FEDERAL COURT OF AUSTRALIA

Friends of Leadbeater’s Possum Inc v VicForests (No 2) [2018] FCA 532

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| File number: | VID 1228 of 2017 |
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| Judge: | **MORTIMER J** |
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| Date of judgment: | 20 April 2018 |
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| Catchwords: | **ENVIRONMENT LAW** –  qualified answer given to separate question concerning statutory interpretation of regulatory scheme established under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and related legislation – submissions made on appropriate relief in light of reasons – relief granted**PRACTICE AND PROCEDURE –** reasons given on separate question – subsequent amendment made to statement of claim – whether in the circumstances application should be dismissed or proceed as amended – application to proceed  |
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| Legislation: | *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 18, 38(1), 475*Federal Court Rules 2011* (Cth), r 16.51*Federal Court of Australia Act 1976* (Cth), ss 24(1A), 37M, 37N*Regional Forest Agreements Act 2002* (Cth), s 6(4) |
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| Cases cited: | *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; 239 CLR 175*Damorgold Pty Ltd v J.A.I. Products Pty Ltd* [2014] FCA 448*Dwyer v O’Mullen* (1887) 13 VLR 933*Friends of Leadbeater’s Possum Inc v VicForests* [2018] FCA 178*N and E Bowder Pty Ltd v Australian Keg Company Pty Ltd* [2014] FCA 288; 220 FCR 166*Peterson on behalf of the Wunna Nyiyaparli People v State of Western Australia* [2017] FCA 1056*TAG Pacific Limited & Anor v McSweeney, BA & Anor* [1992] FCA 191; 34 FCR 438 |
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| Date of last submissions: | 3 April 2018 |
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ORDERS

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|  | VID 1228 of 2017 |
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| BETWEEN: | FRIENDS OF LEADBEATER'S POSSUM INCApplicant |
| AND: | VICFORESTSRespondent |
|  | COMMONWEALTH OF AUSTRALIAFirst IntervenerSTATE OF VICTORIASecond Intervener |
| JUDGE: | MORTIMER J |
| DATE OF ORDER: | 20 April 2018 |

THE COURT ORDERS THAT:

1. The answer to the separate question stated by the Court on 17 November 2017 is:

Insofar as logging in the coupes described in the separate question has been carried out, or will be carried out, the exemptions in s 38(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and s 6(4) of the *Regional Forest Agreements Act 2002* (Cth) are not rendered inapplicable to that logging by the failure to carry out reviews of the performance of the Central Highlands Regional Forest Agreement within the relevant time, as contemplated by cl 36 of the Central Highlands RFA.

1. The parties’ costs of, and incidental to, the hearing and determination of the separate question are reserved.
2. The proceeding be listed for a case management hearing at a date to be fixed in the week commencing 7 May 2018.
3. Any interlocutory applications relevant to the continuation of the proceeding are to be filed and served on or before 4 pm on 2 May 2018 and will be listed for an initial hearing together with the case management hearing in the week commencing 7 May 2018.
4. On or before 4 pm on 2 May 2018, the parties are to agree on and file a map, or maps, in both soft and hard copy form, setting out the location of the coupes which are the subject of this proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MORTIMER J:

## Introduction

1. On 2 March 2018, I handed down reasons for judgment on the separate question which had been stated for determination by the Court: see *Friends of Leadbeater’s Possum Inc v VicForests* [2018] FCA 178. In this judgment, I will describe those reasons as the principal reasons. At [5], I stated:

In summary, I have concluded the stated question should be answered unfavourably to the applicant, but that the answer needs qualification. I have concluded that on a proper construction of s 38(1) of the EPBC Act and s 6(4) of the *Regional Forests Agreements Act 2002* (Cth), the operation of those exemptions is not affected by the failure to carry out reviews of the performance of the Central Highlands Regional Forest Agreement, as contemplated by cl 36 of the Central Highlands RFA. In substance, I have accepted the Commonwealth’s submissions, supported by the State of Victoria, about the proper construction and operation of these two exemptions. The consequence of adopting that approach is that, despite a conclusion unfavourable to the applicant, the separate question cannot be answered affirmatively in an unqualified way. A qualified answer is required to reflect the failure of the applicant’s particular contentions concerning cl 36 of the Central Highlands RFA, rather than an answer reflecting some broader conclusion about the application of the exemptions to all of VicForests’ forestry operations in the identified coupes.

1. Accordingly, I made orders that the parties and interveners should file an agreed proposed form of answer to the separate question, taking into account the Court’s reasons for judgment, together with any further or other orders the parties and interveners submit the Court should make, including as to costs. In the absence of agreement, I ordered the parties and interveners to file submissions concerning their respective proposed form of answer to the separate question, taking into account the Court’s reasons for judgment, together with submissions on any further or other orders the parties and interveners submit the Court should make, including as to costs.
2. The parties and interveners could not reach agreement on these matters, and submissions were filed.
3. The timing of the submissions was as follows:
4. submissions were filed by the Commonwealth on 29 March 2018;
5. submissions were filed by the applicant on 3 April 2018;
6. submissions were filed by the State of Victoria on 3 April 2018; and
7. submissions were filed by VicForests on 3 April 2018.
8. On 29 March 2018, and shortly before the Commonwealth filed its submissions in accordance with the Court’s directions, the applicant also filed an amended statement of claim.
9. By this step, and outside the Court’s directions, the applicant sought to change the basis of its claim for relief in the proceeding. The taking of that step by the applicant has altered the course this proceeding would otherwise have taken.

## Summary

1. The filed submissions disclosed two different approaches: one taken by the applicant, and another taken jointly by VicForests, the Commonwealth and the State.
2. Three issues arise from the submissions, and from the conduct of the applicant subsequent to the Court handing down its reasons on 2 March 2018. Those three issues are:
	1. what is the appropriate form of answer to the separate question;
	2. should the applicant’s originating application be dismissed, given the applicant has now filed an amended statement of claim; and
	3. should there be an order for costs, and if so, what should that order be.
3. In summary, my conclusions on those issues are:
	1. Although as the State submitted, there may not be much of a material difference between the two forms of answer proposed, the appropriate answer to the separate question is, more or less, the answer proposed by the Commonwealth, and with which VicForests and the State agree.
	2. The filing of an amended statement of claim precludes the Court dismissing the originating application, although dismissal would have otherwise been the appropriate order at the time the Court’s reasons were published.
	3. Due to the filing of an amended statement of claim, the costs of the separate question should be reserved.

# Relief: the parties’ competing positions

1. I have carefully considered the submissions filed pursuant to the Court’s orders. It is unnecessary to do more than summarise them.

## Applicant

1. The applicant submits the separate question should be answered in the following way:

Failure to carry out reviews of the performance of the Central Highlands Regional Forest Agreement required by clause 36 of the Central Highlands RFA within the periods stipulated by that clause does not operate to deny to the logging of the Logged Coupes and the proposed logging of the Scheduled Coupes (as described in the stated question) exemption from the application of Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), pursuant to s 38(1) of the EPBC Act.

1. The applicant submits the Court should make no order as to costs:
	1. because neither the applicant nor the respondent was the successful party on the separate question; or
	2. because the proceeding has been brought in the public interest.
2. The applicant submits that its amended statement of claim, filed on 29 March 2018, is permitted by r 16.51(1) of the *Federal Court Rules 2011* (Cth), the object of which is to prevent a multiplicity of proceedings. I describe the amended statement of claim below.

## VicForests, the Commonwealth and the State

1. The Commonwealth submits the separate question should be answered in this way:

The exemptions in s 38(1) of the *Environment Protection Biodiversity Conservation Act 1999* (Cth) and s 6(4) of the *Regional Forest Agreements Act 2002* (Cth) are not rendered inapplicable to logging of the coupes (as described in the separate question) by the failure to carry out reviews of the performance of the Central Highlands Regional Forest Agreement within the relevant time, as contemplated by cl 36 of the Central Highlands RFA.

1. VicForests and the State agree this form of answer is appropriate, although as I have noted the State submits there is not a material difference between the two forms.
2. No orders for costs are sought against either of the interveners, and each recognises it was granted leave to intervene on the basis it bore its own costs. The State therefore does not seek to be heard with respect to any question of costs. The Commonwealth takes the same position.
3. Therefore, it is only VicForests which makes submissions on costs. While recognising there are features of the proceeding which are capable of satisfying some of the factors set out in the authorities as weighing in favour of a Court exercising its discretion to make no order as to costs in proceedings where a public interest in the subject matter is present, VicForests submits that there are insufficient special circumstances to displace the ordinary rule that costs follow the event, and therefore submits the applicant should be ordered to pay VicForests’ costs.
4. Each of VicForests, the Commonwealth and the State submit the originating application should be dismissed, notwithstanding the filing of an amended statement of claim. VicForests submits the utility of the separate question procedure was:

…predicated on its potential to avoid a lengthy and unnecessary trial in light of the specific basis on which the applicant alleged that the exemptions did not operate or apply. In those circumstances, the applicant ought not now be permitted to amend its pleading to bring a case of a fundamentally different nature.

1. The Commonwealth submits:

Allowing the Applicant to continue the proceeding in a completely new guise would lead to increased cost and delay. The more appropriate course would be for the Applicant to bring a new proceeding – particularly where, as here, the Applicant invited an adjudication of the separate question on the basis that, if answered adversely to it, that answer would resolve the proceedings.

1. The Commonwealth submits that the amendment is not designed to cure any defect in the existing pleading, but rather to bring an entirely new case, and the Court should not permit this to occur, especially given the context in which the separate question was agreed.
2. The State makes a submission to the same effect (that the proceeding should be dismissed), although it does not refer specifically to the amended statement of claim.

# Relief: resolution

## The answer to the separate question

1. I set out the separate question at [7] of the principal reasons. The question was:

Was the logging of the Logged coupes, and will the proposed logging of the Scheduled Coupes be, RFA forestry operations undertaken in accordance with the Central Highlands Regional Forest Agreement such that those forestry operations are exempt from the application of Part 3 of the *Environment Protection Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**), pursuant to either s 38(1) of the EPBC Act or s 6(4) of the *Regional Forest Agreements Act 2002* (Cth)?

1. It will be seen that neither of the proposed answers, in form, provide an answer to the question posed. That is to be expected, given the level of qualification necessary because of the conclusions reached in the principal reasons. However, I consider that even a qualified answer needs to be related as closely as possible to the question as stated. For that reason the answer to be given will, in its introductory language, refer back to the separate question.
2. Another matter which, having now examined the facts and the law closely, it would have been better to address with more precision in the separate question, is the use of the term “logging”. That was the phrase proposed by the parties, but of course s 38(1) uses the term “forestry operations”, which is defined by reference to applicable regional forestry agreements: see [124]-[126] of the principal reasons. As the extract from the Central Highlands Regional Forestry Agreement in [126] of the principal reasons demonstrates, the definition extends beyond what would usually be understood by the use of the word “logging”.
3. In the principal reasons, I placed considerable weight on the role played by the term “forestry operations” in its statutory context. Nevertheless, I consider it is now too late to reframe the answer to the separate question by using “forestry operations”, and therefore I have adopted the parties’ and interveners’ term, which is “logging”. I add however, that the use of the word “logging” in the answer must be read and understood with the approach taken by the parties and the Court on the separate question, which was to consider the scope and operation of the two exemptions by reference to the term “forestry operations”.
4. I accept that the language proposed by the Commonwealth accords with some of the language in the principal reasons, especially at [5] and [277].
5. Aside from one matter (identified by VicForests), I tend to agree with the State of Victoria that there is otherwise no material difference between the two proposed forms of answer. That one matter is the use of the word “required” in the applicant’s proposal. I accept VicForests’ submission that since cl 36 is in a part of the Central Highlands RFA that is expressed not to create legally binding obligations between the parties, the use of the word “required” is not apposite. I also take into account that in my principal reasons I explained why the work to be done by the phrase “in accordance with” in s 38(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and s 6(4) of the *Regional Forest Agreements Act 2002* (Cth) may mean that certain parts of a regional forest agreement that are located in a part of that agreement expressed not to create legally binding obligations between the parties may nevertheless be given statutory force as conditions which must be complied with, in order for the exemptions to operate.
6. The critical matter, on which both proposed forms of answer focus, is to ensure that the answer does not travel beyond the agreed facts and the arguments before the Court, in light of the Court’s construction of s 38(1) of the EPBC Act and s 6(4) of the RFA Act. Both proposed forms of answer achieve that objective. In the end, aside from the matters to which I have referred, the form should be as compact and straightforward as possible.

## Should the originating application be dismissed?

1. As I have noted, on 29 March 2018, the applicant filed and served an amended statement of claim. No amendments to the originating application were required as the application itself contains no reference to the grounds on which the relief is sought, other than a reference to contraventions of s 18 of the EPBC Act. The fact that the originating application remains in its original form is not unimportant in considering what should now occur.
2. The amendments to the applicant’s statement of claim, however, are substantial and substantive. There are four broad categories of amendment. VicForests and the Commonwealth are correct to describe the amended statement of claim as putting forward an entirely new case.
3. First, there are amendments to the coupes in the Central Highlands Regional Forest Agreement Area that are to be the subject of challenge. In paragraph [9], which deals with allegations of the clear felling of certain coupes between 2004 and 2017, 15 out of the 32 coupes originally identified have been deleted, and a further 8 coupes have been added. In paragraph [10], which deals with coupes proposed to be logged by either clear felling or seed tree retention, a significant number of coupes have been added (9) and a small number (1) deleted. Thus, in the first category of changes, the applicant has quite substantially redefined the forestry operations it alleges have contravened and will contravene s 18 of the EPBC Act.
4. Second, further detail has been added at [14] and [14A] to allegations regarding the status of the Greater Glider under legislation concerning threatened species.
5. Third, and flowing from the principal reasons, there are amendments to the allegations relating to the operation and application of the exemption in s 38(1). All references to cl 36 of the Central Highlands RFA have been deleted: this occurs from [112] of the amended statement of claim onwards. It will be recalled this was previously the only basis on which the applicant contended the exemptions in s 38(1) and s 6(4) did not apply. In place of allegations relying on the failure to comply with cl 36 of the Central Highlands RFA are a series of substantively different allegations. Each appears to rely on a combination of clauses 33, 40 and 47 of the Central Highlands RFA so as to invoke the prescriptions and requirements set out for forestry operations in the Victorian *Code of Practice for Timber Production 2014*.
6. There then appears a series of pleadings, some in relation to numbers of coupes, some in relation to single coupes, that refer to (for example, this list does not purport to be exhaustive):
	1. references in the Code to the need for VicForests to take a “precautionary approach” and apply the “precautionary principle” in its timber harvesting activities and allegations that it has not done so;
	2. failure to adhere to prescribed buffer zones and exclusion areas for timber harvesting;
	3. failure to identify “biodiversity values” that should, on the applicant’s case, have been protected during timber harvesting and were not; and
	4. failures to observe, or create, special protection zones for the Leadbeater’s Possum.
7. The applicant’s submissions filed in compliance with the Court’s orders were somewhat coy about the significance of the step taken by the applicant in filing this document. Indeed, the applicant made no submissions on the question of dismissal despite the Court adverting to the question expressly in its reasons at [6] and [280]. Instead the applicant noted (at [8] of its written submissions, in the portion dealing with costs) that:

…although it was originally envisaged that the substantive proceeding would be decided if the applicant were not successful on the separate question, the applicant has, consequent on and consistently with the reasons delivered by the Court on the separate question, amended its Statement of Claim.

1. Then under a heading “Further orders to be made in the proceeding”, the applicant simply submitted the proceeding should be listed for a case management hearing, since an amended statement of claim had been filed.
2. In reality, what has happened is that the applicant has been able to take advantage of two events. First, of the cooperation between the parties in having the separate question identified quickly, and listed for hearing in a short period of time, removing the usual next step of VicForests filing a defence. It is the fact that this step has not occurred which has enabled the applicant to rely on the terms of r 16.51 of the Federal Court Rules, which provides:

**16.51 Amendment without needing the leave of the Court**

(1) A party may amend a pleading once, at any time before the pleadings close, without the leave of the Court.

(2) However, a party may not amend a pleading if the pleading has previously been amended in accordance with the leave of the Court.

(3) A party may further amend a pleading at any time before the pleadings close if each other party consents to the amendment.

(4) An amendment may be made to plead a fact or matter that has occurred or arisen since the proceeding started.

Note 1: The object of this rule is to ensure that all necessary amendments may be made to enable the real questions between the parties to be decided and to avoid multiplicity of proceedings.

Note 2: For when the pleadings close, see rule 16.12.

1. Thus, the Court’s leave was not required for the step taken by the applicant on 29 March 2018. The applicant had an entitlement under the Rules to take that step.
2. Two aspects of r 16.51 should be noted. The first is that sub rule (1) is clearly expressed to confer an entitlement to amend without the Court’s leave. The only constraint on that entitlement operates by reference to the close of pleadings. Second, sub rule (4) expressly contemplates that amendments may include amendments to introduce “facts or matters” that have arisen since the proceeding started. The first note to r 16.51 states that:

The object of this rule is to ensure that all necessary amendments may be made to enable the real questions between the parties to be decided and to avoid multiplicity of proceedings.

1. The applicant relied on the content of the first note.
2. It is not necessary to address authorities about the role of notes in statutory interpretation because, as I explain below, the substantive content of the note can be found in other places, such as the *Federal Court of Australia Act 1976* (Cth) itself, and the Court’s Practice Notes.
3. The terms of r 16.51(4) on their face also favour the applicant’s (implicit) contention that there is nothing irregular about the filing of the amended statement of claim.
4. What is set out in the first note to r 16.51 is consistent with the Court’s approach to the case management of proceedings, as set out in the Court’s Central Practice Note (CPN-1, 25 October 2016). I refer in particular to cl 7.1–7.4 of the CPN:

7. 1 The overarching purpose of civil practice and procedure and case management within the individual docket system is to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible (see ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) (“Federal Court Act”)).

7.2 The parties and their lawyers are expected, and have a statutory duty, to co-operate with the Court and among themselves to assist in achieving the overarching purpose and, in particular, in identifying the real issues in dispute early and in dealing with those issues efficiently. There are no exceptions to this expectation because of the size or nature of the matter.

7.3 This co-operation requires (and the Court expects) that the parties and their lawyers think about the best way to run their cases conformably with the overarching purpose. The parties and their lawyers can expect that the Court will engage with them in a dialogue to achieve the overarching purpose. The Court’s Rules should never be viewed as inflexible. The overarching purpose includes the elimination of unnecessary “process-driven” costs. The Court expects parties and their lawyers to have in mind at all times the cost of each step in the proceeding, and whether it is necessary.

7.4 While the Court will manage the issues in dispute, the proceeding is always the parties’ proceeding. In everything they do, the parties should approach their role as the primary actors responsible for identifying the issues in dispute and in ascertaining the most efficient, including cost efficient, method of its resolution.

1. Clause 8.1 of the CPN is also relevant:

The key objective of case management is to reduce costs and delay so that there are:

* fewer issues in contest;
* in relation to those issues, no greater factual investigation than justice requires; and
* as few interlocutory applications as necessary for the just and efficient disposition of matters.
1. It is true, as I observed in the principal reasons, that neither party, nor either of the interveners, appeared to contemplate that the separate question might have a qualified answer. Despite the arguments which the Court upheld originating in the Commonwealth’s submissions, the Commonwealth did not itself suggest – prior to the separate question hearing or during it – that if its arguments were accepted, there would need to be a qualified answer. Accordingly, no party adverted to the prospect that a qualified answer might leave the applicant with an alternative case, which could be pursued by amending its statement of claim.
2. The second event the applicant was able to take advantage of was the time given for submissions on orders. It was because of the non-advertence to which I have referred that, as a matter of procedural fairness, the Court gave the parties (and interveners) an opportunity to be heard on the appropriate form of answer to the separate question, and on the questions of relief and costs. Otherwise, orders on the separate question could, and would, have been made when the Court handed down its reasons for judgment. If that had occurred, it is almost inevitable the applicant’s originating application would have been dismissed as contemplated by r 30.02. In its principal written submissions on the separate question, VicForests submitted that the applicant’s application to this Court should be dismissed. The State also made that submission in writing.
3. After the Court handed down its reasons, there was nothing left of the applicant’s cause of action: it was doomed to fail. The object of listing a separate question, namely, that the argument and determination of the separate question would resolve, one way or the other, the fate of the proceeding, had been achieved. That was the clear basis on which the parties (and in particular VicForests) had agreed to the separate question process. Indeed, that was the basis on which the Court agreed to the process: if the separate question was answered “yes”, the application would be doomed to fail. If it was answered “no”, there would need to be a trial on the remainder of the applicant’s allegations about the particular forestry operations and their impact, on the basis that the provisions of Part 3 of the EPBC Act were capable of applying to those operations.
4. On balance, the authorities favour the proposition that relief granted after the answering of a separate question in the circumstances of this proceeding would have been final relief.
5. In *N and E Bowder Pty Ltd v Australian Keg Company Pty Ltd* [2014] FCA 288; 220 FCR 166 at [7]-[9], while referring to previous authorities where, at least in dicta, such orders had been characterised as final, Rangiah J held that he was bound by Full Court authority to find such orders were interlocutory in nature. However, that was in respect of declaratory relief, and in the context of orders under r 30.01 which split proceedings in relation to liability and damages.
6. At [8], Rangiah J framed the issue in this way:

There is a division of authority in this Court as to whether a declaration made in respect of a separate issue **which does not dispose of the whole proceeding** is interlocutory or final. (emphasis added)

1. In other words, his Honour contemplated that a declaration on a separate question or issue, which did dispose of the whole proceeding, would be final in nature.
2. In *Damorgold Pty Ltd v J.A.I. Products Pty Ltd* [2014] FCA 448, where the trial of the proceeding was split between issues of liability and the validity of the patent on the one hand and pecuniary relief on the other, Tracey J held that orders of separate questions as to liability and validity of the patent had the necessary quality of finality for them to fall within the defined meaning of the word “judgment” for the purposes of s 24(1A) of the Federal Court Act, so that no leave to appeal from those orders was required. His Honour referred to an earlier decision of Olney J in *TAG Pacific Limited & Anor v McSweeney, BA & Anor* [1992] FCA 191; 34 FCR 438, which was to similar effect.
3. In contrast, in *Peterson on behalf of the Wunna Nyiyaparli People v State of Western Australia* [2017] FCA 1056 at [51], McKerracher J (after referring to the above authorities) held that the orders on a separate question in a native title proceeding (concerning whether a particular ancestor was a member of a particular group of Aboriginal people) were not “final” orders, because the proceedings were continuing and the separate question resolved only one of a number of issues.
4. I have referred to these cases simply to emphasise the reasonableness of the apprehension of VicForests, and the interveners, that if their arguments about cl 36 were successful, orders of a final nature could be made. Whether, on the pleaded case at the time the Court gave judgment, the exemptions in s 38(1) (and s 6(4)) applied or not was a threshold issue to the rest of the applicant’s claim. The applicant acknowledged as much in the conduct of the separate question. It is quite a different situation from the one facing McKerracher J in the *Wunna Nyiyaparli People* case. However, drawing an analogy with *Damorgold*, where a large number of the claimed patents were found to be invalid, it would be as if (rather than appeal), *Damorgold* had sought to amend its statement of claim to try and use the Court’s reasoning on invalidity to re-plead its patent claims so as to avoid them being dismissed.
5. I do not consider the Commonwealth’s reliance on *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; 239 CLR 175 per French CJ at 185 [14] assists the resolution of the appropriate order. In *Aon*, and at [14], the Chief Justice was dealing with amendments made at trial, not at the early stages of a proceeding, and more critically was dealing with the judicial discretion to grant leave to amend a statement of claim. The applicant does not require leave: there is no discretion to be exercised of the kind in issue in *Aon*.
6. However, at [14], French CJ refers to the decision of *Dwyer v O’Mullen* (1887) 13 VLR 933. There is a passage in that decision to which it is worthwhile referring. That case, like *Aon*, concerned an exercise of judicial discretion to permit an amendment to a statement of claim, but the Victorian Supreme Court rule in question also had a mandatory aspect. The rule provided:

The Court or a judge may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

1. At 939, Higginbotham CJ said:

The last clause of that rule makes an amendment mandatory. The judge is under the obligation of making an amendment, but only for a certain purpose and in certain cases — for the purpose of determining the real question in controversy between the parties — that being expressed in many cases to be **the question which the parties had agitated between themselves, and had come to trial upon**. It is necessary, before determining whether it is an amendment the judge is required to make, that he should exercise his discretion in view of the evidence as to whether it was or was not the real question in controversy between the parties … [T]his particular question had not been previously in controversy or debated between the parties, and the defendant never came to the Court to have that case tried. (emphasis added)

1. In the present proceeding, the question “agitated” between the applicant and VicForests was whether the exemptions in s 38(1) of the EPBC Act (and s 6(4) of the RFA Act) did not apply because of the failure to comply with cl 36 of the Central Highlands RFA, so that relief could be granted by this Court under s 475 of the EPBC Act for alleged contraventions of s 18 of that Act. That was the subject matter of the separate question, and was the only gateway for the applicant to secure any of the relief sought in its originating application, no matter how many of its other allegations of fact and law it was able to prove.
2. For that critical first step, the applicant relied on only one set of allegations: those relating to the failure to undertake the reviews contemplated by cl 36 of the Central Highlands RFA. That was what it put in issue in the proceeding. To adapt the language of *Dwyer v O’Mullen*, that was the case VicForests (and the interveners) came to this Court to have tried. The applicant then agreed with VicForests and the interveners on a course to determine that critical question. As part of that agreed process, the applicant secured the very tangible and valuable benefit of an undertaking from VicForests (see [3]-[4] of the principal reasons) which relieved the applicant from having to press (and prove) the grounds of its interlocutory injunction application, but saw it achieve the same outcome. VicForests gave that undertaking in a particular context and for a particular purpose, which the applicant’s conduct in filing an amended statement of claim now undermines. The objective of the separate question process was not to provide the applicant with an advisory opinion on how to conduct its case, nor on which parts of its argument about s 38(1) and s 6(4) had merit and should be pursued, and which did not. It was to determine a critical aspect of the controversy between the parties on the case as framed by the applicant.
3. Despite this, the applicant having taken advantage of the time during which the Court’s affording of procedural fairness to the parties was running, the Court must deal with the circumstances as they now exist.
4. I have found the question of whether the application should be dismissed a difficult one. As I have explained, I consider VicForests and the interveners are entitled to feel as if the separate question process has been undermined by the applicant’s conduct, and – in VicForests’ case in particular – that concessions may have been obtained, and agreement secured to a course for the proceeding, which may not have been forthcoming if it was known that the applicant would seek to amend its statement of claim. Although it did not require leave to amend its statement of claim, by the same token the applicant was bound by a set of orders and directions in relation to the separate question that made it clear that process was not completed. None of those orders or directions contemplated that any party would take a step in the proceeding unrelated to the separate question, and indeed one which undermined the finality of that process.
5. On the other side, the argument presented by the Commonwealth and accepted by the Court did not emerge in a full sense until oral submissions on the separate question. Once the applicant became aware the Commonwealth’s approach to s 38(1) and s 6(4) had been upheld by the Court, it acted without delay to amend its claim accordingly. It could, as I have noted, commenced a new proceeding with the same statement of claim it has filed pursuant to r 16.51, and it is difficult to see how that course could have been subject to any substantive criticism. Indeed, the Commonwealth in its submissions recognised that was what the applicant could do. It is clear, from the filing of the amended statement of claim, that the central controversy between the parties is not resolved. The originating application remains in the same form and thus the relief sought has not changed. In those circumstances, it would be difficult to characterise the payment of an extra court fee, together with the expenditure on legal resources necessary to prepare and bring a new proceeding, as a way forward to resolve the dispute between the parties which is consistent with the overarching purpose in s 37M of the Federal Court Act, and with the Court’s Central Practice Note.
6. Accordingly, I consider the applicant has placed the Court in a position where it must proceed with the management of the proceeding towards trial.

# Costs

1. The applicant’s conduct in filing an amended statement of claim has removed the need to determine the costs of the separate question, as between VicForests and the applicant.
2. Although the answer to the separate question could be considered a “final” order in accordance with the authorities to which I have referred if the proceeding were to be dismissed, the applicant’s conduct renders that characterisation unlikely. The separate question is now no more than the resolution of one issue in the proceeding. The application may eventually be dismissed if the applicant fails to prove the remaining matters it needs to prove. Alternatively, the applicant may succeed to a greater or lesser extent.
3. In those circumstances, there is only one appropriate order as to costs, and that is they are to be reserved.

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| I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 20 April 2018