

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 20/05/2019 5:39:48 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Outline of Submissions
File Number:	VID1228/2017
File Title:	FRIENDS OF LEADBEATER'S POSSUM INC v VICFORESTS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 20/05/2019 5:39:51 PM AEST

A handwritten signature in blue ink that reads 'Warwick Soden'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIAN REGISTRY

VID 1228/2017

BETWEEN:

**FRIENDS OF LEADBEATER'S POSSUM INC**

Applicant

and

**VICFORESTS**

Respondent

### OUTLINE OF SUBMISSIONS ON BEHALF OF VICFORESTS

---

#### Table of Contents

OUTLINE OF SUBMISSIONS ON BEHALF OF VICFORESTS .....	1
A. NATURE OF THE APPLICANT'S CASE .....	4
A.1. Relief sought under the EPBC Act .....	4
A.2. Present case fundamentally different in nature from that originally alleged .....	8
B. THE SCHEDULED COUPES.....	9
B.1. No breach of precautionary principle .....	9
B.1.1. The source and content of the precautionary principle .....	9
B.1.2. Conditions precedent to engagement of the precautionary principle .....	12
B.1.3. No sufficiently advanced plans to analyse the threat.....	15
B.1.4. VicForests' operations are deemed to comply with the Code and therefore the precautionary principle.....	18
B.1.4.1. The Code .....	18
B.1.4.2. The Management Standards and Procedures .....	20
B.1.4.3. The deeming provision .....	21
B.1.5. Precautionary principle cannot be used to effect legislative outcomes.....	22
B.1.6. No serious or irreversible threat.....	26
B.1.6.1. Any threat too generalised .....	26
B.1.6.2. Operations to comply with prescriptions .....	27
B.1.6.3. Dr Davey's evidence .....	28
B.1.7. Alternatively, if engaged, VicForests' response will be adequate and proportionate .....	30
B.2. Alternatively, if the precautionary principle will be breached, any loss of exemption from Part 3 of EPBC Act is limited .....	33
B.3. The test for significant impact under the EPBC Act.....	35

B.3.1.	The Applicant’s pleaded case as to “significant impact” .....	35
B.3.1.1.	Greater Glider — Logged Coupes and Scheduled Coupes.....	35
B.3.1.2.	Leadbeater’s Possum — Logged Coupes and Scheduled Coupes .....	37
B.3.2.	The proper construction of “impact” and “significant impact” .....	38
B.3.2.1.	The impact of the forestry operations.....	39
B.3.2.2.	Is the impact of forestry operations significant? .....	41
B.4.	No significant impact on Greater Glider.....	43
B.5.	Alternatively, no significant impact on Leadbeater’s Possum .....	45
B.6.	No injunction available under s 475(2) of the EPBC Act.....	47
C.	LOGGED COUPES .....	49
C.1.	No relief concerning logged coupes if injunctive relief concerning Scheduled Coupes not obtained.....	49
C.2.	No breach of precautionary principle in the Logged Glider Coupes .....	49
C.2.1.	VicForests’ operations are deemed to comply with the Code and therefore the precautionary principle.....	49
C.2.2.	Precautionary principle cannot be used to effect legislative outcomes.....	49
C.2.3.	No serious or irreversible threat.....	49
C.2.4.	Alternatively, if engaged, VicForests’ response was adequate and proportionate .....	51
C.3.	Allegations concerning Skerry’s Reach coupe .....	52
C.4.	Allegations concerning Blue Vein coupe.....	53
C.5.	Allegations concerning Hairy Hyde coupe.....	54
C.6.	Allegations concerning 20m vegetation buffers .....	55
C.6.1.	Proper construction of the landscape vegetation buffer requirement.....	56
C.6.2.	No evidence of any breach of clause 5.3.1.5 .....	57
C.7.	Allegations concerning retained habitat.....	57
C.7.1.	Proper construction of the habitat retention requirement .....	60
C.7.2.	Insufficient evidence of breach of the 150 m gap requirement.....	61
C.8.	Alternatively, if any part of the Code was breached, any loss of exemption from Part 3 of EPBC Act is limited.....	62
C.9.	No significant impact on Greater Glider in the Logged Glider Coupes.....	62
C.10.	No significant impact on Leadbeater’s Possum in the Logged Leadbeater’s Possum Coupes.....	62
D.	RELIEF .....	62
D.1.	Injunctive relief.....	62
D.2.	Declaratory relief.....	63

## GLOSSARY

<b>2FASOC</b>	Second Further Amended Statement of Claim dated 18 January 2019
<b>Applicant</b>	Friends of Leadbeater’s Possum Inc
<b>Brown Mountain</b>	<i>EEG v VicForests</i> (2010) 30 VR 1 (Osborn J)
<b>CFL Act</b>	<i>Conservation, Forests and Land Act 1987</i> (Vic)
<b>CH FMP</b>	Forest Management Plan for the Central Highlands dated May 1998
<b>CH RFA</b>	Central Highlands Regional Forest Agreement dated 27 March 1998
<b>Code defence</b>	<i>Code of Practice for Timber Production 2014</i> Further Amended Defence to Second Further Amended Statement of Claim dated 22 February 2019
<b>Department</b>	Department of Environment, Land, Water and Planning (and its predecessor names)
<b>EPBC Act</b>	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth)
<b>First Baker Report</b>	Expert report of Professor Patrick Baker dated 11 February 2019
<b>First Davey Report</b>	Expert report of Stuart Davey dated 25 January 2019
<b>First Paul Affidavit</b>	Affidavit of William Edward Paul affirmed 1 May 2018
<b>First Smith Report</b>	Expert report of Dr Andrew Peter Smith dated 7 January 2019
<b>FMA</b>	Forest Management Area
<b>FMP</b>	Forest Management Plan
<b>FMZ</b>	Forest Management Zone
<b>Fourth Paul Affidavit</b>	Affidavit of William Edward Paul affirmed 11 February 2019
<b>Fourth Smith Report</b>	Expert report of Dr Andrew Peter Smith dated 7 May 2019
<b>GMZ</b>	General Management Zone
<b>Greater Glider</b>	<i>Petauroides Volans</i>
<b>Leadbeater’s Possum</b>	<i>Gymnobelideus leadbeateri</i>
<b>Logged Coupes</b>	The coupes listed in paragraph 10 of the 2FASOC
<b>Management Standards and Procedures</b>	Management Standards and Procedures for timber harvesting in Victoria’s State forests
<b>McBride Affidavit</b>	Affidavit of Timothy Charles McBride affirmed 15 October 2018
<b>MyEnvironment</b>	<i>MyEnvironment Inc v VicForests</i> [2012] VSC 91 (Osborn JA)
<b>MyEnvironment Appeal</b>	<i>MyEnvironment Inc v VicForests</i> (2013) 42 VR 456
<b>Planning Standards</b>	Appendix 5 to the Management Standards and Procedures
<b>RFA</b>	Regional Forestry Agreement
<b>RFA Act</b>	<i>Regional Forest Agreement Act 2002</i> (Cth)
<b>Scheduled Coupes</b>	The coupes listed in paragraph 9 of the 2FASOC
<b>Second Baker Report</b>	Expert report of Professor Patrick Baker dated 17 April 2019
<b>Second Davey Report</b>	Expert report of Dr Stuart Davey dated 18 April 2019
<b>Second Mueck Report</b>	Expert report of Mr Stephen Mueck dated 22 January 2019
<b>Second Paul Affidavit</b>	Affidavit of William Edward Paul affirmed 15 October 2018
<b>Second Smith Report</b>	Expert report of Dr Andrew Peter Smith dated 9 January 2019
<b>SFT Act</b>	<i>Sustainable Forests (Timber) Act 2004</i> (Vic)

<b>SMZ</b>	Special Management Zone
<b>SPZ</b>	Special Protection Zone
<b>Third Baker Report</b>	Expert report of Professor Patrick Baker dated 9 May 2019
<b>Third Lincoln Affidavit</b>	Affidavit of Andrew Lincoln affirmed 23 January 2019
<b>Third Paul Affidavit</b>	Second Affidavit of William Edward Paul affirmed 15 October 2018
<b>Third Smith Report</b>	Expert report of Dr Andrew Peter Smith dated 11 February 2019
<b>TRP</b>	Timber Release Plan

## A. NATURE OF THE APPLICANT'S CASE

### A.1. Relief sought under the EPBC Act

1. The Applicant's case contains allegations concerning coupes that have already been harvested (**Logged Coupes**) and coupes listed on the TRP that may be harvested at some time in the future (**Scheduled Coupes**).
2. As the Applicant accepts, relief concerning the Logged Coupes is dependent upon relief being obtained concerning the Scheduled Coupes.<sup>1</sup> Insofar as the Scheduled Coupes are concerned, the Applicant seeks a prohibitory injunction under s 475(2) of the EPBC Act. Insofar as the Logged Coupes are concerned, the Applicant seeks additional orders under s 475(3) of the EPBC Act.
3. Orders under s 475(3) of the EPBC Act are “[a]dditional orders with prohibitory injunctions” and only available “[i]f the court grants an injunction restraining a person from engaging in conduct *and* in the Court's opinion it is desirable to do so.”
4. It follows that the logical starting point in the enquiry is whether the jurisdiction to grant a prohibitory injunction under s 475(2) of the EPBC Act has been enlivened and, if enlivened, should the discretion to grant an injunction be exercised.<sup>2</sup> Subsection 475(2) provides:

<sup>1</sup> T 36:15 (hearing on 14 February 2019).

<sup>2</sup> VicForests does not dispute that the Applicant is an “interested person” within the meaning of s 475(7) of the EPBC Act and thus has the requisite standing under s 475(1) to apply for a prohibitory injunction.

*Prohibitory injunctions*

- (2) If a person has engaged, is engaging or is proposing to engage in conduct constituting an offence or other contravention of this Act or the regulations, the Court may grant an injunction restraining the person from engaging in the conduct.
  
5. The prayer for relief makes clear that this case is not about protection of the Greater Glider and Leadbeater's Possum at large. Such matters are quintessentially within the domain of the Executive branch of government, and the Crown in either capacity is not a named party.<sup>3</sup> Rather, this case is about whether any timber harvesting operations (to the extent they are to occur) in the Scheduled Coupes should be enjoined by reason that such operations will be unlawful. Primarily, the case as crafted raises questions of law concerning the proper construction of the Code and the EPBC Act as applied to factual matters not seriously contested. This case is not, as the Applicant submits, essentially one of factual questions about the threat posed by the impact of forestry operations on Greater Glider and Leadbeater's Possum.<sup>4</sup> The manner in which the Applicant frames the case subverts the logical order of the issues for determination and invites the Court to, in effect, use a purported judicial power for an executive or legislative purpose.
  
6. The Applicant alleges that VicForests will contravene s 18(2)(b) and s 18(4)(b) (contained within Part 3 of the EPBC Act) by conducting forestry operations "in some or all" of the Scheduled Coupes.<sup>5</sup>
  
7. Part 3 of the EPBC Act does not apply, however, to an RFA forestry operation that is undertaken in accordance with an RFA.<sup>6</sup> The question then arises as to whether forestry operations "in some or all" of the Scheduled Coupes will be other than in accordance with an RFA.
  
8. The only alleged basis that "proposed" forestry operations will not be in accordance with an RFA is contained in paragraph 113H of the 2FASOC. There it is alleged that future timber harvesting operations in the Scheduled Coupes will not be in accordance with clause 47 of the CH RFA because VicForests will fail to comply with the

---

<sup>3</sup> Thus questions of whether the Commonwealth or the State are failing in any alleged obligation to adequately protect either species, or their habitat, do not arise in this proceeding.

<sup>4</sup> Paragraph 1 of the Applicant's outline of opening submission.

<sup>5</sup> See paragraphs 119A and 119B and 120(1) of the 2FASOC.

<sup>6</sup> Subsection 38(1) of the EPBC Act; s 6(4) of the RFA Act.

precautionary principle in each, some or all of the Scheduled Coupes, thus, leading to the loss of exemption from the application of Part 3 of the EPBC Act.<sup>7</sup>

9. Clause 47 of the CH RFA relevantly provides that the Commonwealth accredits Victoria's forest management system for the Central Highlands, including the systems and processes established by the Code.
10. Clause 2.2.2.2 of the Code provides that the precautionary principle must be applied to the conservation of biodiversity values.
11. The particulars of VicForests' alleged failure to comply with the Code are set out in paragraph 113A of the 2FASOC and concern Greater Glider only.
12. It follows that the logical starting point of the inquiry is whether any timber harvesting operations in some or all of the Scheduled Coupes will breach the precautionary principle. That is so because if that question is answered in the negative it necessarily follows that:
  - (a) the Applicant will have failed to establish that any forestry operations in the Scheduled Coupes will not be in accordance with the CH RFA;
  - (b) without establishing (a), and in the absence of any other alleged basis upon which those forestry operations would not be in accordance with the CH RFA, there is no basis upon which the forestry operations could be held not to be exempt from the application of Part 3 of the EPBC Act;
  - (c) questions of significant impact under Part 3 of the EPBC Act therefore do not arise and any relief in relation to the Scheduled Coupes cannot be granted; and
  - (d) if relief is not granted in relation to the Scheduled Coupes, relief cannot be granted in relation to the Logged Coupes.

---

<sup>7</sup> See paragraph 113I of the 2FASOC.

13. In circumstances where:

- (a) there are no sufficiently advanced plans for any of the Scheduled Coupes to enable the Court to analyse the question of whether timber harvesting (to the extent it may occur) may constitute a serious or irreversible threat to greater Glider;
- (b) the net area available for harvesting in the Scheduled Coupes represents 0.01% of the total forested area of the public land estate<sup>8</sup> and 0.14% of the CH RFA;<sup>9</sup>
- (c) the area modelled as Greater Glider High Quality Class 1 habitat within the net area available for harvesting in the Scheduled Coupes represents 0.07% of the total area modelled as Greater Glider High Quality Class 1 habitat within Victoria;
- (d) populations of Greater Glider are found in other parts of Victoria, New South Wales and Queensland;<sup>10</sup>
- (e) any timber harvesting operations in the Scheduled Coupes will comply with (and must be presumed to comply with) the prevailing accredited regulatory regime at the time any such operations are to occur;<sup>11</sup> and
- (f) on 26 March 2018 the Commonwealth and the State amended the CH RFA to extend its operation until 31 March 2020;<sup>12</sup>

can the Court be satisfied that any timber harvesting operations in the Scheduled Coupes will be in breach of the clause 2.2.2.2 of the Code?

---

<sup>8</sup> The figure is cell K71 of WEP-21A of the Fourth Paul Affidavit [CB 3.6], divided by 6.4 million hectares (being the total area of forest across the public land estate according to the *State of the Forests Report 2018*, p 37) as a percentage. The *State of the Forests Report 2018* is available at <https://www.ces.vic.gov.au/reports/state-forests-2018>

<sup>9</sup> Second Paul Affidavit [CB 3.4], at [442].

<sup>10</sup> [CB 6.18], page 2 (1st para); [CB 6.21; p 2], (Distribution Map).

<sup>11</sup> Subparagraphs 6.3(c)(v) and 113H(b) of the defence; see also *Brown Mountain*, at [765].

<sup>12</sup> First Davey Report [CB 5.1.1.15], at [67].



14. For the reasons set out in section B.1 of these submissions, the answer to that question must be no.

15. Accordingly, the application must be dismissed.

**A.2. Present case fundamentally different in nature from that originally alleged**

16. The Applicant commenced this proceeding by the filing of an originating application,<sup>13</sup> and statement of claim on 13 November 2017. Although the originating application has never been amended, and the relief sought in the claim as presently articulated is (subject to the substitution of the phrase “forestry operations” in lieu of “logging”) consistent with that sought in the originating application, the alleged basis for that relief has fundamentally changed.

17. The most significant change were the amendments made on 29 March 2018 under r 16.51(1). That amended pleading:

(a) was made after the Court handed down its reasons on the separate question,<sup>14</sup> at which point there was nothing left of the Applicant’s case and it was doomed to fail;<sup>15</sup> and

(b) put forward an entirely new case,<sup>16</sup> by which allegations concerning the failure to conduct five yearly reviews of the CH RFA were deleted and replaced with allegations predominantly concerning breaches of the precautionary principle.

---

<sup>13</sup> [CB 1.1].

<sup>14</sup> *Friends of Leadbeater’s Possum Inc v VicForests* (2018) 260 FCR 1.

<sup>15</sup> *Friends of Leadbeater’s Possum Inc v VicForests* (No 2) [2018] FCA 532, at [47].

<sup>16</sup> *Friends of Leadbeater’s Possum Inc v VicForests* (No 2) [2018] FCA 532, at [30].

## B. THE SCHEDULED COUPES

### B.1. No breach of precautionary principle

#### B.1.1. The source and content of the precautionary principle

18. The source of the obligation on VicForests to comply with the precautionary principle is statutory. There is no rule of law known as the precautionary principle.<sup>17</sup>

19. Clause 2.2.2.2 of the Code,<sup>18</sup> provides that:

The precautionary principle must be applied to the conservation of biodiversity values. The application of the precautionary principle will be consistent with relevant monitoring and research that has improved the understanding of the effects of forest management on forest ecology and conservation values.

20. Page 15 of the Code,<sup>19</sup> sets out the definition of the precautionary principle:

**‘Precautionary principle’** means when contemplating decisions that will affect the environment, careful evaluation of management options be undertaken to wherever practical avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various options. When dealing with threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

21. In *MyEnvironment*, Osborn JA quoted with approval the following statement of Stein J in *Leatch v National Parks and Wildlife Service*:<sup>20</sup>

... the precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from

---

<sup>17</sup> *Wattleup Road Development Co Pty Ltd v State Administrative Tribunal (No 2)* [2016] WASC 279, at [68] (Chaney J).

<sup>18</sup> [CB 6.9; p 34].

<sup>19</sup> [CB 6.9; p 15].

<sup>20</sup> *MyEnvironment*, at [261] (citations omitted).

policies, decisions or activities), decision-makers should be cautious.

22. The notion of cautiousness was discussed by Wheeler J in *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management*,<sup>21</sup> in a passage quoted in both *Brown Mountain*,<sup>22</sup> and *MyEnvironment*:<sup>23</sup>

Adopting for the moment a very broad characterisation of the precautionary approach, a requirement that a decision maker ‘be cautious’ says something about the way in which the decision must be made. There must be some research, or reference to available research, some consideration of risks, and a more pessimistic rather than optimistic view of the risks should be taken. However, such a requirement does not in any particular case specify precisely how much research must be carried out, or when a risk should be considered to be so negligible that it may safely be disregarded. Still less, does such an approach dictate what courses of action must be taken after the possibilities have been cautiously weighed.

No doubt there are extremes at either end of a spectrum, where one would be able to say that a decision maker had or had not been ‘cautious’. Where endangered species are concerned for example, one can see that where readily accessible and unambiguous research material pointed to a serious risk that numbers of the species would be dramatically reduced by a course of action, then the adopting of that course of action, in the absence of any evidence of consideration of alternatives, would seem to point inevitably to a finding that there had been no relevant ‘caution’. At the other extreme, an absence of any action, other than research and study, is clearly cautious but is not the only option available in most cases. Although there has been very little judicial consideration of the precautionary approach or ‘precautionary principle’ (a similar or perhaps identical concept which appears in a number of intergovernmental agreements) **the clear thread which emerges from what consideration has been given to the approach is that it does dictate caution, but it does not dictate inaction, and it will not generally dictate one specific course of action to the exclusion of others.**

[Emphasis added].

23. In *MyEnvironment*, Osborn JA said:

Thus, to take two extreme examples, if a patch of forest were found to contain the only living examples of a previously

---

<sup>21</sup> (1997) 18 WAR 102.

<sup>22</sup> *Brown Mountain*, at [186].

<sup>23</sup> *MyEnvironment*, at [262].

undiscovered species of flora (such as the Wollemi pine) it would, on its face, be contrary to the precautionary principle to destroy it in the course of timber harvesting, despite the absence of an Action Statement under the FFG Act or a prescription applicable to it under the FMP. Likewise, if a species of fauna thought to be extinct were rediscovered (as the LBP was in 1961), destruction of its essential habitat would, on its face, be contrary to the precautionary principle, despite the absence of an AS under the FFG Act or a prescription under the FMP. In each case, the threat of serious or irreversible damage to the environment would be accompanied by substantial uncertainty as to the survival of the species if harvesting continued.

Nevertheless, as these examples illustrate, it will be easier to identify a threatened breach of the precautionary principle when a specific action threatens direct serious or irreversible damage to an aspect of the environment of extreme sensitivity and/or novel qualities. **The more generalised the threat and the more indirect and less immediate the damage to a sensitive aspect of the environment, the more difficult it will be to be satisfied that the precautionary principle requires abstinence from a particular action.**

As I said in the Brown Mountain case, the requirements of the precautionary principle fall to be considered in the light of the whole of the evidence bearing on the relevant facts as it now is, and not as it was at the time VicForests completed planning for operations in the coupes in issue.<sup>24</sup>

[Emphasis added]

24. The precautionary principle should not be used to try to avoid all risks; some risks are plainly acceptable and others are plainly unacceptable.<sup>25</sup> A reasonable balance must be struck between the stringency of the precautionary measures, which may have associated costs, such as financial, livelihood and opportunity costs, and the seriousness and irreversibility of the potential threat.<sup>26</sup>
25. The precautionary principle embraces the concept of proportionality.<sup>27</sup>
26. The precautionary principle falls to be applied within a considered and developed framework of regulation which has itself been derived from a strategic planning process

---

<sup>24</sup> *MyEnvironment*, at [268]–[269].

<sup>25</sup> *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 (Preston CJ), at [157] (*Telstra*); see also *Brown Mountain*, at [203].

<sup>26</sup> *Telstra*, at [167].

<sup>27</sup> *Telstra*, at [166]–[178].

which has taken into account principles of environmentally sustainable development and provided for significant conservation reserves.<sup>28</sup>

### **B.1.2. Conditions precedent to engagement of the precautionary principle**

27. In *Brown Mountain*, Osborn JA accepted VicForests' submission that there are preconditions before the precautionary principle is engaged.<sup>29</sup> Although in that case his Honour was considering the *Code of Practice for Timber Production 2007*, the part of that Code requiring application of the precautionary principle,<sup>30</sup> and the definition of the precautionary principle,<sup>31</sup> are relevantly similar to the provisions now in force.
28. The Applicant now asserts that Osborn JA was in error when he found that there were preconditions to the engagement of the precautionary principle.<sup>32</sup> Such a submission is contrary to the Applicant's submissions at the hearing of the application for interlocutory relief.<sup>33</sup> In any event, it is apparent from the definition of "precautionary principle" in the Code,<sup>34</sup> that it is predicated on the existence of a threat of serious or irreversible damage. Further, Osborn J's construction is consistent with s 5(4)(b) of the SFT Act, which has been described by Tate JA as "a statutory expression of the precautionary principle."<sup>35</sup>
29. In *Brown Mountain*, Osborn JA adopted the analysis of the precautionary principle by Preston CJ in *Telstra*:<sup>36</sup>

The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure

---

<sup>28</sup> *Brown Mountain*, at [181]; *MyEnvironment*, at [271].

<sup>29</sup> *Brown Mountain*, at [187].

<sup>30</sup> Clause 2.2.2 as set out in *Brown Mountain*, at [168].

<sup>31</sup> As set out in *Brown Mountain*, at [176].

<sup>32</sup> Footnote 8 to the Applicant's outline of opening submission.

<sup>33</sup> *Friends of Leadbeater's Possum Inc v VicForests (No 3)* (2018) 231 LGERA 75 at [17]–[18]; the Applicant's written submissions dated 1 May 2018, at [31].

<sup>34</sup> [CB 6.9; p 15].

<sup>35</sup> *MyEnvironment Inc v VicForests* (2013) 42 VR 456, at [41] (*MyEnvironment Appeal*).

<sup>36</sup> *Telstra*, at [128]; *Brown Mountain*, at [188].

may be taken to avert the anticipated threat of environmental damage, but it should be proportionate.

30. In cases where the plaintiff alleges threats of serious or irreversible environmental damage by way of impact upon endangered species of fauna, it is a question of fact in each instance as to whether the proposed logging does constitute such a threat.<sup>37</sup> In *Telstra* Preston CJ observed that relevant factors may include:
- (a) the spatial scale of the threat (for example, local, regional, statewide, national, international);
  - (b) the magnitude of possible impacts, on both natural and human systems;
  - (c) the perceived value of the threatened environment;
  - (d) the temporal scale of possible impacts, in terms of both the timing and the longevity (or persistence) of the impacts;
  - (e) the complexity and connectivity of the possible impacts;
  - (f) the manageability of possible impacts, having regard to the availability of means and the acceptability of means;
  - (g) the level of public concern, and the rationality of and scientific or other evidentiary basis for the public concern; and
  - (h) the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts, and the difficulty and expense of reversing the impacts.<sup>38</sup>
31. Osborn JA also relied on *Telstra* for the proposition that the threat hypothesised must have a scientific basis.<sup>39</sup> In particular, the threat of environmental damage must be adequately sustained by scientific evidence:

not every claim or scientifically unfounded presumption of potential risk to human health or the environment can justify the

---

<sup>37</sup> *Brown Mountain*, at [189].

<sup>38</sup> *Telstra*, at [131]; *MyEnvironment*, at [190].

<sup>39</sup> *Brown Mountain*, at [192]; *Telstra*, at [133] – [134].

adoption of national protective measures. Rather, the risk must be adequately substantiated by scientific evidence.<sup>40</sup>

32. In *MyEnvironment*, Osborn JA found that there was no sufficiently advanced proposal to harvest either Freddo or South Col coupes —neither of which, in that case, were the subject of coupe plans— to enable such a threat to be properly identified with respect to them.<sup>41</sup>
33. If the precautionary principle is engaged (which is denied), it requires VicForests to exercise a degree of cautiousness that will typically involve a consideration of a number of alternatives in relation to the threat posed by the action. There will generally be a number of options that would be suitably cautious, and the precautionary principle does not dictate one particular approach or option.
34. The second condition precedent is that there be ‘a lack of full scientific certainty.’ That too, is a question of fact.<sup>42</sup> In *Telstra*, Preston CJ suggested that assessment might involve:
  - (a) the sufficiency of the evidence that there might be serious or irreversible environmental harm caused by the development plan, programme or project;
  - (b) the level of uncertainty, including the kind of uncertainty (such as technical, methodological or epistemological uncertainty); and
  - (c) the potential to reduce uncertainty having regard to what is possible in principle, economically and within a reasonable time frame.<sup>43</sup>
35. Although there is a body of theoretical debate as to what is the requisite degree of uncertainty required to trigger the application of the precautionary principle,<sup>44</sup> in *Brown*

---

<sup>40</sup> *Monsanto Agricoltura Italia v Presidenza del Consiglio dei Ministri*, European Court of Justice, Case C-236/01, 13 March 2003, unreported, as cited in *Telstra*, at [134].

<sup>41</sup> *MyEnvironment*, at [277].

<sup>42</sup> *Brown Mountain*, at [195].

<sup>43</sup> *Telstra*, at [141].

<sup>44</sup> *Telstra*, at [142] – [148].

*Mountain*, Osborn J analysed the evidence on the basis of a standard of ‘substantial uncertainty.’<sup>45</sup>

### **B.1.3. No sufficiently advanced plans to analyse the threat**

36. Unlike *Brown Mountain* and also the Gun Barrel coupe in *My Environment*, the allegation that any forestry operations in the Scheduled Coupes will breach the precautionary principle is made in the absence of knowing how those forestry operations will be conducted.
37. Although it is disputed on the pleadings, since 29 October 2018, it has been expressly pleaded by VicForests that, contrary to the Applicant’s allegation in subparagraph 6.3(c) of the 2FASOC, the TRP does not designate the silvicultural system that *will* be used in each of the coupes listed, but only identifies the most intensive silvicultural system that *may* be used, and that a less intensive silvicultural system may be used (in all or part of a particular coupe).<sup>46</sup> To hold otherwise, as the Applicant invites the Court to do,<sup>47</sup> would necessarily involve an adverse credit finding against Mr Paul when there is no basis to suggest he is being dishonest.
38. In *MyEnvironment*, Osborn JA found that there was no sufficiently advanced proposal to harvest either Freddo or South Col coupes —neither of which, in that case, were the subject of coupe plans— to enable such a threat to be properly identified with respect to them.<sup>48</sup> In the absence of such coupe plans, his Honour was unable to conclude that VicForests intended to log Zone 1A habitat (relevant to Leadbeater’s Possum) in those coupes, even though VicForests freely conceded that those coupes may contain Zone 1A habitat.<sup>49</sup> An appeal in respect of his Honour’s findings concerning Freddo and South Col coupes was abandoned.<sup>50</sup>
39. The Scheduled Coupes are no different. There are no current coupe plans in respect of those coupes.<sup>51</sup> There is therefore no sufficiently advanced proposal to harvest any of the

---

<sup>45</sup>*Brown Mountain*, at [197].

<sup>46</sup> See paragraph 6.3(c) of the defence and paragraphs 79(f) and Second Paul Affidavit [CB 3.4], at [179]-[181].

<sup>47</sup> Paragraphs 103 and 150 of the Applicant’s outline of opening submission.

<sup>48</sup> *MyEnvironment*, at [276].

<sup>49</sup> *MyEnvironment*, at [258].

<sup>50</sup> *MyEnvironment Appeal*, at [132]-[133].

<sup>51</sup> Second Paul Affidavit [CB 3.4] at [443]-[444]; Fourth Paul Affidavit [CB 3.6.1], at [118]-[119].



Scheduled Coupes to enable a threat of serious or irreversible environmental damage to be properly identified with respect to them. Self-evidently, and as set out in subparagraph 6.3(c)(v) of the defence, to the extent that any timber harvesting operations are conducted in the Scheduled Coupes, the manner in which those timber harvesting operations occur will be subject to (among other things):

- (a) the Systems Document and the 2017 HCV Document (as defined in the fourth Paul affidavit) whether in their current forms, subsequent drafts or, following a period of public consultation, the documents as finalised;
- (b) the:
  - (i) TRP;
  - (ii) Code, the Management Standards and Procedures and the Planning Standards; and
  - (iii) SFT Act or other relevant legislationas in force at the time the timber harvesting operations are to occur;
- (c) the results of any:
  - (i) pre-harvest surveys; and/or
  - (ii) opportunistic sightings of threatened flora or faunathat may require a management response under the prevailing Code, Management Standards and Procedures and Planning Standards; and
- (d) any other exclusions that may be required under the prevailing Code, Management Standards and Procedures and Planning Standards.

40. Further, the State and Commonwealth Governments are in the process of developing updates to the Victorian RFA framework to be agreed to by 31 March 2020 which has

the potential to further affect the manner in which any forestry operations can be carried out.<sup>52</sup>

41. Thus there is no evidentiary foundation for the Court to be satisfied that the precautionary principle has been engaged.
42. The Applicant submits that '[t]he TRP should be treated as VicForests' formal proposed conduct in relation to the scheduled coupes.<sup>53</sup> But as has already been noted, the TRP does not designate the silvicultural system that will be used in each of the coupes listed, but only identifies the most intensive silvicultural system that may be used, and that a less intensive silvicultural system may be used (in all or part of a particular coupe).<sup>54</sup> The TRP does not, and does not purport to, give any detail as to how operations might actually occur: it is the coupe plan that is the repository of that information. Sufficiently advanced plans are necessary to enable the identification of any threat.
43. It is not the case, as the Applicant submits, that VicForests' approach 'has the consequence of shielding VicForests' conduct from the Court's scrutiny in perpetuity, until completed.'<sup>55</sup> Clearly, both in *Brown Mountain* and *MyEnvironment* (in respect of Gun Barrel coupe) VicForests' proposed conduct was subject to the Court's scrutiny. But that scrutiny was possible only because the planning for timber harvesting operations was sufficiently advanced to enable the Court to proceed on a proper evidentiary foundation and without impermissibly wandering into a dark cavern of speculation. The consequence of VicForests' approach is that wholesale areas of public forest that would otherwise be available for timber harvesting cannot be tied up opportunistically by litigants in the absence of sufficiently advanced plans demonstrating that VicForests' intended timber harvesting operations in those areas constitute a threat of serious or irreversible environmental damage.

---

<sup>52</sup> First Davey Report [CB 5.1.1], at [77]-[78].

<sup>53</sup> Paragraph 151 of the Applicant's outline of opening submission.

<sup>54</sup> See paragraph 6.3(c) of the defence and paragraphs 79(f) and Second Paul Affidavit [CB 3.4], at [179]-[181].

<sup>55</sup> Paragraph 155 of the Applicant's outline of opening submission.

**B.1.4. VicForests' operations are deemed to comply with the Code and therefore the precautionary principle**

44. Even if the precautionary principle is engaged (which is denied), VicForests' operations are deemed to comply with the Code and therefore with the precautionary principle.
45. It is necessary to set out some aspects of the regulatory system so that certain obligations under that system can be construed, and understood, in context.

**B.1.4.1. *The Code***

46. Management of timber harvesting is dealt with in Part 6 of the SFT Act. By contrast, Part 7 of the SFT Act deals with the conduct of timber harvesting operations.
47. Pursuant to s 46 of the SFT Act, VicForests (and any person who has entered into a harvesting agreement with VicForests) and any other person undertaking timber harvesting operations in a State forest must comply with any relevant Code of Practice relating to timber harvesting.
48. Power to make a Code of Practice is given by Part 5 of the CFL Act. Subject to the provisions of that Part, the Minister may vary a Code of Practice at any time.
49. The Code is a Code of Practice within the meaning of Part 5 of the CFL Act and is a prescribed legislative instrument in Schedule 2 of the *Subordinate Legislation Regulations*.
50. The purpose of the Code (section 1.2.2),<sup>56</sup> is to provide direction to timber harvesting managers, harvesting entities and operators to deliver sound environmental performance when planning for and conducting commercial timber harvesting operations in a way that:
- (a) permits an economically viable, internationally competitive, sustainable timber industry;

---

<sup>56</sup> [CB 6.9; p 22].

- (b) is compatible with the conservation of the wide range of environmental, social and cultural values associated with forests;
  - (c) provides for the ecologically sustainable management of native forests proposed for cyclical timber harvesting operations; and
  - (d) enhances public confidence in the management of timber production in Victoria’s forests and plantations.
51. The Code builds on an earlier 2007 version by “streamlining the environmental regulatory framework for harvesting managers, harvesting entities and operators conducting and planning timber harvesting operations.”<sup>57</sup>
52. Section 47 of the SFT Act empowers the Minister to arrange an audit of VicForests’ compliance with the Code. The Minister must cause any adverse findings against VicForests as a result of an audit conducted under s 47 to be available for inspection by the public and may cause the findings to be published on the internet: s 49.
53. The Management Standards and Procedures are incorporated into the Code “to provide detailed mandatory operational instructions, including region specific instructions for timber harvesting operations in Victoria’s State forests.”<sup>58</sup>
54. The Code itself differentiates between Code Principles, Operational Goals, and Mandatory Actions:<sup>59</sup>

A Code Principle is a broad outcome that expresses the intent of the Code for each aspect of sustainable forest management.

An Operational Goal states the desired outcome or goal for each of the specific areas of **timber harvesting operations**, to meet the Code Principles.

Mandatory Actions are actions to be conducted in order to achieve each operational goal. **Timber harvesting managers, harvesting entities and operators** must undertake all relevant mandatory actions to meet the objectives of the Code. Mandatory Actions are focussed on practices or activities. Failure

---

<sup>57</sup> Section 1.1 of the Code [CB 6.9, p 21].

<sup>58</sup> Section 1.2.6 of the Code [CB 6.9, pp 23–24].

<sup>59</sup> Section 1.2.8 of the Code [CB 6.9, p 25].

to undertake a Mandatory Action would result in non-compliance with this Code.<sup>60</sup>

55. In VicForests' submission, only the mandatory actions in the Code contain obligations, and it's only timber harvesting managers, harvesting entities and operators that must undertake the mandatory actions.
56. The Code explains that the Management Standards and Procedures:
- (a) are consistent with the Operational Goals and Mandatory Actions in the Code and must be complied with;
  - (b) are informed by relevant policy documents including policies relating to specific forest values such as threatened species, guidelines and strategies within FMPs made under the Forests Act and Action Statements made under the *Flora and Fauna Guarantee Act 1988* (Vic); and
  - (c) replace any directions relating to timber harvesting operations within FMPs or Action Statements.<sup>61</sup>
57. Action Statements and FMPs are prescribed by reg 5 of the *Subordinate Legislation Regulations* not to be legislative instruments. Since the Code came into effect, FMPs have had no regulatory force insofar as the conduct of timber harvesting operations is concerned, with the Code and its incorporated documents being the sole repository of mandatory instructions to VicForests and harvesting entities and operators.<sup>62</sup>
58. Page 24 of the Code,<sup>63</sup> sets out a diagram depicting the regulatory framework.

#### **B.1.4.2. The Management Standards and Procedures**

59. Section 1.1.1.1 of the Management Standards and Procedures,<sup>64</sup> states that they apply to all commercial timber harvesting operations conducted in Victoria's State forests where the Code applies. The role of the Management Standards and Procedures is to

---

<sup>60</sup> Ibid. Underlining and boldness in original text. Text in bold indicates a defined term in the Code.

<sup>61</sup> Section 1.2.6 of the Code [CB 6.9; pp 23–24].

<sup>62</sup> [CB 6.9; p 24].

<sup>63</sup> [CB 6.9; p 24].

<sup>64</sup> [CB 6.10; p 21].

provide standards and procedures to instruct managing authorities, harvesting entities and operators in interpreting the requirements of the Code: s 1.2.1.1.<sup>65</sup> VicForests is defined to be the ‘Managing Authority’ in the Code for timber harvesting operations conducted under an Allocation Order.

60. The Planning Standards are Appendix 5 to the Management Standards and Procedures.
61. The Management Standards and Procedures can be reviewed, for the purpose of amendment, pursuant to s 1.5.<sup>66</sup> Pursuant to s 1.5.1.4<sup>67</sup> the Management Standards and Procedures are valid until the completion of a review or until otherwise notified by the Minister for Environment and Climate Change.

#### **B.1.4.3.        *The deeming provision***

62. The Code is a piece of subordinate legislation directed to practical considerations: the conduct of timber harvesting operations. Subordinate legislation of that nature should be construed in light of those practical considerations, not meticulous comparison of language, and if capable of more than one construction, the Court “ought to discard the more natural meaning if it leads to an unreasonable result, and adopt that interpretation which leads to a reasonably practicable result.”<sup>68</sup>
63. Bearing that principle in mind, clause 1.3.1.1 of the Management Standards and Procedures,<sup>69</sup> (**the deeming provision**) provides that operations that comply with the Management Standards and Procedures are deemed to comply with the Code, and thus clause 2.2.2.2<sup>70</sup> itself.
64. As has already been noted, the Code and the Management Standards and Procedures are directed towards VicForests and operators for the purpose of conducting timber harvesting operations, and the reforms in 2014 were intended to streamline the

---

<sup>65</sup> [CB 6.10; p 21].

<sup>66</sup> [CB 6.10; p 22].

<sup>67</sup> [CB 6.10; p 22].

<sup>68</sup> *Gill v Donald Humberstone & Co Ltd* [1963] 1 WLR 929 at 933–34 (Lord Reid), quoted with approval in, amongst other cases, *Australian Tea Tree Oil Research Institute v Industry Research & Development Board* (2002) 124 FCR 316 at [37]–[38]; see generally Herzfeld et al, *Interpretation and Use of Legal Sources*, Thomson Reuters (2013) at [25.1.3790].

<sup>69</sup> [CB 6.10; p 21].

<sup>70</sup> [CB 6.9; p 34].

environmental regulatory framework. The Code is intended to be a repository of the obligations for operators, such that, if operators comply with the Management Standards and Procedures, they will be deemed to comply with the Mandatory Actions in the Code.<sup>71</sup> This construction of the deeming provision provides certainty to timber harvesting entities and operators. Where known values are concerned (by way of contrast to detection of previously unknown species where the precautionary principle would have a clear application), it is not for timber harvesting entities to second-guess the Executive's promulgated regulatory position in regard to that value.

65. On 26 March 2018 Commonwealth accreditation of the regulatory regime as currently in force was extended to 31 March 2020.<sup>72</sup> There is no prescription contained in the Planning Standards based on detection of greater gliders in the CH RFA (in contrast to the position that obtains in the East Gippsland RFA).
66. In light of the practical considerations to which the Code, the Management Standards and Procedures, and the Planning Standards are directed, and in the absence of any identified prescription alleged to be breached in the Scheduled Coupes, the deeming provision operates to ensure that in the circumstances of this case VicForests' operations will be deemed to comply with the Code, and thus the precautionary principle.

#### **B.1.5. Precautionary principle cannot be used to effect legislative outcomes**

67. Although, as has been noted, the precautionary principle is given statutory expression and is binding upon VicForests, it falls to be applied within a considered and developed framework of regulation which has itself been derived from a strategic planning process which has taken account of principles of environmentally sustainable development and provided for significant conservation reserves.<sup>73</sup>
68. The source of the obligation —clause 2.2.2.2 of the Code— is within a subordinate instrument that itself expresses multiple purposes,<sup>74</sup> namely to deliver sound

---

<sup>71</sup> See section 1.2.8 of the Code [CB 6.9; p 25].

<sup>72</sup> First Davey Report [CB 5.1.1.15], at [67].

<sup>73</sup> *MyEnvironment*, at [272].

<sup>74</sup> See section 1.2.2 of the Code [CB 6.9; p 22].

environmental performance when planning for and conducting commercial timber harvesting operations in a way that:

- (a) permits an economically viable, internationally competitive, sustainable timber industry;
- (b) is compatible with the conservation of the wide range of environmental, social and cultural values associated with forests;
- (c) provides for the ecologically sustainable management of native forests proposed for cyclical timber harvesting operations; and
- (d) enhances public confidence in the management of timber production in Victoria's forests and plantations.

69. The Code is made under Part 5 of the CFL Act. Section 4 provides that the object of the CFL Act is to set up a legislative framework to enable the Minister:

- (a) to be an effective conservator of the State's lands, waters, flora and fauna; and
- (b) to make provision for the productive, educational and recreational use of the State's lands, waters, flora and fauna in ways which are environmentally sound, socially just and economically efficient.

70. Tate JA observed in the *MyEnvironment Appeal*:<sup>75</sup>

s 5 of the SFP [sic] Act, in its statement of the principles of ecologically sustainable development designed to guide sustainable forestry management, makes plain that decision making processes should effectively integrate both long-term and short-term economic, environmental, social and equity considerations, as recognised by his Honour.<sup>76</sup>

71. Tate JA further stated,<sup>77</sup> that when construing legislation that has a multiplicity of purposes, or seeks to strike a balance between competing interests, it is necessary to keep

---

<sup>75</sup> At [142].

<sup>76</sup> *MyEnvironment*, [62].

<sup>77</sup> At [148].



in mind the observation of Gleeson CJ in *Carr v Western Australia* where his Honour said:<sup>78</sup>

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. ... *That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.*

72. Her Honour went on to quote with approval another passage of Gleeson CJ in the same case:<sup>79</sup>

As explained in *Kelly and Nicholls*, the general purpose of legislation of the kind here in issue is reasonably clear; but it reflects a political compromise. The competing interests and forces at work in achieving that compromise are well known. The question then is not: *what was the purpose or object underlying the legislation? The question is: how far does the legislation go in pursuit of that purpose or object?*<sup>80</sup>

73. In the context of evidence before the Court in *MyEnvironment* to the effect that the Department was undertaking a review of the existing management prescription for Leadbeater's Possum, his Honour observed that:

Such review will necessarily involve an evaluation of factors bearing on the sustainable ecological use of the whole of the forest affected by the FMP. Such a review involves policy considerations not readily justiciable before this Court.<sup>81</sup>

---

<sup>78</sup> *Carr v Western Australia* (2007) 232 CLR 138 at 142–3, [5] (emphasis as added by Tate JA).

<sup>79</sup> *MyEnvironment Appeal*, at [150].

<sup>80</sup> *Carr v Western Australia* (2007) 232 CLR 138 at 143, [7]; emphasis added by Tate JA.

<sup>81</sup> *MyEnvironment*, at [303].

74. Commenting on Professor Lindenmayer’s evidence in *MyEnvironment* that all areas of 1939 regrowth that support some large living trees should be exempted from logging, Osborn JA observed:

[F]undamentally the resolution of the major forest planning issues raised by Prof. Lindenmayer’s letter cannot be achieved in this proceeding. First, the evidence does not permit a conclusion to be reached as to the appropriateness of the proposal over the whole of the forest area in question. Secondly, the issue ultimately involves questions of policy judgment which are not the province of the Court. The necessary decision raises questions of sustainable ecological development and net community benefit which involve discretionary judgements as to the weight to be given to particular factors and the resolution of their balance. The discretion to make this judgement is not vested in this Court.<sup>82</sup>

75. For like reasons, it is not to the point that the Applicant may have a view that:

An outcome consistent with the precautionary principle can be achieved through precisely the mechanisms envisaged in the NFPS for complementary management outside reserves – namely continuing to both set aside some areas that have important biological value for Greater Glider to be protected from harvesting operations, and the careful management of other such areas during operations so as to safeguard important Greater Glider values.<sup>83</sup>

76. The management of State forests in the Central Highlands FMA generally, and particularly in respect of particular species of flora or fauna, is a matter of policy for the Executive branch of the State of Victoria. Moreover, it is a matter of policy to be put into effect, as best considered by the Executive, in the context of a framework operating at an intergovernmental level, and in the context of managing a dynamic forest resource with competing demands upon it.

77. As Osborn JA has observed, “the issue ultimately involves questions of policy judgment which are not the province of the Court”.<sup>84</sup>

78. The CH RFA expressly provides in clause 40 that “the Parties agree that Victorian processes and systems provide for ecologically sustainable management of forests in the

---

<sup>82</sup> *MyEnvironment*, at [310].

<sup>83</sup> Paragraph 28 of the Applicant’s outline of opening submission.

<sup>84</sup> *MyEnvironment*, at [310].

Central Highlands and that these processes and systems are accredited in clause 47 of this Agreement”. The Applicant is at pains to note that there is nothing in the CH RFA that addresses the Greater Glider and that the CH RFA predates the listing of the Greater Glider as vulnerable.

79. However, it must also be noted that on 26 March 2018, the Commonwealth and Victorian governments extended the timeframe of the CH RFA to 31 March 2020. This occurred after the change in listing status of the Greater Glider. It should also be noted that the Department has given no directions to VicForests as to the conduct of its timber harvesting operations in the Central Highlands FMA regarding detections of Greater Glider pursuant to s 70 of the SFT Act. The Applicant is therefore asking the Court to second guess the actions of both the Executive and the regulator.

#### **B.1.6. No serious or irreversible threat**

##### **B.1.6.1. *Any threat too generalised***

80. The net area available for harvesting in the Scheduled Coupes represents 0.01% of the total forested area of the public land estate,<sup>85</sup> and 0.14% of the CH RFA;<sup>86</sup>
81. The area modelled as Greater Glider High Quality Class 1 habitat within the net area available for harvesting in the Scheduled Coupes represents 0.07% of the total area modelled as Greater Glider High Quality Class 1 habitat within Victoria. The net area itself will be subject to the application of all Code exclusions and the large tree protection policy.<sup>87</sup>
82. As has already been noted above, as the examples described by Osborn J illustrate, it will be easier to identify a threatened breach of the precautionary principle when a specific action threatens direct serious or irreversible damage to an aspect of the environment of extreme sensitivity and/or novel qualities. The more generalised the threat and the more indirect and less immediate the damage to a sensitive aspect of the

---

<sup>85</sup> The figure is cell K71 of WEP-21A of the Fourth Paul Affidavit, divided by 6.4 million hectares (being the total area of forest across the public land estate according to the *State of the Forests Report 2018*, p 37) as a percentage. The *State of the Forests Report 2018* is available at <https://www.ces.vic.gov.au/reports/state-forests-2018>

<sup>86</sup> Second Paul Affidavit, [CB 3.4], at [442].

<sup>87</sup> See sections C.3.1–C.3.6 of the Second Paul Affidavit [CB 3.4].

environment, the more difficult it will be to be satisfied that the precautionary principle requires abstinence from a particular action.

83. In this instance, it cannot seriously be suggested that any timber harvesting that occurs within the net area available in the Scheduled Coupes would be accompanied by substantial uncertainty as to the survival of the species. That is so because the species is known to occur not only in many areas in Victoria outside the Scheduled Coupes, but also because Greater Glider populations exist in New South Wales and Queensland.

**B.1.6.2.        *Operations to comply with prescriptions***

84. It will be recalled that property in timber in State forests only vests in VicForests upon the publication of an allocation order: ss 13 and 14 of the SFT Act.
85. The Allocation Order was amended by the Allocation (Amendment) Order 2019, notice of which was published in the Government Gazette on 24 April 2019. As paragraph 2(2) of the Allocation (Amendment) Order 2019 makes clear, the order was made following a review of the allocation of timber resources conducted in accordance with ss 18 and 19 of the SFT Act.
86. In conducting a review of allocation of timber resources under s 18 of the SFT Act, pursuant to s 19 of the SFT Act the Minister must have regard to (amongst other things):
- (a) the principles of ecologically sustainable development;
  - (b) any report by the Secretary under s 8;<sup>88</sup>
  - (c) the structure and condition of the forest and its impact on future timber resource availability;
  - (d) VicForests' compliance with the allocation order, including the conditions specified in the order;

---

<sup>88</sup> Sections 6 and 8 of the SFT Act provide that the Secretary must report to the Minister on the status, performance or achievement in relation to the indicators determined by the Minister for sustainable forest management.

(e) the provisions of any Code of Practice; and

(f) VicForests' compliance with any Code of Practice.

87. Having conducted that review, the Minister made the Allocation (Amendment) Order 2019 which had the effect of reducing the timber resources allocated to VicForests through the Allocation Order 2013 by 5,000 hectares. But the reduction in resources allocated to VicForests does not affected the Scheduled Coupes, and the timber resources in those coupes remain vested in VicForests.

88. Thus the allocation order process itself factors in the principles of ecologically sustainable development. To that is added the TRP process which involves consultation with, among others, environmental non-government organisations,<sup>89</sup> and the coupe reconnaissance process,<sup>90</sup> that includes identification of values that may require protection (both through a desktop review and a field assessment with a peer review).

89. In *MyEnvironment* Osborn J said:

If it is accepted that the TRP [Timber Release Plan] relates to coupes which have themselves been produced by a balanced planning exercise which takes account of considerations of ecologically sustainable development and if it is further accepted that the logging will comply with the prescriptions designed to protect LBP [Leadbeater's Possum] habitat within such coupes, *MyEnvironment* faces a difficult task in establishing that logging will breach the precautionary principle.<sup>91</sup>

90. Similarly, in this case, any operations in the Scheduled Coupes will comply with all prescriptions in force at the time any such operations occur.

#### **B.1.6.3. *Dr Davey's evidence***

91. Dr Davey will give evidence that, in his opinion, VicForests has not (insofar as the Logged Glider Coupes are concerned),<sup>92</sup> and will not (insofar as the Scheduled Coupes

---

<sup>89</sup> See section C.2.2 of the Second Paul Affidavit [CB 3.4].

<sup>90</sup> See generally section G of the Second Paul Affidavit [CB 3.4].

<sup>91</sup> *MyEnvironment*, at [271].

<sup>92</sup> First Davey Report [CB 5.1.1], at [276].

are concerned),<sup>93</sup> breach the precautionary principle in relation to the Greater Glider, noting in particular that:

- (a) when viewed as a whole, conducting forestry operations in the Scheduled Coupes (individually or collectively) does not pose a serious or irreversible threat to Greater Glider or Greater Glider habitat;<sup>94</sup>
- (b) the components of the CAR reserve system are an embodiment of the precautionary principle;<sup>95</sup>
- (c) the use by Greater Gliders of riparian systems and buffer exclusions associated with harvested coupes resumes within 15 years of harvesting, assuming adequate habitat trees remain available;<sup>96</sup>
- (d) the recolonization by Greater Gliders of coupes subject to clearfell, seed tree or retention harvesting, with scattered retained habitat trees, begins within 25 years with the average return rate being after 40 years;<sup>97</sup>
- (e) the use by Greater Gliders of coupes subject to clearfell, seed tree or retention harvesting stems, with nil retention of suitable habitat trees, resumes within 30 years, with colonization resuming more than 80 years post-harvesting;<sup>98</sup>
- (f) the primary conservation actions and management actions set out in the Conservation Advice on the Greater Glider are embodied in the Code;<sup>99</sup>
- (g) Victoria has good systems and processes for conservation and management of biodiversity and ecologically sustainable forest management, with the draft Greater Glider Action Statement and Interim Greater Glider Conservation

---

<sup>93</sup> First Davey Report [CB 5.1.1], at [305].

<sup>94</sup> First Davey Report [CB 5.1.1], at [303].

<sup>95</sup> First Davey Report [CB 5.1.1], at [213] – [216].

<sup>96</sup> First Davey Report [CB 5.1.1], at [250].

<sup>97</sup> First Davey Report [CB 5.1.1], at [251]; Second Davey Report, [CB 5.4.1], at [203].

<sup>98</sup> First Davey Report [CB 5.1.1], at [253].

<sup>99</sup> First Davey Report [CB 5.1.1], at [273].

Strategy providing guidance and enhancing those systems and processes pending a Greater Glider Recovery Plan;<sup>100</sup> and

- (h) in assessing the impact of past and future forestry operations he performed a desktop assessment of the coupes in question, which desktop assessment considered, among other things, aerial imagery, available habitat modelling, harvest history, modelled timber harvesting exclusions and coupe plan records of forest type, aspect, slope, proportion of dead limbs and interlocking crowns, age classes and growth forms present, harvest area foot print, habitat tree prescription and placement, the implementation Code prescriptions and various aspects of coupe plans that concern the management of forest sites with Greater Glider or Leadbeater's Possum present.<sup>101</sup>

92. For all of the above reasons, any harvesting in the Scheduled Coupes will not constitute a serious or irreversible threat to Greater Glider, and thus the precautionary principle is not engaged.
93. VicForests maintains that an expert conclave, followed by concurrent evidence, would be of assistance to the Court and be the most efficient way for the expert evidence to be given. This submission applies equally in relation to the evidence intended to be given by Professors Baker and Woinarski.

**B.1.7. Alternatively, if engaged, VicForests' response will be adequate and proportionate**

94. If this Court finds, contrary to VicForests' primary submission, that the precautionary principle is engaged in respect of each "forestry operation" in the Scheduled Coupes, VicForests' response is appropriate and necessary in order to address the threat of serious or irreversible damage to the Greater Glider.<sup>102</sup>
95. Contrary to what appears to be submitted by the Applicant, the precautionary principle does not require VicForests to undertake actions "necessary to provide for the recovery

---

<sup>100</sup> First Davey Report [CB 5.1.1], at [274], [271].

<sup>101</sup> First Davey Report [CB 5.1.1], at [256] – [259], [278], Tables 15 and 16 (Table 16 as amended by Table 3 of Second Davey Report [CB 5.4.1]).

<sup>102</sup> *Brown Mountain*, at 49 [207]; *MyEnvironment*, at [314].

of the Greater Glider”,<sup>103</sup> or actions that provide “certainty that Greater Glider population in the Central Highlands will not undergo further decline”.<sup>104</sup>

96. The precautionary principle permits the taking of preventative measures without waiting until the reality and seriousness of the threat posed by forestry operations in the Scheduled Coupes is known.<sup>105</sup> But the precautionary principle is not directed to avoidance of all risks.
97. In respect of “forestry operations” in each of the Scheduled Coupes, the margin for error may be controlled by adaptive management proposals.<sup>106</sup> The precautionary principle does not generally dictate one specific course of action to the exclusion of others.<sup>107</sup>
98. The Applicant contends, in respect of the Scheduled Coupes, that the requisite threat to the Greater Glider is able to be addressed by adaptive management, namely surveys and prescriptions.<sup>108</sup> In *Brown Mountain* Osborn J found that although the evidence in that case established the desirability of pre-harvest surveys in old growth forest, the generalised evidence did not address the specific factors relevant to the engagement of the precautionary principle, and thus that part of the claim was not made good.<sup>109</sup>
99. In any event, the evidence of Mr Paul is that VicForests is developing overall adaptive silvicultural systems that are intended to identify and protect high conservation values (HCVs) identified in the field.<sup>110</sup> Two such HCVs identified are Leadbeater’s Possum habitat and Greater Glider habitat.<sup>111</sup>
100. The adaptive silvicultural systems remain in development and subject to public consultation.<sup>112</sup> In that sense, they are not finalised and may change in the future. As currently drafted the adaptive silvicultural systems contemplate variable levels of tree

---

<sup>103</sup> Applicant’s outline of opening submission, at [119(c)].

<sup>104</sup> First Smith Report [CB 4.2.1; p 10 and 58]; Second Smith Report [CB 4.3] at p 10; Fourth Smith Report [CB.4.12.1; pp 7, 8, 11, 15, 24-25].

<sup>105</sup> *Brown Mountain*, at 49 [201].

<sup>106</sup> *Brown Mountain*, at 49 [205]; *MyEnvironment*, at [314].

<sup>107</sup> *Bridgetown Greenbushes / Friends of the Forest v Department of Conservation & Land Management* (1997) 18 WAR 102, at 119; *Brown Mountain*, at 46-7 [186]; *MyEnvironment*, at [262].

<sup>108</sup> Applicant’s outline of opening submission, at [119(d)] and (e)].

<sup>109</sup> *Brown Mountain*, at [217].

<sup>110</sup> Fourth Paul Affidavit [CB 3.6.1], at [111]; Overview of harvesting and regenerations systems, [CB 3.6.127; p 4, table 2].

<sup>111</sup> Overview of harvesting and regenerations systems, [CB 3.6.127; p 7, section 3].

<sup>112</sup> Fourth Paul Affidavit [CB 3.6.1], at [108].



retention increasing from clearfall (20%, 40% and 50% basal area retention) through to single tree retention and 100% retention (i.e. no harvesting) where particular forest types and conservation values are present.<sup>113</sup>

101. The evidence of Mr Paul is that VicForests will review the silvicultural system by which each Scheduled Coupe is to be harvested and regenerated in conformity with the adaptive silvicultural regimes under development.<sup>114</sup> The identification and presence of conservation values (including HCVs) in the Scheduled Coupes will significantly affect the adaptive silvicultural system to be selected.<sup>115</sup> It is of course not known how any of the Scheduled Coupes will be harvested —if at all— because the evidence is that extant planning is stale and on hold pending the resolution of the proceeding.<sup>116</sup>
102. The development of the adaptive silvicultural methods —together with the ongoing public consultation process— is itself a precautionary measure proportionate to the threat. VicForests’ development of the silvicultural systems occurs in the context of an extant strategic planning process and regulatory landscape which takes account of principles of environmental sustainable development and has provided for significant conservation reserves,<sup>117</sup> and retained forest not associated with the reserve system (such as other fixed zoning, habitat and timber harvesting exclusions required by the Code, the Management Standards and Procedures and the Planning Standards, or any voluntary measures agreed between VicForests and the Department, or the subject of a direction under s 70 of the SFT Act). Dr Davey’s evidence is that many of the high conservation values are already represented and protected in the CAR reserve system.<sup>118</sup>
103. Further, the development of the new silvicultural systems must be considered in the context of VicForests’ existing practices including policies, procedures and requirements with respect to giant, tall and large tree protection,<sup>119</sup> Leadbeater’s Possum Management Units,<sup>120</sup> a moratorium on timber harvesting in an area of 14,800 hectares of forest anticipated to have a more than 0.65 probability of being occupied by Leadbeater’s

---

<sup>113</sup> Fourth Paul Affidavit [CB 3.6.1], at [108].

<sup>114</sup> Fourth Paul Affidavit [CB 3.6.1], at [118].

<sup>115</sup> Fourth Paul Affidavit [CB 3.6.1], at [119].

<sup>116</sup> Second Paul Affidavit [CB 3.4] at [443]-[444]; Fourth Paul Affidavit [CB 3.6.1], at [118]-[119].

<sup>117</sup> *Brown Mountain*, at [181].

<sup>118</sup> Second Davey Report [CB 5.4.1], at [315], [325].

<sup>119</sup> Second Paul Affidavit [CB 3.4], at section C3.3.6 and [CB.3.5.95]

<sup>120</sup> Second Paul Affidavit, [CB 3.4], at section C.3.3.2].

Possum,<sup>121</sup> and existing regrowth retention harvesting practices.<sup>122</sup> These matters have not been taken into account by Dr Smith or Professor Woirnarski in proffering their opinions.

**B.2. Alternatively, if the precautionary principle will be breached, any loss of exemption from Part 3 of EPBC Act is limited**

104. If this Court finds, contrary to VicForests’ primary submission, that the precautionary principle is engaged and will be breached in respect of each “forestry operation” in the Scheduled Coupes, on the proper construction of s 38 of the EPBC Act and s 6(4) of the RFA Act, any loss of exemption from Part 3 of the EPBC Act is limited to the forestry operation or operations that is or are not in accordance with the CH RFA and does not extend to other forestry operations in the same coupe that are undertaken in accordance with the CH RFA.<sup>123</sup>

105. Section 38 of the EPBC Act provides that “RFA forestry operation” has the same meaning as in the RFA Act. The RFA Act relevantly defines “RFA forestry operations” to mean forestry operations as defined in an RFA that are conducted in relation to land in a region covered by the RFA.

106. The CH RFA contains the following definition:

“Forestry Operations” means

- (a) the planting of trees; or
- (b) the managing of trees before they are harvested; or
- (c) the harvesting of Forest Products

for commercial purposes and includes any related land clearing, land preparation and regeneration (including burning), and transport operations.

“Forest Products” means all live and dead trees, ferns or shrubs of parts thereof.

---

<sup>121</sup> Second Paul Affidavit, [CB 3.4], at [136(c)].

<sup>122</sup> Second Paul Affidavit, [CB 3.4], at [152] to [157], [161] and [CB 3.4.33].

<sup>123</sup> See subparagraph 113G(b) of the defence.

107. Subsection 38(1) of the EPBC Act provides that Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA:
108. Part 3 of the EPBC Act, of which s 18 forms part, operates on conduct which is described as “an action”. For the purpose of this proceeding, the parties have agreed that forestry operations in each of, and in some or all of, the Logged Coupes and the Scheduled Coupes are an “action”. In the present case, Part 3 of the EPBC Act seeks to prohibit, and then regulate, an action which has, or is likely to have, a “significant impact” on a listed threatened species.<sup>124</sup>
109. Two matters are immediately apparent from the terms of s 38(1). *First*, that in respect of one coupe, there may be many separate forestry operations, and therefore many separate “actions”. *Second*, by the use of the singular “RFA forestry operation” the focus in s 38(1) of the EPBC is on one particular forestry operation.
110. In this case, forestry operations are the actions that the EPBC Act seeks to regulate so as to avoid a significant impact on a listed threatened species included in the critically endangered category (s 18(2)) or a listed threatened species included in the vulnerable category (s 18(4)). It is the taking of the action (that is, the actual conduct of a forestry operation) that must be “in accordance with” the RFA.<sup>125</sup>
111. The only alleged wrongdoing said to arise in respect of the forestry operations in the Scheduled Coupes is the alleged failure by VicForests to comply with clause 2.2.2.2 of the Code in respect of the Greater Glider.<sup>126</sup> If the exemption in s 38(1) were lost in respect of the Scheduled Coupes, it would be because the conduct of the proposed forestry operations did not comply with clause 2.2.2.2 of the Code in respect of the Greater Glider.
112. The effect is that any loss of exemption must be limited to the forestry operation that is not in accordance with the RFA. It follows, therefore, that any consideration of

---

<sup>124</sup> See the discussion of the general structure of Part 3 in *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment* (No 2) (2016) 215 LGERA 1, at [19]-[34] which was not disturbed by the Full Court’s decision in *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* (No 2) (2016) 244 FCR 21 (Allsop CJ, Griffiths and Moshinsky JJ).

<sup>125</sup> *Friends of Leadbeater’s Possum Inc v VicForests* (2018) 260 FCR 1, at [198] (Mortimer J).

<sup>126</sup> 2FASOC, paragraph 113H.

significant impact in Part 3 of the EPBC Act is likewise limited by reference to the “action” under consideration. As such, any loss of exemption contained in s 38(1) of the EPBC Act in respect of the Scheduled Coupes can only be limited to Greater Glider, and questions of significant impact to other values (such as Leadbeater’s Possum) do not arise.

113. This construction is strengthened by the fact that the general exemption in s 38 forms part of a Division which provides for a substitute regime in which RFAs deal with environmental and other matters in relation to forests and forestry operations that are subject to the RFA.<sup>127</sup> The regulation for which the RFAs provide is an active and ongoing one,<sup>128</sup> and largely a state-based system. The construction of s 38(1) advanced by the Applicant,<sup>129</sup> is one that renders the substitute system otiose once the exemption in s 38(1) no longer applies, such that it opens up questions of significant impact on every matter of national environmental significance. That construction is illogical and contrary to the substitution regime envisaged by Part 4, Div 4 of the EPBC Act.

114. The position is the same with respect to the Logged Coupes.

### **B.3. The test for significant impact under the EPBC Act**

#### **B.3.1. The Applicant’s pleaded case as to “significant impact”**

115. The question of significant impact arises in several paragraphs of the 2FASOC in respect of both Greater Glider and Leadbeater’s Possum and in respect of some or all of the Logged Coupes and Scheduled Coupes. Each allegation is addressed in turn below.

##### **B.3.1.1. *Greater Glider – Logged Coupes and Scheduled Coupes***

116. At paragraphs 32 to 39D of the 2FASOC the Applicant alleges that forestry operations in each of Logged Coupes 9.5, 9.6, 9.12, 9.13, 9.17, 9.20, 9.26, 9.30, 9.32, 9.33, 9.35 and 9.36 have had, are having or are likely to have, a significant impact on the Greater Glider. The allegations in these paragraphs are coupe specific, and therefore require the

---

<sup>127</sup> *Wilderness Society v Turnbull* (2007) 166 FCR 154, at [32] (Branson and Finn JJ).

<sup>128</sup> *Friends of Leadbeater’s Possum Inc v VicForests* (2018) 260 FCR 1, at [139] (Mortimer J).

<sup>129</sup> Applicant’s outline of opening submission, at [141]–[142].

Court to consider the question of significant impact on the Greater Glider in respect of forestry operations in each individual coupe the subject of that allegation.

117. At paragraph 40 of the 2FASOC, the Applicant alleges that forestry operations in some or all of Logged Coupes 9.5, 9.6, 9.12, 9.13, 9.17, 9.20, 9.26, 9.30, 9.32, 9.33, 9.35 and 9.36 (defined as the **Logged Glider Coupes**) have had, are having or are likely to have, a significant impact on the Greater Glider. This is a global allegation and requires the Court to consider the question of significant impact on the Greater Glider in respect of forestry operations in some or all of the Logged Glider Coupes. This allegation is repeated in paragraph 105D.
118. Paragraphs 73 to 104F of the 2FASOC relate to the Scheduled Coupes. By those paragraphs the Applicant alleges that forestry operations in each of Scheduled Coupes 10.1 to 10.36 and 10.38 to 10.40 are likely to have a significant impact on the Greater Glider.
119. By paragraph 105, the Applicant alleges that forestry operations in some or all of the Scheduled Coupes are likely to have a significant impact on the Greater Glider. This allegation is repeated in paragraph 105D.
120. The particulars of the alleged significant impact on the Greater Glider (in respect of the Logged Glider Coupes, the Scheduled Coupes and in respect of the coupes individually and cumulatively) are contained in paragraphs 32, 73 and 105D of the 2FASOC. The particulars of the alleged significant impact are as follows:

*There is a real chance that forestry operations ...have had, are or are likely to*

*(a) lead to a long-term decrease in the size of an important population of Greater Glider;*

*(b) reduce the area of occupancy of an important population of Greater Glider;*

*(c) fragment an important population of Greater Glider into two or more populations;*

*(d) adversely affect habitat critical to the survival of the Greater Glider;*

*(e) disrupt the breeding cycle of an important population of Greater Gliders;*

*(f) modify, destroy, remove, isolate, or decrease the availability or quality of habitat to the extent that the Greater Glider is likely to decline;*

*(g) interfere substantially with the recovery of the Greater Glider; have an impact that is important, notable or of consequence for the Greater Glider, having regard to its context and intensity, and the sensitivity, value and quality of the environment being impacted.*

**B.3.1.2. Leadbeater's Possum — Logged Coupes and Scheduled Coupes**

121. At paragraphs 22 to 29C of the 2FASOC, the Applicant alleges that forestry operations in each of Logged Coupes 9.12, 9.16 to 9.21, 9.25, 9.26, 9.31, 9.32, 9.35, 9.36 and 9.37 to 9.40 have had, are having or are likely to have a significant impact on the Leadbeater's Possum. The allegations in these paragraphs are coupe specific, and therefore require the Court to consider the question of significant impact on the Leadbeater's Possum in respect of forestry operations in each individual coupe the subject of that allegation.
122. In paragraph 30 of the 2FASOC, the Applicant alleges that forestry operations in some or all of Logged Coupes 9.12, 9.16 to 9.21, 9.25, 9.26, 9.31, 9.32, 9.35, 9.36 and 9.37 to 9.40 (defined as the **Logged Leadbeater's Possum Coupes**) have had, are having, or are likely to have a significant impact on the Leadbeater's Possum. The allegation is repeated in paragraph 105B of the 2FASOC. This is a global allegation of the type discussed above.
123. Insofar as the Scheduled Coupes are concerned, the Applicant alleges at paragraphs 42 to 70B of the 2FASOC that forestry operations in each of Scheduled Coupes 10.1 to 10.8, 10.11 to 10.16, 10.8 to 10.20, 10.22 to 10.31, 10.34 and 10.32A are likely to have a significant impact on the Leadbeater's Possum. This is an individual coupe allegation.
124. At paragraph 71 of the 2FASOC, the Applicant alleges that forestry operations in some or all of the Scheduled Coupes 10.1 to 10.8, 10.11 to 10.16, 10.8 to 10.20, 10.22 to 10.31, 10.34 and 10.32A (defined as the **Scheduled Leadbeater's Possum Coupes**) are likely to have a significant impact on the Leadbeater's Possum. This allegation is repeated at paragraph 105B. Again, this is a global allegation of the type discussed above.

125. The particulars of the alleged significant impact (in respect of the Logged Leadbeater's Possum Coupes, the Scheduled Leadbeater's Possum Coupes and in respect of the coupes individually and cumulatively) are set out in paragraphs 22, 42, 71 and 105B of the 2FASOC. The particulars of the alleged significant impact are as follows:

*There is a real chance that forestry operations ...have had, are or are likely to:*

*(a) lead to a long-term decrease in the size of the population of the Leadbeater's Possum;*

*(b) reduce the area of occupancy of the Leadbeater's Possum;*

*(c) fragment an existing population of Leadbeater's Possum into two or more populations;*

*(d) adversely affect habitat critical to the survival of the Leadbeater's Possum;*

*(e) disrupt the breeding cycle of Leadbeater's Possums;*

*(f) modify, destroy, remove, isolate, or decrease the availability or quality of habitat to the extent that the Leadbeater's Possum is likely to decline;*

*(g) interfere with the recovery of the Leadbeater's Possum;*

*(h) have an impact that is important, notable or of consequence for the Leadbeater's Possum having regard to its context and intensity, and the sensitivity, value and quality of the environment being impacted.*

### **B.3.2. The proper construction of "impact" and "significant impact"**

126. Part 3 of the EPBC Act prohibits "actions" that have, or are likely to have, a significant impact on matters of national environmental significance, unless the person taking the relevant action has obtained an approval or is otherwise exempted from obtaining such an approval. Although the term "matters of national environmental significance" is not defined in the EPBC Act, matters of national environmental significance presently are: World Heritage properties, National Heritage properties, Ramsar wetlands of international importance, listed threatened species and communities, migratory species

protected under international agreements, nuclear actions and the Commonwealth marine area.<sup>130</sup>

127. Sections 18 and 18AA of the EPBC Act are located in Subdivision C of Part 3 and relate to actions with significant impact on listed threatened species.
128. The first step in the analysis as to significant impact is to determine what the *impacts* are of VicForests' action(s) (both past action(s) and future action(s)). The second step is to determine whether those impacts are *significant* such as to attract the prohibition in sub s 18 (2) and (4). It is at this second stage that any mitigation or protection measures fall to be considered in determining whether the significance of the action exceeds the thresholds in sub s 18(2) and (4).

#### **B.3.2.1. The impact of the forestry operations**

129. The term “impact” is defined in s 527E of the EPBC Act:

##### *527E Meaning of impact*

- (1) For the purposes of this Act, an event or circumstance is an impact of an action taken by a person if:
- (a) the event or circumstance is a direct consequence of the action; or
  - (b) for an event or circumstance that is an indirect consequence of the action—subject to subsection (2), the action is a substantial cause of that event or circumstance.
- (2) For the purposes of paragraph (1)(b), if:
- (a) a person (**the primary person**) takes an action (**the primary action**); and
  - (b) as a consequence of the primary action, another person (**the secondary person**) takes another action (**the secondary action**); and
  - (c) the secondary action is not taken at the direction or request of the primary person; and
  - (d) an event or circumstance is a consequence of the secondary action;
- then that event or circumstance is an **impact** of the primary action only if:
- (e) the primary action facilitates, to a major extent, the secondary action; and

---

<sup>130</sup> See subdivisions A–FB of Part 3 of the EPBC Act.



- (f) the secondary action is:
  - (i) within the contemplation of the primary person; or
  - (ii) a reasonably foreseeable consequence of the primary action; and
- (g) the event or circumstance is:
  - (i) within the contemplation of the primary person; or
  - (ii) a reasonably foreseeable consequence of the secondary action.

130. It is clear from the text of the section that only an “event” or “circumstance” may be an impact. Further, the event or circumstance may be either a direct or an indirect consequences of an action. In this case, the question becomes what are the direct and indirect consequences (by way of events or circumstances) that follow from the “action(s)” of forestry operations in the Logged Coupes and the Scheduled Coupes?
131. It is not apparent from the 2FASOC whether it is put that the pleaded impacts are direct or indirect consequences. For an event or circumstance to be an indirect consequence of an action, it must be demonstrated that the action is a “substantial cause” of that event or circumstance (s 528E(1)(b)) *and* the criteria prescribed by s 527E(2) are met.<sup>131</sup> In these circumstances, the Applicant must be taken to allege that the pleaded impacts in paragraphs 22, 42, 71 and 105B (for Leadbeater’s Possum) and 32, 73 and 105D (for Greater Glider) of the 2FASOC are direct impacts. That is because, as alleged, there is no intermediate or interposed conduct or activity occurring between the forestry operations as a whole and the alleged event or circumstances constituting the impact.<sup>132</sup> The applicant must therefore establish that each of the pleaded impacts in paragraphs 22, 42, 71 and 105B (for Leadbeater’s Possum) and 32, 73 and 105D (for Greater Glider) of the 2FASOC is a direct consequence of the forestry operations in each of the Logged

---

<sup>131</sup> *Tarkine National Coalition Incorporated v Minister for the Environment* (2014) 202 LGERA 244, at [86] (Tracey J); *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254, at [36] - [43] (Jessup J, with whom Kenny and Middleton JJ agreed); *Australian Conservation Foundation Incorporated v Minister for the Environment* (2016) 251 FCR 308, at [157] (Griffiths J) (appeal and application for review dismissed in *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* (2017) 251 FCR 359).

<sup>132</sup> See *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* (2016) 215 LGERA 1, at [230] (Mortimer J). Her Honour’s characterisation of the direct and indirect impacts was not disturbed on appeal: *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* (2016) 244 FCR 21.

Glider Coupes, the Logged Leadbeater's Possum Coupes, the Scheduled Leadbeater's Possum Coupes and the Scheduled Coupes, both individually and collectively.

**B.3.2.2. *Is the impact of forestry operations significant?***

132. The term “significant” is not defined in the EPBC Act. The authorities suggest that it should be interpreted as meaning “important, notable, or of consequence having regard to its context or intensity”.<sup>133</sup> The word “significant” operates as a limitation to exclude impacts which are minor or unlikely on a listed threatened species.<sup>134</sup>
133. The question of significant impact is ultimately a question of fact as to whether any past or future proposed action has had or will have a significant impact on the listed threatened species included in the vulnerable category or critically endangered category,<sup>135</sup> taking into consideration any mitigation or protection measures. The outcome of that enquiry in part turns on what is meant by “listed threatened species included in the vulnerable category or critically endangered category”.
134. Part 13, Division 1, Subdivision A of the EPBC Act sets out the process of listing threatened species. Section 178(1) of the Act provides that the Minister must, by legislative instrument, establish a list of threatened species divided into categories which include critically endangered and vulnerable. A native species,<sup>136</sup> is eligible to be included in the critically endangered category at a particular time if, at that time, it is facing an extremely high risk of extinction in the wild in the immediate future, as determined in

---

<sup>133</sup> *Booth v Bosworth* (2001) 114 FCR 39, at [99] (Branson J); *Minister for the Environment & Heritage v Greentree (No 2)* (2004) 138 FCR 198, at [191] - [198] (Sackville J); *Krajniw v Brisbane City Council (No 2)* [2011] FCA 563, at [10] (Dowsett J); *Northern Inland Council for the Environment Inc v Minister for the Environment* (2013) 218 FCR 491, at [91]-[92] (Cowdroy J); *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301, at [215] (Gilmour, Foster and Barker JJ); *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* (2016) 215 LGERA 1, at [240] (Mortimer J) (Her Honour's characterisation of the test was not disrupted on appeal: *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* (2016) 244 FCR 21).

<sup>134</sup> *Krajniw v Brisbane City Council (No 2)* [2011] FCA 563, at [10] (Dowsett J); *Northern Inland Council for the Environment Inc v Minister for the Environment* (2013) 218 FCR 491, at [91]-[92], [118] (Cowdroy J); *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* (2016) 215 LGERA 1, at [240].

<sup>135</sup> *Minister for the Environment & Heritage v Greentree (No 2)* 138 FCR 198, at [192] (Sackville J).

<sup>136</sup> The term “native species” is defined in s 528 of the EPBC Act as a species that is indigenous to Australia or an external Territory, indigenous to the seabed of the coastal sea of Australia or an external Territory, indigenous to the continental shelf, indigenous to the exclusive economic zone, or were present in Australia or an external territory before 1400. The definition also includes members of species which periodically or occasionally visit Australia or an external territory.

accordance with the prescribed criteria.<sup>137</sup> A native species is eligible to be included in the vulnerable category at a particular time if, at that time, it is not critically endangered or endangered and it is facing a high risk of extinction in the wild in the medium-term future, as determined in accordance with the prescribed criteria.<sup>138</sup>

135. Each of the species *Gymnobelideus leadbeateri* (Leadbeater's Possum) and *Petauroides Volans* (Greater Glider) are native species that are listed threatened species. The listing of the *Gymnobelideus leadbeateri* (Leadbeater's Possum) and *Petauroides Volans* (Greater Glider) as threatened species triggers, among other matters, the operation of Part 3 of the EPBC Act (of which s 18 forms part), which relate to matters of national environmental significance. It is the listed threatened species to which s 18 is directed.
136. The judicially accepted approach is that the significant impact must impact a species as a whole.<sup>139</sup> Accordingly, the Applicant must demonstrate a risk of significant adverse impact on the species Greater Glider and Leadbeater's Possum as a whole, which is a direct consequence of the past or future action.
137. The EPBC Act did contain a reference to matters which were prescribed by the regulations as required to be considered in assessing whether an impact was significant,<sup>140</sup> but it was removed by the *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001* (Cth). The regulations in present form do not contain any provisions that are relevant to this question of significant impact.
138. From time to time, the relevant Commonwealth Department has published guidelines entitled "Matters of National Environmental Significance Significant Impact Guidelines 1.1" (the Guidelines).<sup>141</sup> The current version is dated 2013. The stated purpose of the

---

<sup>137</sup> EPBC Act, s 179(3).

<sup>138</sup> EPBC Act, s 179 (5).

<sup>139</sup> *Booth v Bosworth* (2001) 114 FCR 39, at [101]-[106] (Branson J); *Krajniw v Brisbane City Council (No 2)* [2011] FCA 563, at [10] (Dowsett J); *Northern Inland Council for the Environment Inc v Minister for the Environment* (2013) 218 FCR 491, at [113]. That case concerned the meaning of the phrase "significant impact" as it occurs in s 139 of the EPBC Act. Section 139 relates to approvals for the taking of an action for the purpose of ss 18 and 18A of the EPBC Act. Here, the question of approval for the taking of an action does not arise, however, it is submitted His Honour's comments are apposite given this case concerns the meaning of the term "significant impact" in the context of ss 18 and 18A of the EPBC Act.

<sup>140</sup> EPBC Act, s 524B.

<sup>141</sup> [CB 4.2.2.14].

Guidelines is to assist a person who proposed to take an action to decide whether they should submit a referral to the Department for a decision by the Minister on whether assessment and approval for the action is required under the EPBC Act.<sup>142</sup> The Guidelines provide general guidance to the public only,<sup>143</sup> and do not have any legislative force. In any event, one can infer, given their stated purpose, that the Guidelines have been drafted with a risk-averse approach to the interpretation of the EPBC Act.

139. As for the question of cumulative impacts, VicForests submits that given it is the consequences of a particular forestry operation that are under consideration, it is not part of this Court's task to consider the consequences of any other action, present or anticipated, which are not under consideration. This is consistent with the approach taken by the Full Court in *Tarkine National Coalition Inc v Minister for the Environment*,<sup>144</sup> and arises in this case because of the manner in which the Applicant has alleged significant impact on an individual coupe basis.

#### **B.4. No significant impact on Greater Glider**

140. Significant impact on Greater Glider in the Scheduled Coupes is alleged in paragraphs 116BB, 116BD, 119B of the 2FASOC. For the same reasons as set out in section B.1.3 above, it is not possible for the Court to assess whether, to the extent they occur, any forestry operations in the alleged Scheduled Coupes will constitute a significant impact on Greater Glider within the meaning of the EPBC Act.
141. In the alternative to that submission, VicForests relies on Dr Davey's evidence that there will be a relatively limited impact on Greater Glider arising from VicForests' future forestry operations in the Scheduled Glider Coupes, noting in particular that:<sup>145</sup>

---

<sup>142</sup> [CB 4.2.2.14 at p 4].

<sup>143</sup> *Krajniw v Brisbane City Council (No 2)* [2011] FCA 563, at [10] (Dowsett J). In *Humane Society International v Minister for the Environment & Heritage* [2003] FCA 64, the Minister for Environment and Heritage submitted that the Guidelines fulfilled the function that was envisaged by s 524B, but Kiefel J (as she then was) did not need to determine the matter and observed the submission in passing, at [12].

<sup>144</sup> (2015) 233 FCR 254, at [40] - [43] (Jessup J, with whom Kenny and Middleton JJ agreed).

<sup>145</sup> First Davey Report [CB 5.1.1] Tables 16 and 17 (as amended by Table 3 of Second Davey Report [CB.5.4.1]).

- (a) in assessing the impact of future forestry operations he performed a desktop assessment of the coupes in question, as described above;<sup>146</sup>
- (b) forestry operations in the Scheduled Coupes will be appropriate for the recently listed Greater Glider provided specific consideration is given to the conservation requirements of Greater Gliders in planning and implementation of those operations in coupes classed as Moderate impact severity;<sup>147</sup>
- (c) insofar as coupes classed as Limited or Minor impact severity:<sup>148</sup>
  - (i) the current forest system provides satisfactory retention of forest areas;<sup>149</sup>
  - (ii) while local populations of Greater Glider may be impacted, those decreases would not result in the overall decrease of the size of an important regional population;<sup>150</sup>
  - (iii) forestry operations taken as a whole or collective would not result in the reduction or fragmentation of available habitat for Greater Glider to the extent that those operations would be likely to displace a regional population, result in a long term decline in a regional population or threaten the viability of the species;<sup>151</sup>
- (d) while forestry operations within an area would reduce the spatial coverage of habitat, those operations would permit the maintenance of the area of occupancy of the existing Greater Glider population in a planning unit;<sup>152</sup>
- (e) the presence of forest in the formal and informal reserve systems and remaining SMZ and GMZ means that the areas the subject of future forestry operations are unlikely to comprise habitat critical for the Greater Glider;<sup>153</sup>

---

<sup>146</sup> First Davey Report [CB 5.1.1], at [278].

<sup>147</sup> First Davey Report [CB 5.1.1], at [289(i)].

<sup>148</sup> See First Davey Report [CB 5.1.1], Table 17. See also Table 3 of Second Davey Report [CB 5.4.1].

<sup>149</sup> First Davey Report [CB 5.1.1], at [289(i)].

<sup>150</sup> First Davey Report [CB 5.1.1], at [289(i)].

<sup>151</sup> First Davey Report [CB 5.1.1], at [289(i),(iii)].

<sup>152</sup> First Davey Report [CB 5.1.1], at [289(ii)].

<sup>153</sup> First Davey Report [CB 5.1.1], at [289(iv)].

- (f) the existing areas of harvesting exclusion are sufficient to avoid the displacement, reduction or substantial limitation of the movement or dispersal of populations of Greater Glider;<sup>154</sup>
- (g) while forestry operations in certain Scheduled Coupes will likely impact on individual Greater Glider, it is not likely that operations will result in a long-term decrease in or threat to the viability of a population of Greater Glider;<sup>155</sup>
- (h) satisfactory policy and planning systems have meant that forestry operations will not interfere with the recovery of the Greater Glider regionally or nationally;<sup>156</sup>
- (i) Greater Glider populations recover from wildfire after a decade or decades;<sup>157</sup>
- (j) insofar as the Greater Glider regional populations were concerned:<sup>158</sup>
  - (i) planning informed by detailed fauna and habitat surveys of coupes and forests surrounding the coupes found in map series 4 and 12 would be required to minimise any adverse impacts on the regional population of Greater Glider, assuming collective harvesting of those coupes;<sup>159</sup> and
  - (ii) the combined impacts of harvesting of the Logged and Scheduled Coupes in the other two groupings of coupes analysed (map series 13 and 19; and map series 16, 18 and 25 and the Logged Coupes at map series 24) are unlikely to have a significant impact on a regional population.<sup>160</sup>

#### **B.5. Alternatively, no significant impact on Leadbeater's Possum**

142. Significant impact on Leadbeater's Possum in the Scheduled Coupes is alleged in paragraphs 105B, 116BA, 116BC, 119A of the 2FASOC. For the same reasons as set out in section B.1.3 above, it is not possible for the Court to assess whether, to the extent

---

<sup>154</sup> First Davey Report [CB 5.1.1], at [289(v)].

<sup>155</sup> First Davey Report [CB 5.1.1], at [289(vi)].

<sup>156</sup> First Davey Report [CB 5.1.1], at [289(vii)].

<sup>157</sup> First Davey Report [CB 5.1.1], at [299].

<sup>158</sup> First Davey Report [CB 5.1.1], at [297].

<sup>159</sup> First Davey Report [CB 5.1.1], at [300].

<sup>160</sup> First Davey Report [CB 5.1.1], at [302].

they occur, any forestry operations in the alleged Scheduled Coupes will constitute a significant impact on Greater Glider within the meaning of the EPBC Act.

143. Independently of the above, questions of significant impact in the Scheduled Coupes do not arise for Leadbeater's Possum by reason of the matters set out in section B.2 above.
144. In the alternative to both of the above submissions, VicForests relies on the evidence of Professor Baker that:
  - (a) using a conservative estimate for Leadbeater's Possum Zone 1A habitat,<sup>161</sup> of the Scheduled Coupes only Infant (~10% of coupe area); Jakop (~3% of coupe area) and Smyth Creek (<3% of coupe area) indicated any presence of Zone1A Leadbeater's Possum habitat;<sup>162</sup>
  - (b) no coupes (either Scheduled or Logged) had three or more hectares of Zone 1A Leadbeater's Possum habitat *and* three or more hectares of habitat suitability index (HIS) > 0.5;<sup>163</sup>
  - (c) in the 65 coupes assessed, (2,310 hectares) only 20 hectares was assessed to be Zone 1A Leadbeater's Possum habitat;
  - (d) 55/65 (or 84.5%) contained forest structure not considered high-quality habitat for Leadbeater's Possum;<sup>164</sup>
  - (e) timber harvesting was modelled to have no discernible impact on total habitat hectares for most coupes, and where it did have an impact it was typically minor and transient;<sup>165</sup> and
  - (f) recent anecdotal evidence suggest that Leadbeater's Possum are recolonising areas of young forest that regenerated after the 2009 bushfires.<sup>166</sup>

---

<sup>161</sup> Third Baker report [CB 5.5] at [15].

<sup>162</sup> First Baker report [CB 5.2] at [24].

<sup>163</sup> First Baker report [CB 5.2] at [24].

<sup>164</sup> First Baker report at [CB 5.2] at [26]. The figure of 62 coupes appears to be an error.

<sup>165</sup> Second Baker report at [10].

<sup>166</sup> First Baker report at [150].

## **B.6. No injunction available under s 475(2) of the EPBC Act**

145. In respect of the Scheduled Coupes, for each of the reasons set out above, the foundation for a grant of injunctive relief is not made out.
146. VicForests makes the following further observations as to the nature of the relief sought in paragraph 120 of the 2FASOC.
147. The Applicant seeks an injunction pursuant to s 475(2) of the EPBC Act restraining VicForests from undertaking or authorising any forestry operations in the Scheduled Coupes in contravention of s 18 of the EPBC Act.
148. In terms, the Applicant seeks to restrain VicForests from undertaking or authorising any forestry operations in the Scheduled Coupes that would have a significant impact on a listed threatened species or endangered community without a requisite approval. This does no more than reproduce, but with the risk of sanctions for contempt, that which the EPBC already forbids by s 18.<sup>167</sup> The framing of the relief granted under s 475 of the EPBC Act must bear a relationship with the case alleged and proved against the Respondent and should indicate the conduct which is enjoined or required to be performed.<sup>168</sup>
149. Subsection 475(2) is entitled “prohibitory injunctions”. It provides that if a person is proposing to engage in conduct constituting a contravention of the EPBC Act, the Court may grant an injunction restraining the person from engaging in the conduct. As framed, however, the relief sought is properly understood as mandatory because it requires a series of positive acts (that is, conducting forestry operations in a particular way) as opposed to refraining from acting or the maintenance of the status quo. In terms, s 475(2) does not permit the Applicant to obtain the relief it seeks.<sup>169</sup>

---

<sup>167</sup> *Commadore Business Machines Pty Ltd v Trade Practices Commission* (1990) 92 ALR 563, at 574-575 (Gummow, Foster and Hill JJ); *ICI v Trade Practices Commission* (1992) 38 FCR 248, at 259-260 (Lockhart J).

<sup>168</sup> *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 2)* [2009] FCA 237, at [55], [58] (Logan J); *Commadore Business Machines Pty Ltd v Trade Practices Commission* (1990) 92 ALR 563, at 574-575 (Gummow, Foster and Hill JJ); *ICI v Trade Practices Commission* (1992) 38 FCR 248, at 259-260 (Lockhart J).

<sup>169</sup> Cf s 475(4).



150. Even if relief in the nature of a mandatory injunction is available under s 475(2) of the EPBC Act, an injunction must be certain in its terms, so that a party enjoined may know precisely what may or may not be done pursuant to the injunction.<sup>170</sup> Imprecision and ambiguity must be avoided.<sup>171</sup> This is especially so where relief is in the nature of a mandatory injunction because it requires the taking of positive steps and is by nature more intrusive.<sup>172</sup> Further, constant supervision by a Court such that applications for rulings on compliance are necessary must be discouraged.<sup>173</sup>
151. This Court can have no certainty, or even reasonable certainty,<sup>174</sup> as to what conduct may or may not be done by VicForests and therefore, any injunction in these terms is not capable of enforcement. The conduct sought to be restrained is not identified.
152. The Applicant seeks to restrain “any forestry operations” in the Scheduled Coupes that are in contravention of s 18. “Forestry operations” is defined to include the harvesting of forestry products for commercial purposes including any related land clearing, land preparation, regeneration (including burning) and transportation operations which is sought to be restrained. There is no evidence about how forestry operations in each of the Scheduled Coupes are proposed to be undertaken.<sup>175</sup> The terms of the relief would therefore require VicForests to approach this Court for a ruling as to whether any “forestry operation” in each of the Scheduled Coupes would have a significant impact on a listed threatened species such that approval is required.
153. The task for this Court is to determine whether there is any proper evidentiary foundation to determine whether the proposed forestry operations (as they currently stand) are likely to have a significant impact on a listed threatened species. By its relief the Applicant asks this Court to express a view in the nature of an advisory opinion as to what types of forestry operations *will not* constitute a breach of s 18 of the EPBC Act.

---

<sup>170</sup> *A v Minister for Immigration, Citizenship and Multicultural Affairs* [2018] FCA 1343 at [29] (Mortimer J citing *Optus Networks Pty Ltd v City of Boroondara* [1997] 2 VR 318 at 336-337 (Charles JA)).

<sup>171</sup> *Ibid*; *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 2)* [2009] FCA 237, at [53] (Logan J).

<sup>172</sup> *Businessworld Computers v Telecom* (1988) 82 ALR 499 at 502-3 (Gummow J).

<sup>173</sup> *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 46-7 [78] – [81] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

<sup>174</sup> *A v Minister for Immigration, Citizenship and Multicultural Affairs* [2018] FCA 1343 at [29]-[31] (Mortimer J).

<sup>175</sup> Fourth Paul Affidavit [CB 3.6.1], at [118].

154. Finally, the terms of the relief are wider in ambit than in necessary,<sup>176</sup> and capture not only the listed threatened species the subject of this proceeding but every threatened species and community listed under the EPBC Act.

155. Any injunctive relief, even if available (which is denied) should not be ordered in the terms sought.

## **C. LOGGED COUPES**

### **C.1. No relief concerning logged coupes if injunctive relief concerning Scheduled Coupes not obtained**

156. For the reasons set out in section A.1 above, the claimed relief in relation to the Logged Coupes under the EPBC Act is not available absent a prohibitory injunction having been granted in relation to the Scheduled Coupes.

### **C.2. No breach of precautionary principle in the Logged Glider Coupes**

#### **C.2.1. VicForests' operations are deemed to comply with the Code and therefore the precautionary principle**

157. As pleaded in subparagraph 113A (c) of the defence, the timber harvesting operations in each of the Logged Glider Coupes complied with the Management Standards and Procedures, and accordingly are deemed to have complied with the Code.

158. VicForests refers to and repeats section B.1.4 above.

#### **C.2.2. Precautionary principle cannot be used to effect legislative outcomes**

159. VicForests refers to and repeats section B.1.5 above.

#### **C.2.3. No serious or irreversible threat**

160. In the alternative to sections C.2.1 and C.2.2 above, VicForests relies on Dr Davey's analysis of the question of any serious or irreversible threat to Greater Glider as set out in section B.1.6.3 above insofar as also applicable to the Logged Coupes. In addition,

---

<sup>176</sup> *A v Minister for Immigration, Citizenship and Multicultural Affairs* [2018] FCA 1343 at [29] (Mortimer J citing *Optus Networks Pty Ltd v City of Boroondara* [1997] 2 VR 318 at 336-337 (Charles JA)).

VicForests relies on Dr Davey's evidence of the relatively limited impact on Greater Glider arising from VicForests' forestry operations in the Logged Glider Coupes, noting in particular that:<sup>177</sup>

- (a) in assessing the impact of past forestry operations he performed a desktop assessment of the coupes in question, as described above;<sup>178</sup>
- (b) the past retention of forests to provide current and future suitable habitat for Greater Glider has been satisfactory;<sup>179</sup>
- (c) while local populations of Greater Glider may be impacted, those decreases would not result in the overall decrease of the size of an important population;<sup>180</sup>
- (d) forestry operations taken as a whole or collective would not result in the reduction or fragmentation of available habitat for Greater Glider to the extent that those operations would be likely to displace a regional population, result in a long term decline in a regional population or threaten the viability of the species;<sup>181</sup>
- (e) while forestry operations within an area reduce the spatial coverage of habitat, those operations permit the maintenance of the area of occupancy of the existing Greater Glider population in a planning unit;<sup>182</sup>
- (f) the presence of forest in the formal and informal reserve systems and remaining SMZ and GMZ means that the areas the subject of past forestry operations are unlikely to comprise habitat critical for the Greater Glider;<sup>183</sup>

---

<sup>177</sup> First Davey Report [CB 5.1.1], at Table 15 and [265] – [266].

<sup>178</sup> First Davey Report [CB 5.1.1], at [256], Table 15.

<sup>179</sup> First Davey Report [CB 5.1.1], at [264(i)].

<sup>180</sup> First Davey Report [CB 5.1.1], at [264(i)].

<sup>181</sup> First Davey Report [CB 5.1.1], at [264(i), 264(iii)].

<sup>182</sup> First Davey Report [CB 5.1.1], at [264(ii)].

<sup>183</sup> First Davey Report [CB 5.1.1], at [264(iv)].

- (g) the existing areas of harvesting exclusion are sufficient to avoid the displacement, reduction or substantial limitation of the movement or dispersal of populations of Greater Glider;<sup>184</sup>
- (h) while forestry operations in certain Logged Coupes have likely impacted on individual Greater Glider and local populations, it is not likely that operations have or will result in a long-term decrease in or threat to the viability of a population of Greater Glider;<sup>185</sup> and
- (i) satisfactory policy and planning systems have meant that forestry operations in the Logged Coupes have not interfered with the recovery of the Greater Glider.<sup>186</sup>

#### **C.2.4. Alternatively, if engaged, VicForests' response was adequate and proportionate**

161. If this Court finds, contrary to VicForests' primary submission, that the precautionary principle was engaged in respect of each "forestry operation" in respect of the Logged Coupes, VicForests' response was appropriate and necessary in order to address the threat of serious or irreversible damage to the Greater Glider.
162. *First*, the evidence establishes that of the 26 Logged Coupes the subject of the Proceeding, four were harvested using the clearfell silvicultural method,<sup>187</sup> totalling an area of approximately 68.2 hectares of a total Logged Coupe gross area of approximately 868.79 hectares (or approximately 7.8% of Logged Coupe gross area).<sup>188</sup> Thirteen Logged Coupes were harvested using the Regrowth Retention Harvesting Method.<sup>189</sup> Nine Logged Coupes were harvested using the seed tree method.<sup>190</sup>
163. *Second*, in assessing the Logged Coupes, it is important to consider the actual area harvested. For example, in Hairy Hyde coupe 9.20, an area of 2.58 hectares has been harvested (out of a gross area of 46.27 hectares). In Swing High coupe 9.35, an area of 3.07 hectares has been harvested (out of a gross area of 23.43 hectares). In Rowles coupe 9.32, an area of 7.77 hectares has been harvested (out of a gross area of 42.24

---

<sup>184</sup> First Davey Report [CB 5.1.1], at [264(v)].

<sup>185</sup> First Davey Report [CB 5.1.1], at [264(vi)].

<sup>186</sup> First Davey Report [CB 5.1.1], at [264(vii)].

<sup>187</sup> Second Paul Affidavit [CB 3.4], at [161], [178].

<sup>188</sup> WEP-21A [CB 3.6.21A].

<sup>189</sup> Second Paul Affidavit, [CB 3.4] at [161].

<sup>190</sup> Second Paul Affidavit, [CB 3.4] at [161].

hectares). In Opposite Fitzies coupe 9.21, an area of 6.06 hectares has been harvested (out of an area of 34.3 hectares). In respect of the four coupes which were clearfell harvested:<sup>191</sup>

- (a) *Greendale*: an area of 18.3 hectares was harvested (out of a gross area of 26.97 hectares).
- (b) *Skerry's Reach*: an area of 13.12 hectares was harvested (out of a gross area of 33.8 hectares).
- (c) *Houston*: an area of 16.1 hectares was harvested (out of a gross area of 18.23 hectares).
- (d) *Camberwell Junction*: an area of 20.60 hectares was harvested (out of a gross area of 27 hectares).

164. *Third*, The forestry operations in the Logged Coupes took place in the context of the extant strategic planning process and regulatory landscape including retained forest not associated with the reserve system (such as fixed zoning, habitat and timber harvesting exclusions required by the Code of Practice, the Management Standards and Procedures and the Planning Standards or as directed by the Department),<sup>192</sup> together with the CAR reserve system and VicForests' existing policies, practices and requirements. In this regard, the matters set out in paragraph 89 above are repeated.

### **C.3. Allegations concerning Skerry's Reach coupe**

- 165. Paragraph 113B of the 2FASOC concerns an allegation that VicForests failed to comply with clause 2.2.2.4 of the Code.
- 166. The particulars of the allegation are that VicForests failed to identify mature Tree Geebungs in Skerry's Reach coupe and, contrary to clause 4.5 of the Management Standards and Procedures, read with the prescriptions for the Central Highlands FMA

---

<sup>191</sup> Second Paul Affidavit, [CB 3.4] at [161], [178].

<sup>192</sup> See the C maps series in the Agreed Book of Maps, the post-harvest maps that comprise WEP-35 [CB 8.1A - 8.26A] and section J of the Second Paul Affidavit [CB 3.4], at [283] to [440].

in Appendix 3, Table 14, failed to protect those mature Tree Geebungs from disturbance when logging Skerry's Reach coupe where it was possible to do so.

167. Appendix 3, Table 14 of the Management Standards,<sup>193</sup> provides that in respect of Tree Geebung (*persoonia arborea*) the required management action is to protect mature individuals from disturbance where possible.
168. The state of the evidence when assessed as a whole does not permit a positive finding as to the maturity of the alleged damaged specimens, the practicality of retaining the specimens nor the cause for disturbance.
169. It follows that this allegation must fail.

#### **C.4. Allegations concerning Blue Vein coupe**

170. Paragraph 113B of the 2FASOC concerns an allegation that VicForests failed to comply with clause 2.2.2.4 of the Code.
171. The particulars of the allegation are that VicForests failed to identify an area of Leadbeater's Possum Zone 1A habitat in Blue Vein coupe and, contrary to clause 4.2 of the Management Standards and Procedures,<sup>194</sup> failed to follow clause 2.1.1.3 of the Management Standards and Procedures by applying to the Secretary to the Department to create a special protection zone that includes the Zone 1A habitat in accordance with Appendix 5 of the Planning Standards prior to commencing logging in the Blue Vein coupe.
172. This allegation raises the following questions:
  - (a) a factual dispute as to whether one tree in the coupe, identified as FE101, has the characteristics that meet the description of a hollow bearing tree in the context of Zone 1A habitat;

---

<sup>193</sup> [CB 6.10].

<sup>194</sup> [CB 6.10].

- (b) whether, if it is, it should be included in any “patch” for the purposes of a Zone1A habitat assessment; and
- (c) whether, if it isn’t, any there still exists a “patch” for the purposes of Zone1A habitat.

173. The state of the evidence when assessed as a whole does not permit a positive finding that VicForests’ forestry operations in Blue Vein failed to comply with the Management Standards and Procedures. It follows that this allegation must fail.

#### **C.5. Allegations concerning Hairy Hyde coupe**

174. Paragraph 113D of the 2FASOC concerns a further allegation that VicForests failed to comply with clause 2.2.2.4 of the Code.

175. The particulars of the allegation are that VicForests failed to identify a Leadbeater’s Possum colony within the Hairy Hyde coupe, and contrary to clause 4.2 of the Management Standards and Procedures,<sup>195</sup> failed to follow clause 2.1.1.3 of the Management Standards and Procedures, by applying to the Secretary to the Department to create an SPZ for the colony in accordance with Appendix 5 of the Planning Standards prior to commencing logging the Hairy Hyde coupe.

176. By way of the ASOF, the Applicant and Respondent have agreed the following facts for the purpose of this proceeding:

- (a) Leadbeater’s Possum was detected on 2 August 2016 within coupe 345-505-0006 (Hairy Hyde) at the location marked by a white cross numbered “567” on the maps at Annexure BTN-5,<sup>196</sup> to the Affidavit of Blake Nisbet affirmed 17 September 2018; and
- (b) the Respondent had conducted forestry operations within Hairy Hyde prior to 2 August 2016.

---

<sup>195</sup> [CB 6.10].

<sup>196</sup> [CB 2.4.5].

177. The state of the evidence when assessed as a whole does not permit a finding that a Leadbeater's Possum colony was within Hairy Hyde coupe before the commencement of harvesting on 31 May 2016.<sup>197</sup>
178. This allegation must fail at this threshold level.

#### **C.6. Allegations concerning 20m vegetation buffers**

179. In paragraph 113E of the claim it is alleged that forestry operations in any, some or all of the logged coupes other than Blue Vein, Hairy Hyde, Tarzan, Rowels, the Cambarville logged coupes,<sup>198</sup> and Swing High (113E coupes) were not in accordance with clause 47 of the CH RFA because VicForests failed to comply, in planning and conducting those forestry operations, with clauses 2.3.1.1 and 2.5.1.1 of the Code.
180. The particulars under paragraph 113E make clear that the allegation is that in the 113E coupes VicForests failed to screen timber harvesting operations and new road alignments from view with a 20 m vegetation buffer, and thus failed to:
- (a) plan and manage timber harvesting for the 113E coupes in accordance with clause 5.3.1.5 of the Management Standards and Procedures; and
  - (b) exclude timber-harvesting operations from the exclusion areas created for the 113E coupes in accordance with clause 7.1.2.1(c) of the Management Standards and Procedures.
181. The only evidence in support of this allegation is contained in the Third Lincoln Affidavit, and concerns five Logged Coupes only: Greendale (coupe 9.25), De Valera (coupe 9.31), Professor Xavier (coupe 9.16), Bullseye (coupe 9.19) and Opposite Fitzies (coupe 9.21). The allegation concerning the balance of the 113E coupes,<sup>199</sup> must therefore be dismissed irrespective of whether VicForests' submissions as to the proper

---

<sup>197</sup> Second Paul Affidavit [CB 3.4] at [161].

<sup>198</sup> Paragraphs 9.33 and 9.34 of the 2FASOC.

<sup>199</sup> Glenview (coupe 9.5), Flicka (coupe 9.6), Guitar Solo (coupe 9.12), Mont Blanc (coupe 9.13), Kenya (coupe 9.14), The Eiger (coupe 9.15), Ginger Cat (coupe 9.17), Estate (coupe 9.30), Skerry's Reach (coupe 9.36), Golden Snitch (coupe 9.37), Hogsmeade (coupe 9.38), Houston (coupe 9.39), Rocketman (coupe 9.40) and Camberwell Junction (coupe 9.41).



construction of clause 5.3.1.5 of the Management Standards and Procedures (set out below) is accepted.

182. Clause 5.3.1.5 of the Management Standards and Procedures is contained within section 5.3 titled “Landscape” of chapter 5 “Other values”, which follows detailed provisions to ensure water quality, river health and soil protection (chapter 3) and biodiversity (chapter 4).

### C.6.1. Proper construction of the landscape vegetation buffer requirement

183. Insofar as the CH FMAs are concerned, the landscape provisions state:

5.3.1.1	Central Highlands FMAs
5.3.1.1	Retain all <b>mature</b> trees within 20 m of the Monda Track.
5.3.1.2	Apply a 50 m <b>buffer</b> either side of La La Falls walking track.
5.3.1.3	Apply a 50 m buffer either side of Island Creek walking track and a 100 m buffer around the Ada tree.
	<i>Foreground (0–500 m)</i>
5.3.1.4	Within 500 m of the scenic drives and designated lookouts listed in table 9 in Appendix 5 [of] the Planning Standards, manage <b>timber harvesting operations</b> to ensure landscape alterations are temporary, subtle and not evidence to the casual observer.
5.3.1.5	Screen timber harvesting operations (except <b>selective harvesting</b> operations) and new road alignments from view. Use a minimum 20 m vegetation buffer with particular emphasis on the sensitive landscape features listed in table 9 in Appendix 5 [to] the Planning Standards.
	<i>Middleground (500 m – 6.5 km)</i>
5.3.1.6	In the middle ground, between 500 m and 6.5 km, seen from the features listed in table 9 in Appendix 5 [to] the Planning Standards:
	(a) manage timber harvesting operations to ensure landscape alterations are only subtly apparent within 5 years of the operation; and
	(b) shape, position and time timber harvesting operations and new roads to minimise their visual impact.

184. On its proper construction, clause 5.3.1.5 requires a minimum 20 m vegetation buffer where a new coupe or road is within the foreground (0–500m) of, and may be visible from, a landscape feature listed in table 9 in Appendix 5 to the Planning Standards, with particular emphasis on the sensitive landscape features in table 9.
185. That construction is consistent with surrounding context, in particular clause 5.3.1.6 relating to the middle ground (500 m — 6.5km), which makes plain that the clause is concerned with operations as seen from the features listed in table 9.
186. In other words, contrary to the construction advanced by the Applicant (by implication from the nature of the evidence adduced in the Third Lincoln Affidavit), clause 5.3.1.5 does not require a minimum 20 m vegetation buffer to be applied to *all* timber harvesting operations. Such a construction:
- (a) ignores the sub-heading “Foreground (0-500 m)” and impermissibly construes the phrase “[u]se a minimum 20 m vegetation buffer” in isolation from its surrounding text, namely the introductory phrase “[s]creen timber harvesting operations ... and new road alignments from view”; and
  - (b) would be inconsistent with surrounding context, namely clause 5.3.1.6.

#### **C.6.2. No evidence of any breach of clause 5.3.1.5**

187. There is no evidence in the Third Lincoln Affidavit that any of the five coupes Mr Lincoln visited are within the foreground (0–500 m) of a landscape feature listed in table 9 of Appendix 5 to the Planning Standards, and thus fall within the requirements of vegetation buffer requirements of clause 5.3.1.5.
188. It follows that the allegations in paragraph 113E must be dismissed in entirety.

#### **C.7. Allegations concerning retained habitat**

189. In paragraph 113F of the claim it is alleged that forestry operations in any, one or all of the De Valera coupe, the Ginger Cat coupe, the Greendale coupe, the Professor Xavier

coupe and the Rubicon logged coupes<sup>200</sup> (113F coupes) were not in accordance with clause 47 of the CH RFA because VicForests failed to comply with clause 2.2.2.1 of the Code.

190. Clause 2.2.2.1 of the Code is a mandatory action in a section concerning conservation of biodiversity. It provides:

2.2.2.1	Planning and management of timber harvesting operations must comply with relevant biodiversity conservation measures specified within the <b>Management Standards and Procedures</b> .
---------	--

191. The particulars under paragraph 113F of the claim make clear that clause 4.1.4.4 of the Management Standards and Procedures is the ‘relevant biodiversity conservation measure’ relied on by the Applicant. Clause 4.1.4.4 is within chapter 4 ‘Biodiversity’ and in section 1 ‘Habitat Retention’. To properly construe that clause it is necessary to provide it in its context. Clause 4.1.4 in entirety provides:

4.1.4	Central Highlands FMAs
4.1.4.1	When selecting habitat trees, prioritise hollow-bearing trees where they are present and trees most likely to develop hollows in the short-term.
4.1.4.2	Scatter habitat trees across the timber harvesting coupe in mixed-species forest.
4.1.4.3	Where possible, retain potential hollow-bearing ash eucalypts in clumps to increase their protection from exposure, windthrow and fire.
4.1.4.4	No gap between retained vegetation to be greater than 150 m.
4.1.4.5	Retain habitat trees where they can be most easily protected from damage during harvesting and site preparation treatment.

<sup>200</sup> Defined in paragraphs 9.37–9.40 of the 2FASOC to be Golden Snitch (coupe 9.37), Hogsmeade (coupe 9.38), Houston (coupe 9.39) and Rocketman (coupe 9.40).

192. The phrase “retained vegetation” is not defined. “Habitat tree” is defined in the Management Standards and Procedures to have the same meaning as in the Code. The Code definition is:

‘**habitat tree**’ means a tree identified and protected from harvesting to provide habitat or future habitat for **wildlife**. A habitat tree may be living or dead, and often contains hollows that are suitable shelter and/or nesting sites for animals such as possums and parrots.

193. Clause 4.1.4 only applies to the Central Highlands FMAs; preceding it, however, is clause 4.1.1 that applies statewide. That section provides:

4.1.1	Statewide
4.1.1.1	Retain <b>habitat trees</b> in accordance with the FMA summary provided in Appendix 3 Table 12 (Habitat tree prescriptions).
4.1.1.2	Trees in <b>buffers</b> or other <b>exclusion areas</b> that have been extended beyond minimum required widths can contribute to habitat tree retention requirements.

194. Appendix 3 Table 12 states the following for Central Highlands FMAs:

Forest Type	Habitat Tree Requirements	Comment
Ash/HEMS <sup>201</sup>	All ash eucalypts originating before 1900. At least 40 trees per 10 ha for the length of the rotation in ash forests originating since 1900.	Retain at least 1 potential hollow-bearing tree where gaps between retained trees are greater than 150-metres. Retained trees should be a mixture of hollow bearing trees where present and other trees most likely to develop hollows in the short term.
Mixed Species	40+ trees per 10 ha	

195. There is no allegation concerning clause 4.1.1.1.

---

<sup>201</sup> High Elevation Mixed Species.

### C.7.1. Proper construction of the habitat retention requirement

196. Clause 4.1.4.4 requires VicForests to ensure that there are no gaps greater than 150 m between retained vegetation and hollow-bearing trees, or potential hollow-bearing trees, where such trees are present.
197. The reference to “retained vegetation” in clause 4.1.4.4 of the Management Standards and Procedures must be understood in light of the localised reference to Central Highlands FMAs in Appendix 3 Table 12. In other words, clause 4.1.4.4 should be read harmoniously with Appendix 3 Table 12: the latter explaining that where gaps between retained trees (that is, vegetation) are greater than 150 metres, retain at least 1 potential hollow-bearing tree (that is, hollow-bearing trees, or other trees most likely to develop hollows in short term).
198. Such a construction is consistent with the CH FMP,<sup>202</sup> which is a relevant policy document that has informed the Management Standards and Procedures.<sup>203</sup> In the “Management Guideline” for tree retention on timber harvesting coupes it states (with emphasis added):

On timber harvesting coupes in the Central Highlands:

- all ash eucalypts originating before 1900 should be retained
- at least 40 trees per 10 hectares should be retained for the length of the rotation in ash-eucalypt forest originating since 1900, and in all mixed species forests
- retained tree should be a mixture of:
  - hollow bearing trees (where present)
  - *other trees most likely to develop hollows in short term*

Distribution of retained trees:

- In mixed species forest retained trees should remain scattered across the timber harvesting coupe
- Potential hollow-bearing ash eucalypts should be retained in clumps to increase their protection from exposure, windthrow and fire
- Within 150 m of retained vegetation there is no requirement to *retain potential hollow-bearing trees* (although at least 40 trees per 10 hectares should be retained across the coupe)
- Trees should be retained where they can be most easily protected from damage during harvesting and site preparation treatment

---

<sup>202</sup> [CB 6.15; p 26].

<sup>203</sup> Code [CB 6.9; p 24].

### C.7.2. Insufficient evidence of breach of the 150 m gap requirement

199. The evidence in support of this allegation is contained in the Second Mueck Report. No evidence has been filed concerning Ginger Cat (coupe 9.17) in support of this allegation, and to that extent the allegation must be dismissed.
200. It is apparent from the Second Mueck Report that he has misdirected himself as to the true construction of clause 4.1.4.4, assuming VicForests' construction is accepted. For example, although Mr Mueck recognises that trees have been retained in the coupes,<sup>204</sup> he does not consider those trees to be retained vegetation within the meaning of clause 4.1.4.4, nor does he consider whether there are (or were) any hollow-bearing trees, or potentially hollow-bearing trees, in the coupes.
201. In that event, there is no evidence supporting a finding that VicForests' has breached clause 4.1.4.4 in any of the alleged coupes because there is no evidence that there are gaps greater than 150 m between retained vegetation and hollow-bearing or potential hollow-bearing trees that were or are present in any of the coupes. All of the coupes the subject of the allegation contained 1939 regrowth,<sup>205</sup> and predominantly Mountain or Alpine Ash.<sup>206</sup> This type of regrowth forest generally contains only low numbers of mature and senescent trees.<sup>207</sup> In other areas of the Central Highlands, particularly in the mixed-species forests in the east of the planning area, hollow-bearing trees are more abundant, and in those areas retained trees will be a mixture of existing and potential hollow-bearing trees.<sup>208</sup> But the forest age and type in the coupes the subject of this allegation means it was unlikely to have actual or potential hollow-bearing trees.
202. For the above reasons this aspect of the claim must be dismissed.

---

<sup>204</sup> Second Mueck Report [CB 4.8], at [23].

<sup>205</sup> See [CB 7.20.3e], [CB 8.18; p 3], [CB 8.19; p 2], [CB 8.20; p 3], [CB 8.21; p 3](Rubicon coupes: Golden Smith, Hogsmeade, Houston, Rocketman); [CB 7.21.3e] and [CB 8.22; p 2](De Valera); [CB 7.17.3e] and [CB 8.16 p 2], (Greendale); [CB 7.14.3e] and [CB 8.26; p 3](Professor Xavier); [CB 7.6.3e] and [CB 8.5; p 2] (Ginger Cat).

<sup>206</sup> [CB 8.5; p 2] (Ginger Cat coupe plan); [CB 8.16; p 2] (Greendale coupe plan); [CB 8.18; p 3](Golden Snitch coupe plan); [CB 8.19; p 2], (Hogsmeade coupe plan); [CB 8.20; p 3], (Houston coupe plan); [CB 8.21; p 3], (Rocketman coupe plan); [CB 8.22; p 2], (De Valera coupe plan); [CB 8.26; p 3] (Professor Xavier coupe plan).

<sup>207</sup> CH FMP [CB 6.15; p 25].

<sup>208</sup> CH FMP [CB 6.15; p 26].

**C.8. Alternatively, if any part of the Code was breached, any loss of exemption from Part 3 of EPBC Act is limited**

203. VicForests refers to and repeats section B.2 above.

**C.9. No significant impact on Greater Glider in the Logged Glider Coupes**

204. In paragraphs 31–40, 105D, 115AB, 115AD, 115AF, 115BB, 115CB, 115DB, 115DD and 119B of the 2FASOC the Applicant alleges significant impact on Greater Glider in the logged coupes. VicForests refers to and repeats section C.2.3 above.

**C.10. No significant impact on Leadbeater’s Possum in the Logged Leadbeater’s Possum Coupes**

205. In paragraphs 22–29C, 105B, 115AA, 115AC, 115AE, 115BA, 115CA, 115DA, 115DC and 119A of the 2FASOC the Applicant alleges significant impact on Leadbeater’s Possum in the logged coupes. VicForests refers to and repeats section B.6 above.

**D. RELIEF**

**D.1. Injunctive relief**

206. For the reasons set out in section A.1 above, the claimed relief in relation to the Logged Coupes under the EPBC Act is not available absent a prohibitory injunction having been granted in relation to the Scheduled Coupes.

207. For the reasons set out in sections B.1 - B.5, the foundation for a grant of injunctive relief in respect of the Scheduled Coupes is not made out. As no coupe plans have been prepared in respect of those coupes, there is therefore no sufficiently advanced proposal to harvest any of the Scheduled Coupes. Accordingly, the Applicant cannot demonstrate that VicForests has engaged, is engaging or is proposing to engage in conduct constituting an offence or other contravention of the EPBC Act in respect of the Scheduled Coupes.

208. Moreover, as set out in section B.6 above, the form of the injunctive relief sought in respect of the Scheduled Coupes is misconceived.

## D.2. Declaratory relief

209. Although no part of its pleaded case, the Applicant now says it will also seek a declaration of right pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) that:

- (a) VicForests has breached s 18(2) of the EPBC Act by reason of its forestry operations in the Logged Leadbeater's Possum Coupes; and
- (b) VicForests has breached s 18(4) of the EPBC Act by reason of its forestry operations in the Logged Glider Coupes.

210. For the reasons set out earlier in these submissions, VicForests has not breached s 18(2) of the EPBC Act by reason of its forestry operations in the Logged Leadbeater's Possum Coupes or s 18(4) of the EPBC Act by reason of its forestry operations in the Logged Glider Coupes. Accordingly, the declarations sought by the Applicant ought not be made.

211. In *Ainsworth v Criminal Justice Commission*,<sup>209</sup> the High Court said:

It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which it is neither possible nor desirable to fetter... by laying down rules as to the manner of its exercise. However, it is confined by the considerations which mark the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have a real interest and relief will not be granted if the question is purely hypothetical, if relief is claimed in relation to circumstances that have not occurred and may never happen, or the courts declaration will produce no foreseeable consequence for the parties.

212. Further, in so far as the declarations sought by the Applicant relate to the lawfulness of conduct that has already occurred, such a declaration will produce no foreseeable

---

<sup>209</sup> (1992) 175 CLR 564, at 581.



consequences for the parties. To make a declaration of what the legal position was in the past is of no relevance to the rights and duties of these parties as they now stand.<sup>210</sup>

I G WALLER

H L REDD

R V HOWE

Counsel for VicForests

---

<sup>210</sup> *Direct Share Purchasing Corporation Pty Ltd v LM Investment Management Ltd* [2011] FCA 165, at [40].