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IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN REGISTRY

VID 1228/2017

BETWEEN:

FRIENDS OF LEADBEATER'S POSSUM INC

Applicant

and

VICFORESTS

Respondent

REPLY SUBMISSIONS ON BEHALF OF VICFORESTS

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A. GENERAL OBSERVATIONS

1. The applicant's closing submissions:

   (a) largely proceed on a mis-characterisation of the obligations created under the legislative scheme governing Victorian State forest, and also under the EPBC Act; and

   (b) contain a number of factual errors, inaccuracies and overstatements[1] —often using intemperate and emotive language— together with unjustified criticism of witnesses called on behalf of VicForests.

B. RELIEF PURSUANT TO SECTION 475(2)

2. It is common ground that the Federal Court's power to grant a prohibitory injunction pursuant to s 475(2) may be enlivened on the basis of past conduct, present conduct or future conduct.[2]

3. The applicant's closing submissions regarding relief under s 475(2) do not, however, overcome the hurdles identified in VicForests' closing submissions.

4. The applicant acknowledges that:

   (a) "the conduct that constitutes the past, present and proposed conduct that did and will constitute contraventions of ss 18(2) and 18(4) of the Act, and therefore ground the injunction under s 475, is "forestry operations" in the logged and scheduled coupes" [3]; and

   (b) "in order to identify with precision the conduct that is the basis of the Applicant's s 475 application (and will be the focus of the contravention of s 18(2) and (4)

[1] The more significant examples are set out in Annexure A.
[2] Paragraphs 2 and 7 of the applicant's closing submissions.
[3] Paragraph 20 of the applicant's closing submissions.

allegation), it is necessary to turn to the conduct that the Applicant alleges constitutes breaches of the Code." [4]

5. Insofar as the applicant seeks prohibitory injunctive relief in respect of the Scheduled Coupes on the basis of VicForests' alleged *past conduct*, the applicant in its closing submissions principally relies on "the selection of the logged and scheduled coupes for harvesting, and the designation of silvicultural methods for those coupes"[5] as the relevant contravening conduct.

6. Despite not being any part of its pleaded case, even if the applicant could establish that "the selection of the logged and scheduled coupes for harvesting, and the designation of silvicultural methods for those coupes" was:

   (a) an "RFA forestry operation";

   (b) undertaken otherwise than in accordance with the CH RFA; and

   (c) contravened ss 18(2) and 18(4) of the EPBC Act,

   the Court is only empowered pursuant to s 475(2) to grant an injunction restraining the conduct that was found to have contravened the EBPC Act. Such conduct, however, is not the conduct that the applicant now seeks to restrain in respect of the Scheduled Coupes.[6]

7. It should also be noted that the conduct that leads to the loss of the s 38 exemption (i.e. the RFA forestry operation which is undertaken otherwise than in accordance with CH RFA) must be the same (past, present or proposed) conduct that is said to contravene the EPBC Act. Put another way, the applicant cannot establish the loss of exemption by reference to one sort of conduct and then characterise separate and different conduct as the conduct that is said to contravene the EPBC Act.

8. To the extent that the applicant relies on timber harvesting in the Logged Coupes as the relevant past contravening conduct, having regard to the lack of precision surrounding

[4] Paragraph 40 of the applicant's closing submissions.
[5] Paragraphs 58 and 61 of the applicant's closing submissions.
[6] See subparagraph 120(1) of the 3FASOC.

the nature, timing and scope of any forestry operations that might be undertaken in each, some or all of the Scheduled Coupes,[7] the applicant has failed to demonstrate that the conduct sought to be restrained constitutes the same conduct previously engaged in in respect of the Logged Coupes, even assuming it can establish past contraventions.

9. The applicant therefore has not identified any proper basis on which prohibitory injunctive relief in respect of the Scheduled Coupes could be granted on the basis of VicForests' alleged past conduct.

10. Insofar as the applicant seeks prohibitory injunctive relief in respect of the Scheduled Coupes on the basis of VicForests' alleged *proposed conduct*, the applicant in its closing submissions submits that "the proposed harvesting of the trees in the scheduled coupes, like the actions that have preceded such harvesting, will fail to comply with cl 2.2.2.2 of the Code, and therefore will not be undertaken in accordance with the RFA and will not be exempt under s 38."[8]

11. Insofar as the applicant seeks prohibitory injunctive relief in respect of the Scheduled Coupes on the basis that VicForests *is proposing to engage* in contravening conduct in each, some, or all of the Scheduled Coupes, the applicant also fails in its closing submissions to overcome the hurdles identified by VicForests.

12. VicForests does not contend, as the applicant asserts,[9] that the claim for relief is premature as the proposed conduct has not yet occurred. VicForests instead submits that the applicant has not established with precision the nature and extent of the proposed conduct it relies on. The proposed conduct must be of a kind that enables the Court to assess and determine whether it would not be undertaken in accordance with the CH RFA such that the s 38 exemption does not apply, and if so whether it consists of acts or omissions constituting a contravention of the EPBC Act. That is not possible in respect of incomplete, undeveloped or hypothetical plans.

13. If the constituent elements of the proposed conduct, being the acts or omissions, cannot be ascertained with sufficient certainty in order to make a finding that those acts or omissions constitute a contravention of the EPBC Act, the Court cannot be satisfied on

[7] See Section C.2.1 of VicForests' closing submissions.
[8] Subparagraph 37(c) of the applicant's closing submissions.
[9] Paragraph 12 of the applicant's closing submissions.

the balance of probabilities that the proposed conduct consists of acts or omissions which constitute a contravention of the EPBC Act. Accordingly, the relevant jurisdictional fact does not exist and the Court has no jurisdiction to grant prohibitory injunctive relief in respect of the Scheduled Coupes on the basis of VicForests' alleged proposed conduct. The applicant's submissions in this regard invite the Court into error.

C. LOSS OF EXEMPTION UNDER SECTION 38

C.1. The applicant now asserts an unpleaded case

14. As explained in paragraphs 81, 100 and 113 of the VicForests' closing submissions, the applicant's unpleaded assertion that the listing of the Scheduled Coupes on the TRP "for the designated silvicultural methods without any system in place that takes into account the vulnerability of the Greater Glider"[10] constituted a forestry operation, is an attempt to surmount the conceptual and evidentiary difficulties which the applicant faces on its Scheduled Coupes case.[11] So much is inconsistent with the applicant's pleaded case.[12]

15. The 3FASOC did not put VicForests on notice that the applicant contended that the listing of the Scheduled Coupes on the TRP constituted a "forestry operation" for the purpose of s 38 of the EPBC Act. Neither the applicant's written outline of submission,[13] nor its oral opening,[14] expressly raised this contention.

16. Further, at paragraph 36 of its closing submissions, the applicant now submits that each of the 2017 and 2019 TRPs, the Pre-harvest Biodiversity Survey Instruction and the Interim Greater Glider Strategy were made without applying cl 2.2.2.2 of the Code. The applicant appears to assert that if it can establish that the Pre-harvest Biodiversity Survey

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[10] T. 736:43; T. 346:34.
[11] See section F.1 of VicForests' closing submissions.
[12] See paragraphs 113A to 113H of the 3FASOC (excepting the Miscellaneous Logged Coupe allegations).
[13] [**CB 1.16**; at paragraphs [9]–[10], [16], [83]–[85], [96] (the submission with respect to the TRP in this paragraph deals with an alleged failure to comply with the precautionary principle, not whether the listing of the coupes on the TRP with the designated silvicultural method itself constitutes a forestry operation for the purpose of s 38 of the EPBC Act), and [105].
[14] T 37:31–42; T 39:28–33; T 49:20–39 (whether the listing of the coupes on the TRP is an "action" for the purposes of s 38 — a contention pleaded by the applicant at paragraph 8 of the 3FASOC, and not admitted by VicForests); T 50:46–T 51:3; T 52:33–T 62:15 (outline of the applicant's case on the precautionary principle); T 70:35–45; T 72:19–23; T 73:13–18.

Instruction and the Interim Greater Glider Strategy were made without applying cl 2.2.2.2 of the Code, that will result in a loss of exemption under s 38 of the EPBC Act.

17. This is a misconceived approach which subverts the logical order of the issues for determination. Even if (which is denied) the Pre-harvest Biodiversity Survey Instruction and the Interim Greater Glider Strategy were drafted without applying cl 2.2.2.2 of the Code, it cannot be said that that conduct is a "forestry operation" within the meaning of the CH RFA (as picked up by s 6(4) of the RFA Act). The applicant did not plead its case in this way: the case has always concerned the past and potential future harvesting of particular coupes. Contrary to the submission in paragraph 37 of its closing submissions, the applicant's pleaded case is not about the management of trees in the Logged and Scheduled Coupes. That submission was made for the first time in closing address in an attempt to overcome some of the conceptual difficulties with the applicant's Scheduled Coupe case.[15]

18. Axiomatically, the function of pleadings is to "state with sufficient clarity the case that must be met."[16] Pleadings provide the benchmark for discovery before trial and the admissibility of evidence at trial.[17] At trial, a party is entitled to have the opposing party confined to that party's pleading and to meet only the issues raised in the pleadings.[18] This is not a case where the parties chose to disregard the pleadings and fight the case on the issues chosen at trial.[19] Nor is it one where this new issue (or a new way of particularising an existing issue) emerged for the first time in the running of the trial and

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[15] See paragraph 22 and footnote 19 of VicForests' closing submissions.
[16] *Dare v Pulham* (1982) 148 CLR 658, 664 (Murphy, Wilson, Brennan, Deane and Dawson JJ); *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279, 286–287 (Mason CJ and Gaudron J); r 16.02(d) *Federal Court Rules 2011* (Cth).
[17] *Betfair Pty Limited v Racing New South Wales* (2010) 189 FCR 356, [50] (Keane CJ, Lander and Buchanan JJ).
[18] *Betfair Pty Limited v Racing New South Wales* (2010) 189 FCR 356, 374 [51] (Keane CJ, Lander and Buchanan JJ).
[19] Cf. *Gould v Mount Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490, 517–518 (Isaacs and Rich JJ); *Dare v Pulham* (1982) 148 CLR 658, 664 (Murphy, Wilson, Brennan, Deane and Dawson JJ); *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279, 286–287 (Mason CJ and Gaudron J).

was litigated.[20] Procedural fairness requires that relief be confined to that available on the pleadings.[21]

19. The applicant has not made an application for leave to amend the 3FASOC.[22] Such amendment would involve the applicant bringing a new case after closing address in circumstances where such a case, had it been pleaded, would have required further discovery and the giving of evidence including evidence as to the processes, decisions, drafting and consultations that occurred in relation to the preparation of the 2017 and 2019 TRPs, the Pre-harvest Biodiversity Survey Instruction and the Interim Greater Glider Strategy. Mr Paul's evidence regarding the TRPs[23] is at a level of generality: it does not descend into the processes surrounding the preparation of (and designation of coupes on) a TRP given such matters are not part of the applicant's pleaded case concerning s 38 of the EPBC Act.

C.2. The scope of any loss of exemption

20. The applicant has submitted that:

(a) "in each instance the exemption is lost for all purposes in respect of the forestry operation in question";[24]

(b) "[s]ection 38 does not limit the purpose for which the exemption is lost. For example, loss of exemption due to a failure to comply with a mandatory Code

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[20] In *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 a case was submitted to the jury which was factually different from that alleged in the pleadings and particulars. Stephen, Mason and Jacobs JJ observed at 668 that the pleadings should have been amended in order to make the facts alleged and the particulars of negligence precisely conform to the evidence. The failure to apply for the amendment in that case was held not to be fatal. However, in *Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 291, Jacobs J, with whom the other members of the Court agreed, pointed out (at 294) that the conclusion in *Leotta* was reached only upon the presupposition that the new issue or new way of particularising the existing issue had emerged at the trial and had been litigated. In any event, as observed by Robb J recently in *Griffiths as trustee for the Griffiths HWL Practice Trust v Martinez as trustee for the Martinez HWL Practice Trust as representative of the partners trading as HWL Ebsworth Lawyers* [2019] NSWSC 664 at [93], the approach to allowing amendments permitted by the courts many decades ago in personal injury jury trials does not easily translate into modern commercial trials and attendant case management principles in a post-*Aon* world.

[21] *Dare v Pulham* (1982) 148 CLR 658, 664 (Murphy, Wilson, Brennan, Deane and Dawson JJ); *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279, 286–287 (Mason CJ and Gaudron J).

[22] Rule 16.53 *Federal Court Rules 2011* (Cth).

[23] Second Paul Affidavit [**CB 3.4**; paragraph [49] ff].

[24] Paragraph 34 of the applicant's closing submissions.

provision concerning mature Tree Geebung in a specific coupe means loss of the exemption for that coupe for all purposes";[25] and

(c) "the exemption was lost for all of the coupes in the CH RFA where Greater Glider is or may be present (or seriously/irreversibly damaged), when each of the 2017 and the 2019 TRP was made without applying cl 2.2.2.2".[26]

21. The applicant's case now proceeds on the basis that the consequence of preparing the TRP is that the exemption is lost for all purposes (and Part 3 of the EPBC Act will therefore apply) in respect of any "forestry operations in those coupes, i.e. the management and harvesting of the trees in those coupes (be it past management and harvesting or present management and proposed harvesting)".[27] In other words, according to the applicant, any timber harvesting in any of the approximately 1,000 coupes on the TRP where the Greater Glider is or *may be* present will be subject to Part 3 of the EPBC Act for all purposes.

22. For the reasons set out in VicForests' closing submissions[28] the applicant's submission invites error and should be rejected.

23. As the only basis on which it is alleged that forestry operations in the Logged Coupes[29] or the Scheduled Coupes were or will be undertaken otherwise than in accordance with the CH RFA is the alleged failure by VicForests to comply 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 the Logged Coupes[30] and the Scheduled 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.

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[25] Paragraph 34 of the applicant's closing submissions.
[26] Paragraph 36(a) of the applicant's closing submissions.
[27] Paragraph 576 of the applicant's closing submissions.
[28] See sections B.1.3.1, B.2 and B.3 of the VicForests' closing submissions.
[29] Other than the miscellaneous allegations contained in paragraphs 113B–F of the 3FASOC which are dealt with in Section D of VicForests' closing submissions.
[30] Idem.

D. PRECAUTIONARY PRINCIPLE

D.1. The pleaded case concerns timber harvesting, not the management of trees before harvest or the "decisions" as submitted by the applicant

24. The applicant's pleaded case as to why exemption from Part 3 of the EPBC Act is lost is different to that submitted by the applicant in its closing submissions.[31] Putting to one side the miscellaneous allegations concerning the Logged Coupes,[32] its pleaded case is set out in paragraphs 113A and 113H of the 3FASOC.[33]

25. Contrary to what the applicant now submits, the pleaded case concerns, and has always concerned, timber harvesting (both actual and proposed), not the management of trees before they are harvested.[34] There is no reference in paragraphs 113A and 113H of the 3FASOC to the making of either of the 2017 or 2019 TRP,[35] or to the drafting of the Pre-Harvest Biodiversity Instruction.[36]

26. The pleaded precautionary principle case is predicated upon the probability or serious possibility that the logging in each, some, or all of the Logged Glider Coupes and the Scheduled Coupes poses and continues to pose a threat of serious or irreversible damage to the Greater Glider and that there remains scientific uncertainty as to that threat.[37] That allegation (and the absence of any allegation in the 3FASOC concerning a failure to carefully evaluate management options) is inconsistent with the applicant's closing submissions as to the proper construction of cl 2.2.2.2 of the Code.

27. More fundamentally, the applicant's closing submissions now assert an unpleaded case that certain decisions (variously described as "primary decisions in issue"[38] or falling within some other "range of decisions"[39]) failed to comply with cl 2.2.2.2 of the Code.[40]

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[31] See paragraphs 36–37;
[32] Paragraphs 113B–113F of the 3FASOC (addressed in section D of VicForests' closing submissions).
[33] See also paragraphs 2.5.7 and 2.6.1 of the reply [**CB 1.15**] that refer to paragraph 113H of the 3FASOC.
[34] See further in this regard paragraph 22 of VicForests' closing submissions.
[35] Cf. subparagraph 36(a) of the applicant's closing submissions.
[36] Cf. subparagraph 36(b) of the applicant's closing submissions.
[37] See subparagraph (e) of the particulars under paragraph 113A of the 3FASOC.
[38] See paragraph 61 of the applicant's closing submissions.
[39] See paragraph 62 of the applicant's closing submissions.
[40] See section C(iii) of the applicant's closing submissions titled "What are the decision made by VicForests that failed to comply with cl 2.2.2.2?"

Since amending its statement of claim in reliance on the precautionary principle,[41] the applicant's pleaded case has always concerned alleged failures by VicForests to:

(a) conduct detection activities or surveys for Greater Glider;[42] and

(b) specify timber harvesting prescriptions to protect the Greater Glider consequent upon detection or reports of detection.[43]

28. For these reasons, there is no question for determination (either factual or legal) as to whether the Court is satisfied that VicForests, in identifying coupes for potential harvesting and designating potential silvicultural methods for those coupes, carefully evaluated management options to wherever practical avoid a threat of serious or irreversible damage to the Greater Glider and properly assessed the risk-weighted consequences of those options.[44] Likewise, there is no question for determination concerning what the applicant now characterises as the "range of decisions" set out in subparagraphs 62(a)–(h) of its closing submissions. Accordingly, section C of the applicant's closing submissions is largely directed to an unpleaded case, and is thus inutile.

D.2. State regulatory framework

29. The applicant asserts in paragraph 43 of its closing submissions that VicForests must comply with any relevant code of practice in making a TRP. That submission is inconsistent with the language of s 37 of the SFT Act itself, and the structure of the SFT Act more broadly.[45]

30. The language of the section draws a distinction between matters that must be complied with in the preparation of a plan (sub-s (2)) and matters that VicForests must ensure a plan is consistent with (sub-s (3)). The only thing that VicForests must comply with in

[41] Paragraphs 113A and 113H introduced by the amended statement of claim dated 29 March 2018 filed pursuant to r 16.51 of the *Federal Court Rules 2011* (Cth).
[42] Subparagraphs (f)(i) and (iii) and (f)(v)A of the particulars under paragraph 113A of the 3FASOC.
[43] Subparagraphs (f)(ii), (iii) and (iv) and (f)(v)B of the particulars under paragraph 113A of the 3FASOC.
[44] Cf. paragraphs 58–59 of the applicant's closing submissions. See also paragraph 61 of the applicant's submissions where the selection of the logged and scheduled coupes for harvesting, and the designation of silvicultural methods for those coupes are described as "[t]he primary decisions in issue in this proceeding."
[45] See generally paragraphs 100–113 of VicForests' closing submissions.

preparing a TRP is "any condition relating to consultation that is specified in the allocation order to which the plan relates" (sub-s (2)).

31. Were the phrase "is consistent with" in sub-s (3) to be read as though it meant "complies with" —as the applicant invites— sub-s (2) would be entirely otiose. Necessarily, in this statutory context, for sub-s (2) to have any work to do, the phrase "is consistent with" in sub-s (3) must mean something more general and less stringent than "complies with". This construction is also consistent with s 46 in Part 6 where the draftsperson expressly uses the word "comply" in regard to the Code.

D.3. Correct test for cl 2.2.2.2

32. The question of whether VicForests has complied with cl 2.2.2.2 of the Code (on its true construction) is a question of fact; subjective opinion evidence of lay witnesses is irrelevant to that question.[46]

33. Reliance by the applicant on *Bondelmonte v Bondelmonte*[47] for the proposition advanced in paragraph 56 of its closing submissions is misplaced: that case concerned the *Family Law Act 1975* (Cth) (**the FLA**), and in particular the requirement that a court must regard the best interests of the child as the paramount consideration when making a parenting order under s 65D of the FLA. It was in that particular statutory context that the Court construed the meaning of the term "consider" within s 60CC(3)(a); a context far removed from the Code and the precautionary principle which, as was submitted by VicForests in sections C.1.1–C.1.3 of its closing submissions, has a widespread international usage and meaning.[48]

D.4. New silvicultural methods

34. Far from being a "cornerstone" of VicForests defence as the applicant submits,[49] the adaptive silvicultural systems are an example of any number of matters that have the

[46] See paragraph 54 of the applicant's closing submissions where the applicant relies on a "concession" from Mr Paul. In fact, his answer at T 217:13 was qualified by "I presume …" in any event.
[47] (2017) 259 CLR 662, [43].
[48] See in particular paragraph 202 of VicForests' closing submissions.
[49] Paragraph 308 of the applicant's closing submissions.

capacity to affect the manner in which any timber harvesting operations may be undertaken in the Scheduled Coupes.[50]

35. As VicForests has repeatedly foreshadowed,[51] it was always highly probable that it would need to update the Court and the parties on the development of the Systems Document and the 2017 HCV Document (as defined in subparagraph 6.3(c) of the Defence) and any other relevant matters that may have the potential to impact on any timber harvesting in the Scheduled Coupes. In fact, on the third day of trial updated versions of both documents were tendered through Mr Paul.[52]

36. At paragraphs 80–99 and 104–105 of its closing submissions, the applicant undertakes an analysis of the "proposed new silvicultural methods"[53] in the updated versions of the documents before the Court and asserts "there is no real difference between the traditional methods and the proposed new methods".[54] The applicant then refers to the traditional methods and the proposed new methods as "high intensity" silvicultural methods or forestry operations,[55] and asserts that "high intensity forestry operations" cause serious and irreversible damage to the Greater Glider.[56] VicForests rejects both the nomenclature and the substantive proposition advanced by the applicant.

37. In response to the "different methods" set out in paragraphs 100–103 of the applicant's closing submissions VicForests refers to paragraph 364 of its closing submissions. Further, any reliance by the applicant on the Draft Recovery Plan is inapposite to the precautionary principle analysis. First, the document is in draft and it is unknown when it will be finalised and in what form.[57] Secondly, the precautionary principle is not directed towards reversing long-term declining populations of threatened species, which is one of the stated objectives of the Draft Recovery Plan. To hold otherwise would be inconsistent with established authority.[58]

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[50] See subparagraph 6.3(c)(v) of the Defence.
[51] See T 29:10 (directions hearing 14 February 2019); paragraph 16 of VicForests' submissions on costs of the adjournment filed on 15 March 2019; and subparagraph 6.3(c) of the Defence.
[52] [**CB 12.1**] and [**CB 12.2**]. T 180:40–T 182:29.
[53] [**CB 12.1** and **CB 12.2**].
[54] Paragraph 105 of the applicant's closing submissions.
[55] Paragraph 105 of the applicant's closing submissions.
[56] Paragraph 106 of the applicant's closing submissions.
[57] See *MyEnvironment*, [319]–[324].
[58] See generally section C.1 of VicForests' closing submissions.

E. SIGNIFICANT IMPACT: "COUPE GROUPS" AND CUMULATIVE IMPACTS

38. In closing address, the applicant was invited to make clear how its case as to "coupe groups" was put.[59] The applicant has not done so.[60] The applicant has failed to identify precisely which forestry operations in the Logged Coupes or the Scheduled Coupes (or which combination thereof) were or would be undertaken otherwise than in accordance with the CH RFA for the purposes of s 38 of the EPBC Act, and are therefore said to constitute an action for the purposes of the significant impact assessment under s 18.

39. The applicant's failure to clearly state how its case as to "coupe groups" was put is not raised by VicForests as a mere pleading complaint: it goes to the heart of the task that the Court must now undertake. The Court must now undertake an analysis of each of the more than 60 coupes the subject of this proceeding and determine first, the requisite forestry operation for the s 38 analysis and second, if that gate be opened, the requisite significant impact under s 18. The Court is left in the invidious position of working out for itself which combination of coupes constitutes a "coupe group" and then augmenting, for itself, the (expansive) significant impact evidence which has been advanced on a coupe-by-coupe basis. The same vice applies in respect of the precautionary principle analysis.[61]

40. This is unsatisfactory not only for the reasons expressed at paragraph 486 of VicForests' closing submissions, but also because it goes to the question of how this Court is to approach the task of assessing a threat of serious or irreversible damage and significant impact.

41. Section 18 requires the Court to undertake an assessment of the impact of an action, necessarily requiring identification of the action. Here, the relevant action is an unspecified forestry operation undertaken in relation to land (coupe or coupes) in a region covered by an RFA. The lack of precise identification of the relevant "action" invites uncertainty regarding the conduct by which significant impact can be assessed. This uncertainty would not operate had the question of the relevant forestry operation (and thus action) been identified with precision.

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[59] T 805:21–46.
[60] Paragraph 586 of the applicant's closing submissions.
[61] See the reference to "each, some or all" in paragraphs 113A and 113H of the 3FASOC.

42. Given the way the applicant's case has sought to be advanced on a "coupe group" basis, the Court should treat with caution Dr Smith's evidence on the question of significant impact.[62]

43. It is clear from Dr Smith's evidence that the issue of cumulative impacts assumed critical importance in his coupe impact analysis,[63] in the sense that his impact assessment is to be seen through the prism of what he considered to be the cumulative impact of timber harvesting in the whole of Victoria and in other States.[64] Dr Smith's opinion is that it was not relevant or appropriate to consider logging impacts solely on a coupe basis, rather, it was the overall cumulative logging impact in space and time that was to be considered.[65]

44. For the purposes of s 18 of the EPBC Act, Dr Smith's approach was flawed. The term "cumulative impact" does not appear in the EPBC Act.

45. If the gateway provision in s 38 is opened, then the Court is to assess the significant impact —being an event or circumstance—[66] of an action. But it is no part of the Court's task to consider:

> … the end situation actually or prospectively arrived at as a result of the proposal considered together with any other actions, known or reasonably anticipated, which also had, or were likely to have, consequences for the matter protected by the controlling provision in question.[67]

46. As Jessup J made clear in *Tarkine National Coalition Inc v Minister for the Environment*, consideration of the consequences of an action normally proceeds from a base line constituted by the existing circumstances of that species, whether they had been brought

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[62] At paragraph 484 of VicForests' closing submissions, it was noted that VicForests would deal with the issue of "coupe groups" in its reply submissions.
[63] First Smith Report [**CB 4.2.1**; pp 22 and 56]. See also Third Smith Report [**CB 4.10.1**; pp 5, 8–9, 18–21].
[64] Third Smith Report [**CB 4.10.1**; p 20].
[65] Third Smith Report [**CB 4.10.1**; pp 19–21].
[66] EPBC Act, s 527E.
[67] *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254, [40] (Jessup J, with whom Kenny and Middleton JJ agreed).

about by the natural course of events, or previous actions that had "impacts", or a combination of both.[68] His Honour continued:[69]

> But the burden of the appellant's argument in the present case was concerned not so much with what had happened in the past as with other actions, present and future, that might also be expected to have, potentially at least, some consequences of the kind to which the EPBC Act referred. Here the position is, in my view, quite clear. One needs only to express the argument in the language of the statute, as I have done in para 39 above, to see that it was the consequences of the proposal as such —or, at the general level, of the "action" under consideration— that had to be the subject of the Minister's attention under s 136(2)(e). The Minister was under no obligation to take account of the consequences of any other action, present or anticipated. **In this sense I agree with counsel for the appellant that use of the metaphor "cumulative impacts" tended to mask what lay at the heart of the appellant's contention, namely, that the Minister was obliged to take account of circumstances which were not consequences of the proposal at all, but which presumptively came about by other actions. In my view, that contention should be rejected** (emphasis added).

47. Whilst *Tarkine National Coalition Inc v Minister for the Environment* concerned the environmental assessment and approvals provisions in Chapter 4, Part 9 of the EPBC Act (specifically the matters the Minister was required to take into account in s 136 of the EPBC Act) it is submitted that Jessup J's reasoning is apposite.

48. If the Court concludes that the exemption in s 38 of the EPBC Act is lost, then it is open to VicForests to seek an approval under Part 9 of the EPBC Act insofar as the Scheduled Coupes are concerned. In that event, the Minister is only required to consider the consequences of the specific action under consideration, and not the consequences of other actions (past or future). Likewise, when considering the impacts of an action for the purposes of deciding whether the action is a controlled action under s 75(1) of the EPBC Act (which occurs in Chapter 4 and relates to Ministerial decisions as to whether an action needs approval) the Minister must not consider any adverse impacts of any RFA forestry operation to which, under Division 4, Part 4 of Chapter 3 does not apply (see s 75(2B) of the EPBC Act). Parts 3, 4, 7 and 9 of the EPBC Act should be construed harmoniously and in a way that promotes a coherent and consistent approach to the assessments of "impacts" as they arise under different provisions of the EPBC Act.

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[68] (2015) 233 FCR 254, [41].
[69] (2015) 233 FCR 254, [43].

49. To illustrate the point, assume the following scenario: the s 38 gateway is "passed" with respect to 5 Scheduled Coupes and 5 Logged Coupes on the basis that forestry operations in those coupes do not, and will not, comply with cl 2.2.2.2 of the Code by reason of the matters pleaded in paragraph 113A and 113H of the 3FASOC. The forestry operations in those 10 coupes constitute an action within the meaning of s 523E of the EPBC Act. A significant impact assessment must then be undertaken to determine whether the identified forestry operations (as an action) will have a significant impact on the whole of the species of the Greater Glider. In undertaking that assessment, this Court may not have regard to the remaining Logged Coupes and Scheduled Coupes,[70] or VicForests' timber harvesting operations in other parts of the CH RFA Area or Victoria or other timber harvesting operations in other parts of the distributional range of the Greater Glider, or any other "action" not under actual consideration by the Court.

50. Dr Smith's evidence is so inexorably bound up with the question of cumulative impacts that it is impossible to parse his opinion on the actual question that this Court may have to resolve, namely what is the actual significant impact on the species of Greater Glider of the actions, and only the actions, the subject of this proceeding? In the result, Dr Smith's opinion should be given no weight as to that question.[71]

F. MISCELLANEOUS LOGGED COUPE ALLEGATIONS

F.1. Alleged failure to protect Tree Geebung in Skerry's Reach coupe

51. The pleaded allegation concerns cl 2.2.2.4 of the Code, and cl 4.3 of the Management Standards and Procedures.[72] At paragraph 474 of its closing submissions, the applicant alleges a failure to identify Tree Geebung during coupe planning prior to commencing harvesting, and a failure to plan the coupe to protect the mature individuals, constitutes forestry operations (management of trees) contrary to the Code, resulting in loss of exemption for forestry operations in that coupe. The applicant alleges that the alleged

[70] In this scenario timber harvesting in these coupes would constitute RFA forestry operations to which, under Division 4 of Part 4, Part 3 of the EPBC Act does not apply.
[71] VicForests otherwise refers to and repeats section C.2.3.9 of its closing submissions which deals with the other limitations of Dr Smith's opinion.
[72] Note that the reference in paragraph 371 of VicForests' closing submissions to cl 4.5 of the Management Standards and Procedures should be a reference to cl 4.3.

damage caused to the mature Tree Geebungs during harvesting was "a further and separate breach founding loss of exemption."

52. This (unpleaded) proposition is a permutation of the applicant's contention that ss 18 and 38 of the EPBC Act are not coextensive. For the reasons explained in paragraphs 22, 90 and 493–494 of VicForests' closing submissions, that contention should be rejected.

53. On the question of the specimens' maturity[73] Mr Mueck was unable to express an opinion as to maturity in a number of instances.[74] VicForests repeats paragraph 382 of its closing submissions as to the Department's audit of Tree Geebung in Skerry's Reach coupe. The Department concluded that Tree Geebung had been well managed in the coupe.[75]

54. The applicant's literal construction of the requirement to "protect mature individuals from disturbance where possible"[76] equates to an absolute prohibition on disturbance of mature tree geebungs, because it is always, in a sense, possible to protect mature individuals by not harvesting in the area *at all*. If an absolute prohibition was intended, the Management Standards and Procedures would have said so. Rather, the use of the word "possible" indicates that harvesting is to occur in the area and that mature individuals should be protected from disturbance where it is practical to do so. That is VicForests' interpretation of the requirement;[77] one with which the Department did not "see any major concerns".[78] The Departmental audit of VicForests' management of Tree Geebung in Skerry's Reach post-dated this correspondence.

55. In the alternative, VicForests otherwise repeats paragraph 385 of its closing submissions as to the question of substantial compliance with the Code.

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[73] Subparagraph 503(b) of the applicant's closing submissions.
[74] First Mueck Report [**CB 4.4.1**, pp 5-6].
[75] [**CB 3.3.9**].
[76] See paragraphs 494–496 of the applicant's closing submissions.
[77] [**CB 11.80**], relevantly extracted at paragraph 490 of the applicant's submissions.
[78] [**CB 11.80**] p 2.

F.2. Alleged failure to protect Zone 1A habitat in Blue Vein coupe

56. The "patch" of Zone 1A habitat configured by Mr Shepherd and extracted at paragraph 519 of the applicant's closing submission ignores the import of Mr Shepherd's own evidence that where a polygon is linear, it is not a "patch".[79] VicForests otherwise refers to and repeats section D.2 of its closing submissions.

F.3. Alleged failure to identify Leadbeater's Possum Colony

57. The applicant's submissions concerning this allegation[80] are premised on a mis-reading of the requirements concerning a Leadbeater's Possum Colony.

58. The requirement in cl 2.1.1.3 of the Management Standards and Procedures to make application to the Secretary or delegate to create or amend an SPZ or SMZ is predicated upon the detection of a value in the field. In this instance, the only detection of Leadbeater's Possum in Hairy Hyde coupe (and thus a "colony" within the meaning of the prescription) occurred *after* timber harvesting operations had ceased. As the evidence demonstrates, application was made to the Secretary following that detection and an appropriate THEZ implemented.[81]

59. By complying with the requirement in cl 2.1.1.3 of the Management Standards and Procedures VicForests is deemed to have complied with the Code (relevantly cl 2.2.2.4).[82]

F.4. Alleged failure to maintain a 20 m buffer

60. The applicant's submissions concerning this allegation also proceed on a mis-reading of the relevant prescription.[83] Dr Smith's opinion that he was "not aware of any effective vegetation buffer" on any coupes[84] was not directed at the correct construction of the prescription, and additionally, is at such a level of generality that it ought to be given no weight.

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[79] [**CB 4.6.1**; p 15].
[80] Paragraphs 544–557 of the applicant's closing submissions.
[81] See paragraph 430 of VicForests' closing submissions.
[82] See cl 1.3.1.1 of the Management Standards and Procedures.
[83] See section D.4 of VicForests' closing submissions.
[84] Applicant's closing submission, [564]; First Smith Report [**CB 4.2.1**; p 48].

61. Similarly, the applicant's submissions at paragraph 566 are misdirected in the absence of any evidence that they fall within the prescription as properly construed. As Mr Paul said in cross examination, most coupes had no requirement for a landscape buffer.[85]

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13 September 2019

[85] T. 322:36-43 (B. Paul XXN).

Annexure A — List of the applicant's key factual errors, inaccuracies and overstatements

Ref	Error, correction or overreach
[15]	The applicant's characterisation of the TRP at paragraph [15] is wrong and contrary to the evidence.[86] The TRP does not "make the harvest method to be deployed for each coupe explicit".[87] The evidence (set out in Table A to VicForests' closing submissions) is that around half of the Logged Coupes were harvested using a less intensive silvicultural method than that designated on the relevant TRP. Each of Floater, Flow Zone, Impala, Bayern Munich and Dejavu (being coupes not actually the subject of this proceeding) were harvested using a less intensive method than that designated on the relevant TRP.[88] The evidence, when considered as a whole, does not support the applicant's submission.
[69]	Golden Snitch coupe was harvested using Regrowth Retention Harvesting, not clearfell.[89]
[96]–[97]	There is no support in the evidence for the applicant's speculative assertion that under the "new systems", VicForests considers it permissible to harvest retained areas.[90] That proposition is not apparent from the face of document CB 12.7 (on which the applicant relies). It is unclear how that document is said to assist the applicant's case in this regard. The applicant reasons, by false syllogism, that because the documents are silent on the question, it follows that retained areas will not be protected. That reasoning has no evidentiary basis.
[88]–[89]	The applicant alleges that VicForests' existing practice of mapping coupe boundaries to include excluded areas, buffers and SPZs inflates the gross group area and may give a false impression that a larger proportion of the coupe is to be retained. The applicant asserts, by reference to Kenya Scheduled Coupe, that this results in a more intensive operation within the harvest unit because VicForests counted retained trees in existing SPZ rather than retaining them within the harvest unit.[91] This is an irrelevant issue. The Management Standards provide that a coupe boundary must be able to be identified in the field and must reflect the mapped coupe boundary.[92] Timber harvesting operations must be excluded from, inter alia, SPZ, areas of SMZ where timber harvesting operations are excluded and buffers and other exclusion areas created in accordance with the Management Standards.[93] There is nothing that requires areas to be excluded from timber harvesting to be likewise excluded from the gross coupe area, so long as those areas are in fact excluded from timber harvesting as required by the Code. The applicant's references to Greendale coupe are inapposite because Mr Mueck's report demonstrates that areas were retained within the coupe boundary.[94] In any event, the Systems Document makes clear that under Variable Retention System 1, habitat trees are to be identified and retained across the active harvest area,[95] whilst the 2:1 method is deployed within the harvest areas.[96]
[114(c)]	The references to the Second Davey Report in this subparagraph should be read, as Dr Davey notes,[97] subject to Dr Davey's comments regarding Dr Smith's definition of old growth, and the other qualifications Dr Davey specified in paragraphs [52]–[57] of the Second Davey Report.

[86] Second Paul Affidavit [**CB 3.4**; [79(f)], [82], [176]]; T. 199:37 (B. Paul XXN).
[87] Applicant's closing submissions, [15].
[88] Annexure C to VicForests' closing submissions.
[89] Second Paul Affidavit [**CB 3.4**; [161] and **CB 3.6.21A**].
[90] Applicant's closing submissions, [96]–[97].
[91] Applicant's closing submissions, [89].
[92] [**CB 6.10**; cl 7.1.1; p 53]
[93] [**CB 6.10**; cl 7.1.2; p 53].
[94] Second Mueck Report [**CB 4.8.1**; p 19
[95] Page 19. Cf applicant's closing submissions, [92].
[96] Pages 18–22.
[97] Second Davey Report [**CB 5.4.1**; [51]].

[112]–[123]; [232(b)]	It is an incorrect characterisation of Dr Davey's evidence at paragraphs [122]–[123] that he "disputed the conclusion that most Greater Gliders would perish following forestry operations". Dr Davey's evidence was more nuanced.[98] Dr Davey observed that the Kavanagh and Wheeler study "provided better insights about the response of Greater Gliders to an intensive harvesting operation".[99] It was in that context that Dr Davey observed that the Tynedale Biscoe and Smith study (referred to by the applicant in paragraph [123]) related to the conversion of areas of native forest to pine plantations.[100]
[135]	The assertion that VicForests has no systematic process for recording or identifying habitat trees on coupe plans is unfounded. VicForests is obliged under the Management Standards to retain habitat trees: the evidence discloses that VicForests does so.[101]
[137(b)]	The applicant's reliance on cl 2.2.2.8 of the Code is irrelevant as there are no allegations in the proceeding that concern this provision of the Code. VicForests maintains its objections to the evidence of Dr Smith that concern cl 2.2.2.8 on the basis that it is irrelevant.[102]
[138(a)]	The applicant's assertion that there is a real risk that coupes will be logged before they can be recolonized by Greater Glider, in circumstances where the forest is "harvested primarily for woodchip" is a bare assertion and unsupported on the evidence as to the Logged Coupes and Scheduled Coupes specifically.
[139]; [334(d)]	The applicant asserts that Dr Davey assumed that habitat trees had been retained consistently with the Code. First, no allegation is made that VicForests failed to retain habitat trees as required by the Code. Second, the evidence discloses that VicForests does retain habitat trees consistently with its obligations (see comment on paragraph [135] above). It was proper for Dr Davey to assume that VicForests complies with its obligations under the relevant regulatory instruments.
[177]; [334(d)]	The applicant references Dr Smith's irrelevant opinion regarding wildlife corridors, streamside buffers and drainage lines. This is not part of the pleaded case. Dr Smith's evidence regarding his observations of streamside buffers is irrelevant.
[183]	The reference to Dr Davey's evidence provided in this paragraph demonstrates that he accepted what was expressed in the Conservation Advice, namely that the Conservation Advice stated there had been a decline in population between 1997 and 2010 and that assessment was based on statistics provided by David Lindenmayer.
[187]	It is clear from the First Davey Report that Dr Davey's opinion is based on an assessment and not an assumption (as suggested by the applicant). The references to interconnected corridors are irrelevant.
[190]	The applicant bears the onus of proof that any forestry operations have posed, or will pose, a serious or irreversible threat to the environment.
[198]	There is no basis to suggest that Dr Davey's use of LMU's as a proxy[103] was "fundamentally flawed". Dr Davey's use of LMUs was used to make his impact analysis workable. The applicant's amorphous approach in alleging that forestry operations in "some or all" of the Scheduled Coupes (without articulating (a) which forestry operations were in issue and (b) in which combination of coupes) made Dr Davey's approach necessary and appropriate.
[199(a)]	It is not correct to say that Dr Davey's assessment was based on assumptions that were invalid. Dr Davey's opinion is that forest age class mapping is correct in depicting *predominant* stand age.[104] As he noted in his report (and confirmed in cross examination) forest class maps predict stand age only and therefore do not depict more than one age.[105] This is not an "inaccuracy". Each coupe is the subject of field-reconnaissance enabling VicForests to assess the accuracy of mapped to actual forest in recording the forest classes on its coupe plans.[106]

[98] Second Davey Report [**CB 5.4.1**; [103]–[105]].
[99] Second Davey Report [**CB 5.4.1**; [104]].
[100] Second Davey Report [**CB 5.4.1**; [104]].
[101] Camberwell Junction coupe plan [**CB 8.8A**; p 23]; Blue Vein operations map [**CB 8.6**]; the photographs extracted in the First Smith Report demonstrate the retention of trees in coupes: see for example [**CB 4.2.1**; pp 69, 77, 80, 81 and 90].
[102] VicForests' objections to evidence [**CB 12.2**; p 13].
[103] First Davey Report [**CB 5.1.1**; [246]–[247]]; T. 470: 199 (Dr Davey XXN).
[104] Second Davey Report [CB 5.4.1; [89]]
[105] T. 473:46–T.474:5 (Dr Davey XXN).
[106] See section H.1 of the Second Paul Affidavit [**CB 3.4**].

[218]	The difference between habitat that is suitable for the Greater Glider and habitat that is critical is not one of semantics. The distinction was identified by the Victorian Court of Appeal (in the context of Zone 1A habitat) in the *MyEnvironment Appeal*.[107] VicForests otherwise refers to paragraphs [348] to [350] of its closing submission as to Dr Smith's treatment of "critical habitat".
[219]	The reliance on the draft Recovery Plan is misplaced. The document is a draft and no reliance should be placed on its content. It is not known what form the final Recovery Plan will take.[108] Dr Davey's evidence was that changes were to be made to the definition of critical habitat in the document.[109]
[220]	Dr Davey's evidence was that it is unknown "what and where critical habitat [for Greater Glider] actually is."[110] The applicant's assertion that the coupes the subject of this proceeding contain critical habitat must be seen in the context of Dr Smith and Dr Davey's fundamental disagreement as to what constitutes "critical habitat". VicForests repeats the comments made immediately above with respect to the applicant's reliance on the draft Recovery Plan.
[223]	The applicant's suggestion that Mr Paul refused to recognise the 2009 fires "may" cause decline to the habitat and population of Greater Glider should be seen in the context of Dr Smith's own evidence that "on their own, wildfires do not appear to represent a threat to Greater Glider habitat".[111]
[229]	This is a mischaracterisation of Dr Davey's evidence. His evidence was not that the 2009 fires would improve Greater Glider habitat. Rather, his evidence is that the quality and extent of Greater Glider habitat in the Central Highlands would be improving and therefore habitat for the Greater Glider in the Central Highlands is likely stable or increasing, rather than declining, with improvements in habitat in burnt forests offsetting any current losses caused by timber harvesting.[112] Dr Davey notes that the applicant's evidence demonstrates that Greater Gliders have been recorded in forest burnt in 2009.[113] Professor Baker's evidence is that a large proportion of the landscape affected by the 2009 fires had surviving trees on them.[114]
[234]–[238]	There is no basis for a finding submitted by the applicant in paragraph 234. This part of the cross-examination of Mr Paul was on a document created by the applicant for the purposes of the proceeding (but not agreed by the parties) and not an internal VicForests document created in the ordinary course of its business.
[252]	It is wrong to say that Mr Paul accepted that the Central Highlands forest is "highly variable as to type". When this question was put to Mr Paul, his response was "—Can you explain what you mean by 'highly variable'".[115] Mr Paul accepted the proposition – which was then put to him – that there is a large forest area, which contains Ash, Mixed Species and other areas unsuitable for harvesting.[116]
[254]	The transcript reference provided for the proposition that Cengea failed to identify Greater Glider habitat in the coupes in issue in this proceeding does not support this assertion. A proper reading of T. 202:10-20 makes clear that what was in issue was the High Quality Habitat Class 1 mapping layer, not VicForests' systems as a whole. As set out in Table A to VicForests' closing submissions, a number of coupe plans and other documents in the Coupe Files record various actions to be undertaken with respect to the Greater Glider.
[266]–[271]	This passage of the applicant's submissions deals with the Department's survey program. The applicant is wrong in a number of respects. *First*, the surveys are not only for species the subject of a prescription.[117] The document make clear that the Greater Glider is a priority species for surveys.[118] *Secondly*, Mr

[107] (2013) 42 VR 456, at [23].
[108] See Osborn JA's treatment of the draft LBP Action Statement in *MyEnvironment*, at [316]–[318].
[109] T. 497:17–47 (Dr Davey XXN).
[110] T. 486:34 (Dr Davey XXN).
[111] First Smith Report [**CB 4.2.1**; p 27]; see the paragraph immediately following paragraphs [226] (incorrectly numbered as paragraph [2]) in the applicant's closing submissions.
[112] Second Davey Report [**CB 5.4.1**; [67]].
[113] Second Davey Report [**CB 5.4.1**; [67]].
[114] T. 655:1-3 (Prof. Baker XXN).
[115] T. 217:36 (B. Paul XXN).
[116] T. 217:41 (B. Paul XXN).
[117] Applicant's closing submissions, [269].
[118] [**CB 12.3**]; VicForests closing submissions, [286].

	Paul's evidence was not incorrect.[119] His evidence is that the Department's program aims to cover 80% of all coupes,[120] and the Department was "working towards" that figure.[121] *Thirdly*, the suggestion that the program is "embryonic" is without a basis, given the unchallenged evidence is that the Department's program has been on foot since July 2018,[122] and the Department has surveyed "a lot of coupes".[123] *Fourthly*, whilst Mr Paul did accept that the Department had not surveyed the coupes the subject of this proceeding,[124] Mr Paul's evidence was that if the Scheduled Coupes ever go back on the schedule, then those coupes would be "lined up for the department's survey program".[125] That proposition was not challenged by the applicant.
[274]	The Interim Strategy was only formally adopted by VicForests on 30 November 2017,[126] after the harvesting of many of the Logged Coupes. The Interim Strategy was implemented in Skerry's Reach coupe and Swing High coupe.[127]
[276(d)]	There is no basis for this assertion. VicForests repeats section C.2.1.1 of its closing submission as to the applicant's treatment of so-called "tendency evidence".
[278]	The applicant asserts there has been a failure to monitor at Castella Quarry coupe. A post-harvest survey was carried out in Castella Quarry coupe to ascertain the presence of Greater Gliders following the implementation of adaptive harvesting techniques.[128]
285(c)	This is a mischaracterisation of Mr McBride's evidence, which actually was that gliding distance was factored into the Interim Strategy in an informal way.[129]
[285(d)]	It is a serious overstatement of Mr McBride's evidence to state that he agreed the Interim Strategy provided for Greater Glider habitat to be destroyed. Those words do not appear in the transcript references cited by the applicant.
[290]	Clauses 4.1.1.1 and 4.1.4.1 of the Management Standards are directed at habitat trees. The Interim Strategy is directed at live, large, hollow bearing trees.[130] As described in Table A to VicForests' closing submissions,[131] there are a number of directions and comments regarding the retention of trees and/or habitat specifically for Greater Glider in relation to the following coupes: Mont Blanc, Kenya, Camberwell Junction, Swing High, Skerry's Reach and Backdoor. Of course, any planning of the Scheduled Coupes is stale and has to be revisited if harvesting ever recommences.[132]
[294]	This is another false syllogism. The absence of a specific reference to Greater Glider in the Pre-Harvest Biodiversity Instruction does not mean that VicForests' planning is uninformed by the presence or absence of Greater Glider.
[299][133]	Contrary to the applicant's assertion, the evidence (summarised in Table A to VicForests' closing submissions) demonstrates the Logged Coupes were largely harvested using a less intensive method than designated on the TRP. See paragraph [233] of VicForests' closing submission.
[320]	A proper reading of Mr Paul's evidence at T. 302:28–33 demonstrates that merchantability was one factor in determining which areas to retain in Castella Quarry.
[331]	This comment is gratuitous, beyond any pleaded issue, and a finding to this effect is not available on the limited evidence before the Court.

[119] Applicant's closing submissions, [267].
[120] T. 205:29-31 (B. Paul XXN).
[121] T. 269:32 (B. Paul XXN).
[122] [**CB 12.4**; p 1].
[123] T. 271:42-44 (B. Paul XXN). The Department's website states that surveys have been carried out in many coupes [**CB 12.4**; p 1].
[124] Applicant's closing submissions, [271].
[125] T. 205:37-40; T. 214:15–17 (B. Paul XXN); see also [**CB 11.96**; [24].
[126] Second Paul Affidavit [**CB 3.4**; [256].
[127] Second Paul Affidavit [**CB 3.4**; [256]; Table A to VicForests' closing submissions; [**CB 3.4.50**].
[128] [**CB 11.74**; **CB 11.75**].
[129] T. 379:29-30 (T. McBride XXN).
[130] [**CB 2.1.33**; p 7].
[131] 8th column.
[132] See paragraph [237] of VicForests' closing submission.
[133] See also [344(a)(i)–(ii); (e)].

[334]	The applicant did not cross examine Mr Paul about the undated, unsigned letter from VicForests to the Department [**CB 11.78**]. It was not put to Mr Paul. There is no evidence before this Court as to its status. The applicant's tender list records that it is dated 6 September 2017. If that is correct, it is before the commencement of the Interim Strategy.
[336]	This is a confused argument because the applicant conflates two issues. The protection of Tree Geebung has nothing to do with the retention of habitat suitable for Greater Glider.
[340]	Document 11.2 referenced in this paragraph is not a Board Paper, as was made clear in Mr Paul's re-examination.[134] The correct Board Paper is at [**CB 12.10**].
[342]	The Controlled Wood Standard was not, as appears to be suggested, auditing VicForests' compliance with the Code. It was assessing as against the relevant FSC Standards. The non-conformities identified were with respect to the FSC Standard.
[344(a)(iii)]	The document prepared by the applicant (CB 11.27) does not demonstrate any intention of VicForests to harvest the Scheduled Coupes using a particular silvicultural system or in any particular configuration. The SFT Act does not require VicForests to nominate a silvicultural method on the TRP (ss 37 and 44).
[344(b)(iii)	A proper reading of Mr McBride's evidence at T. 372:1–19 demonstrates that his answer was confined to recognising that his recommendation was not recorded in the Rowles coupe plan, not that it was not implemented at all.
[344(b)(iv) and (f)]	The reference to 2022 is an obvious typographical error, so it is entirely predictable that Mr McBride could not explain the reference to that date. No *Jones v Dunkel*[135] inferences arise. The assertions in subparagraph [344(f] involve serious logical contortions and there is no basis for this Court to draw the inferences the applicant seeks. VicForests intends to engage in an FSC Audit by 2020.[136]
[18]; [359]	The applicant mischaracterises the evidence. Mr Paul was asked, and declined, to give an undertaking not to use "proposed adaptive system 1" or "method 1" i.e. clearfell.[137] He then said he was not sure how any system will be used in the Scheduled Coupes because they would need to be fully replanned in accordance with the FSC principles.[138] He said he could not say whether variable retention system 1 or variable retention system 2 would be used.[139]
[375(a)]	The assertion that there is no Board Paper affirming a move to the "new methods" is wrong: see document [**CB 12.10**]. The document [**CB 3.6.125**] provides a description of the various phases of the FSC 2020 Project and was approved by VicForests' CEO.[140]
[381]	The inflammatory language is unnecessary. The spatial information was provided to VicForests by the Department.[141]
[383]	VicForests has never asserted that the test for the engagement of the precautionary principle is "substantial uncertainty as to the survival of the species". Rather, that substantial uncertainty as to the survival of the species is one matter that goes to the questions of serious or irreversible harm to the environment and scientific uncertainty.
[430]	The transcript does not record any concession by Dr Davey to the conclusionary effect submitted.

[134] T. 340:17-31 (B. Paul Re-XN).
[135] (1959) 101 CLR 298.
[136] [**CB 3.6.124**; pp 4, 8].
[137] T. 325:7-9; T. 325:26-45 (B. Paul XXN).
[138] T. 326:4 (B. Paul XXN).
[139] T. 326:4-10 (B. Paul XXN).
[140] [**CB 3.6.125**; p 4].
[141] See section B.3.1 of the McBride Affidavit [**CB 3.3**].