person or body for the purposes of sale or processing and sale—

- (a) felling or cutting of trees or parts of trees;
- (b) taking or removing of **timber**;
- (c) delivering timber to a buyer or transporting timber to a place for collection by a buyer or sale to a buyer;
- (d) any works, including road works, **site preparation**, planting and **regeneration**, ancillary to any of the activities referred to in paragraphs (a) to (c) —but does not include—
- (e) the collection of production firewood for **domestic** use.

[Terms in bold are defined terms in the Code].

- 110. In this context, the reference to “planning” for timber harvesting operations in cl 1.2.2 of the Code should be understood as a reference to the operational planning clauses in the Code identified on p 29, none of which concern a TRP.
- 111. Further, the breach of the Code said to be occasioned by the preparation of the TRP is of cl 2.2.2.2 (the precautionary principle). Clause 2.2.2.2 is a mandatory action in support of the operational goal that timber harvesting operations in State forests address biodiversity conservation risks. Again, the focus of the operational goal is on timber harvesting operations themselves, and not the management of timber resources in Part 5 of the SFT Act.
- 112. For all of these reasons the Code has no application to the preparation, and publication of notice of, a TRP. There is thus no basis in the submission that, by reason of the listing of the Scheduled Coupes on the TRP, VicForests has breached the Code and in so doing has been engaged in a forestry operation otherwise than in accordance with an RFA, leading to loss of exemption from Part 3 of the EPBC Act.

⁸² A similar definition is contained in s 3 of the SFT Act.