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Federal Court of Australia
District Registry: Victoria
Division: ACLHR

No. VID 1228/2017

FRIENDS OF LEADBEATER'S POSSUM INC

Applicant

and

VICFORESTS

Respondent

Applicant's Reply Submissions

Applicant's case and the TRP

1. VicForests' submission that the Applicant's pleaded case does not take issue with preparation of the TRP: **VicForests Closing Submissions (VCS) [18], [22], [81], [91], [92], [113]** is erroneous. The Applicant alleges a failure by VicForests' to specify "timber harvesting prescriptions" to protect the Greater Glider (FASOC [113]). Such prescriptions may include the designation of a less intensive silvicultural system or exclusion areas where the Greater Glider is or may be present. Because the TRP specifies the silvicultural system that "will be used" in a particular coupe (CB 6.8A p5 "Silviculture System"), and estimated net area as "the gross coupe area minus any areas likely to be excluded" due to Code prescriptions and retained habitat (CB 6.8A p5; 3FASOC [6.3]), an allegation that VicForests has failed to specify any or adequate prescriptions to protect the Greater Glider requires examination of the silvicultural systems and net coupe area designated in the TRP, and the process by which those methods and areas were so designated.
2. That the case was conducted on this footing is clear from the pleadings:
    a. The Applicant alleged that VicForests failed to specify "timber harvesting prescriptions" to protect the Greater Glider ([113A.4(f)(ii),(iv),(v.B)]);
    b. VicForests responded alleging that it had "determined to shift from traditional silvicultural systems to a more adaptive suite of silvicultural systems", "has not finalised any proposed harvesting plans" for each scheduled coupe and would apply Code prescriptions in those coupes ([6.3(c)], [42]-[70B] and [73]-[104E] Defence);
    c. In Reply to 6.3(c), the Applicant alleged that the TRP showed the silvicultural methods that would be used, that VicForests had continued to use those systems in coupes where the Greater Glider was present while purporting to develop new systems, that the HCV and Systems documents did not impose any mandatory prescriptions for the use of less intensive methods of harvesting (CB 1.15 [2.6.1(b)(ii)]) (the recent 12 August 2019 iterations, do not impose any mandatory prescriptions for the use of less intensive methods of harvesting (2.4(h)), that the proposed new systems did not constitute a shift

and, that VicForests would not use the "new systems" and that even if those new systems were used, they would fail to comply with cl 2.2.2.2.

d. In Reply to [42-70B] and [73-104E], it is alleged the TRP states the net area expected to be logged and the practice in the logged coupes was to plan and conduct forestry operations which have, are having or will have a significant impact (CB 1.15 [4-9]). VicForests led no evidence that it will apply exclusions for Greater Glider that will reduce the net area of the scheduled coupes at all, or in a manner different to the logged (and tendency) coupes where no such exclusions were applied. The Court can be satisfied that no exclusions for Greater Glider will reduce the net area and existing Code exclusions have been accounted for in net areas stated on the TRP.

3. By their Defence, VicForests made the selection of silvicultural systems a key issue in the proceeding. To now state that the TRP, which records (3FASOC [6]) both the selection of the silvicultural systems that will be used in and an estimated net coupe area, is outside the scope of the pleadings is unsustainable. VicForests is attempting to artificially break up the elements of the case to avoid scrutiny under the EPBC Act. Such an approach should not be taken: *Brown v Forestry Tasmania (No 4)* [2006] FCA 1729 (***Wielangta***) at [63].

4. The Respondent's assertion that "forestry operations" has always been synonymous with "logging, i.e. the harvesting of trees" and that only the latter is relied upon for the s 18 analysis: VCS [22] and [493] is baseless. "Forestry operations" is a term derived from the legislation and regulatory instruments and has the meaning derived from those instruments. If forestry operations was synonymous with "logging" there would have been no need for the Applicant to amend to change "logging" to "forestry operations". Further, the 3FASOC and Reply plead failure to comply with cl 2.2.2.2 in the scheduled coupes in the past, present and future tense, which necessarily agitates management not only harvesting, c.f **VCS [606]** (see Applicant's closing submissions (**ACS**) [37], 3FASOC [113H]-[113I], Reply [2.5.7] and [2.5.6]).

Meaning of "an RFA forestry operation"

5. **VCS [23]** submits that any loss of exemption is limited to the forestry operation or operations that is or are not undertaken in accordance with the CH RFA and does not extend to other forestry operations in that coupe or coupe groups that are undertaken in accordance with the CH RFA. VicForests never explains as a matter of fact what is "a forestry operation".

6. VicForests attempts to construe "forestry operation" by reference to the definition in the RFA Act: i.e. RFA forestry operations are forestry operations "conducted in relation to land in a region covered by the RFA". There is nothing to be gained from that phrase. The reference to "the land" in the definition of RFA forestry operation designates the region to which the RFA

applies – for example, the Central Highlands. It does not mean that forestry operations are to be defined by the land on which a specific incident of forestry operations occurs.

7. Contrary to **VCS [56]**, the pleaded reference to coupes has no bearing on the definition of "an RFA forestry operation" (or forestry operation). The definition of forestry operation must derive from the text, the text of the Act, RFA Act and CH RFA, the last of which states that forestry operations means planting, managing or harvesting of trees. "Coupes" are not referred to in statutory text, but are an incident of VicForests' forest management.

8. **VCS [59]-[60] ff** seeks to confine the term "action" by suggesting that a single "forestry operation" (which remains undefined as a matter of fact) will equate to an "action". However that is not necessarily so. VicForests is effectively attempting to re-run the argument that failed in *Wielangta* at [63]-[65].

9. A similar approach should be adopted here. The couping of the Central Highlands constitutes a "project" and/or an undertaking and/or a series of activities. That is not to say that a single forestry operation cannot be an action, it is just that an action is not necessarily confined to a single forestry operation (whatever that is). After all, s 38(1) specifically uses the term "forestry operation", not "action", unlike other provisions in Part 3, indicating a deliberate choice not to equate forestry operations with actions.

When is the exemption lost and in respect of what "forestry operation" and "action"

10. **VCS [75]-[78]**, **[495]**, submits the Applicant cannot identify with sufficient precision an RFA forestry operation in the scheduled coupes that will constitute a breach of cl 2.2.2.2 or the relevant "action". It relies upon VicForests' revision of forestry operations. As per the Applicant's closing submissions, the overwhelming evidence shows that VicForests is and will continue to use the traditional clearfelling, seed tree and regrowth retention harvesting systems. This is confirmed with the finalisation in August 2019 of the HCV and Systems and Regeneration documents where the commitment to clearfell remains.[1] What were "prescriptions" in earlier versions of the Systems document for methods 1 to 4 have become no more than "guidelines"[2]. The August 2019 HCV document contains a fresh assertion, "VicForests has a strong focus on risk management that is guided by the precautionary principle"[3]. The evidence at trial provides absolutely no support for that statement. The same applies to the assertion in the August 2019 document of an expectation that, by 2020, variable retention systems will account for 75% of VicForests Annual Harvesting Operations[4]. The two now finalised documents designed to obtain FSC certification simply dress up the traditional

1 Systems, version 1.2, p19
2 See, eg, Systems, version 1.2, p17, regarding clearfelling and seed tree
3 HCV document, p16
4 P9

methods as new methods, with the exception of single tree selection, which Mr Paul said would not be used in any of the scheduled coupes. The Court can give no credence to VicForests' purported commitment to shift to more adaptive silvicultural systems. Nothing about the August 2019 documents changes the position and certainly there is no evidence of any commitment to change in any of the scheduled coupes.

11. For the Applicant to obtain an injunction under s 475, it is sufficient for it to point to proposed conduct and to establish by evidence that it is more probable than not that VicForests will engage in that conduct. The 2019 TRP proposes clear fell, seed tree or regrowth retention harvesting in specified net areas for each of the scheduled coupes. VicForests has continued to employ these methods in other coupes in the Central Highlands notwithstanding their purported commitment to shift. At its highest, VicForests might only apply "new methods" Variable Retention 2 and 3, methods not sufficiently distinguished from existing methods such that forestry operations labelled by those methods remain more likely than not to threaten serious/irreversible damage and have significant impact. The Court can readily injunct the use of the traditional or proposed silvicultural methods, or any of proposed methods 1 to 3 in the scheduled coupes. A Court may grant an injunction based on a reasonable belief about what VicForests will do, even if certainty cannot be achieved[5].

12. **VCS [76]** submits that VicForests' silvicultural systems are undergoing a process of development such that the system that may be used in each coupe is unknown. As the VicForests submission and the August 2019 documents confirm, the proposed demonstrates systems are in their infancy. Reference is now made to a "5 year coupe planning process initiative"[6], of which no evidence was given at trial, and to a "landscape planning initiative", both "in different stages of development"[7]. The Court cannot act on evidence that VicForests' will shift to new systems, even if it were committed to do so, the new systems are both embryonic and not in place – the Court must determine the matter on the basis of the systems identified in the TRP. Mr Paul, VicForests' spokesman, would not undertake to the court not to use any of the traditional methods in the scheduled coupes. The possible (but non-committal) application of un-tested and undeveloped mitigation measures ought not permit a person to avoid the Act, particularly where the person has formally documented their proposed conduct without such measures and says the decision as to their possible application will only occur upon commencing the conduct.[8] The Guidelines provide that mitigation measures should only be relied upon to conclude an action will not have a significant impact where those measures are demonstrated to be effective

5 See *Brown v Tasmania* (2017) 261 CLR 328 at [454] (Gordon J).
6 August 2019 HCV document, p16.
7 August 2019 HCV document, p17.
8 Coupe plans are finalised upon entry of contractor to a coupe: Paul (1) CB 3.2 at [43].

(based on studies and research), with a high degree of certainty, to prevent the impact (Guidelines CB 4.2.2.14 p8 at [3]). That is not this case. None of the new systems meet this standard.

13. **VCS [88]** submits that the definition of forestry operations in the CH RFA does not encompass the preparation, review of and changes to the TRP. It is entirely unclear how the preceding paragraphs are said to support that proposition.

14. **VCS [90] and [493]** submit that the proposition that an exemption can be lost at the management stage and also at the harvesting stage is problematic, and that the Applicant relies on different "forestry operations" to establish impact from that which loses the exemption. That submission fails to distinguish between different types of forestry operations: an exemption may be lost when trees are not managed in accordance with the Code; it may be lost when trees are not harvested in accordance with the Code; it may be lost when trees are not planted in accordance with the Code. The fact that trees are not managed *and* are not harvested in accordance with the Code is not a reason that s 18 will cease to operate. Rather, s 18 will operate in respect of either and both incidents of forestry operations, which are separately and together one "action" and one "forestry operation" (see ACS [28]-[29]).

15. The relevant impact is a direct consequence of both managing and harvesting within the meaning of s 527E of the Act. **VCS [493]** seeks to draw an artificial wedge between planning/proposing conduct (managing trees before they are harvested), and carrying out conduct (harvesting), for the purpose of assessing impact. That is contrary to the definition of action (series of activities, undertaking or project). It also defeats the purposes of the Act – to regulate proposed conduct before harm is occasioned – which necessarily relies on assessing the impact of planned conduct prior to it being carried out. In respect of forestry operations, if the exemption is lost during management/planning (upon making the TRP, interim strategy and biodiversity instructions without applying cl 2.2.2.2: ACS [36]), it is necessarily lost for the conduct (harvesting) planned and undertaken in consequence of the breach. *First*, because harvesting conducted consequential upon or pursuant to management decisions which are contrary to cl 2.2.2.2, is itself harvesting contrary to cl 2.2.2.2. *Second*, if 'managing trees before they are harvested' is abstracted and isolated from its consequential harvesting, the 'managing' could never be considered to have any impact within the meaning of the Act, there would be no purpose to its inclusion in the conduct exempted by s38. *Third*, and related, the term 'managing of trees **before they are harvested'** provides an express textual nexus between the management and the harvesting. *Fourth*, the management is evidence of the manner by which the future harvesting will occur, see also ACS [32(a)].

16. **VCS [91]-[92]** seeks to artificially divorce the TRP from the forestry operations in the coupes. The TRP is not a separate process wholly divorced from what happens in each coupe. It designates the location, boundary and silvicultural method to be used in each coupe. It is the use of those methods at those locations – in the absence of any effective prescription to ameliorate the effect of those methods – that the Applicant seeks to injunct.

17. **VCS [502]** admits that separate incidents of "harvesting trees" may constitute one action being an undertaking or series of activities. It is unsustainable that "managing of trees before they are harvested" and "harvesting of trees" for the same purpose, by the same person, at the same location would not be one action and one forestry operation.

The Code does apply to the making of the TRP

18. **VCS [100]-[113]** submits that the Code only applies to Part 6 of the SFT Act, and thus the Code cannot be breached by the preparation of the TRP. This is wrong. Section 37(3)(b) of the SFT Act, which is in Part 5, titled "Management of Timber Resources by Vic Forests", expressly provides that "Vic Forests must ensure that a plan prepared under this section is consistent with … any relevant Code of Practice relating to timber harvesting". Section 43(2)(b) provides, in relation to amendment to a TRP "Vic Forests may change a timber release plan at any time if the change is not inconsistent with … any relevant Code of Practice relating to timber harvesting".The making of, and any changes to, the TRP, must therefore comply with the Code. A forestry operation that fails to comply with the Code, i.e. the management of trees and consequential harvesting, will not be exempt: ACS [32]. Clause 2.2.2.2 is a clause that readily applies to the making of, or changing of, the TRP, given that the TRP identifies the location and size, and designates the silvicultural method for each coupe. The fact that there are limited references within the Code to the TRP (see **VCS [107]**) is unsurprising given that the SFT Act itself expressly requires action be taken consistently with the delegated instrument. In any case the Act cannot be read by reference to the Code.

19. All that said, it is a distraction from the real issues in the case. The issue is, what is VicForests proposing to do in the scheduled coupes? The TRP indicates the methods designated for each coupe. If what VicForests is proposing to do does not comply with the Code, VicForests cannot claim the benefit of the exemption for that forestry operation (see VCS [72]).

20. **VCF [63-65] and [93-99]** claim the loss of exemption relates only to the species subject of the prescription breached. There is no textual support for that assertion and it is contrary to the scheme of the Act. Once the exemption is lost, the question turns to whether that action is contrary to s18. It is as simple and as clear as that.

What sort of breaches will lead to a loss of exemption

21. **VCS [114]-[143]** submits that clauses that involve matters of degree or subjective judgment, such as cl 2.2.2.2, are not clauses breach of which leads to a loss of exemption under s 38. To this end, VicForests submits that the distinction drawn in the Separate Question Reasons between clauses that cause a loss of the exemption and clauses that do not turned upon whether the clauses were capable of clear interpretation and implementation (e.g. **VCS [131]**).

22. That was not the premise of the Separate Question Reasons. The distinction drawn turned upon clauses that were capable of affecting the conduct of forestry operations and clauses that were not: Separate Question Reasons [35], [149], [171]. Clearly cl 2.2.2.2 is capable of affecting the conduct of forestry operations – to speak colloquially, it requires VicForests to be cautious in the manner in which it conducts forestry operations where the Greater Glider is or may be present.

23. Clause 2.2.2.2 is less precise in what it requires than other clauses of the Code. However the submission that a provision that involves matters of degree or judgment cannot be applied must be rejected. Judges and juries "often grapple with concepts that are difficult to define with precision… [s]uch concepts, although attended by a degree of difficulty in application, are not usually regarded by the Courts as incapable of application": *Monis v The Queen* (2013 249 CLR 92 at [338] (Crennan, Kiefel and Bell JJ)). The task, and the obligation, of the Court is to construe legislative and regulatory provisions and to give them meaning. That may involve construing broad terms more narrowly by reference to context, which context includes the penalty that attends the offence: *ICAC v Cunneen* (2015) 256 CLR 1 at [57]; *Monis v The Queen* (2013) 249 CLR 92 at [311] (Crennan, Kiefel and Bell JJ). Further and in any event, Australia knows no doctrine of statutory (or regulatory) uncertainty: *Brown v Tasmania* (2017) 261 CLR 328 at [149] (Kiefel CJ, Bell and Keane JJ); [306], [448]-[456] (Gordon J) and the authorities cited therein on regulatory provisions; see also [506]-[508] (Edelman J). Provisions must be given meaning according to text, purpose and context.

24. All that said, cl 2.2.2.2 is not uncertain in what it requires (cf **VCS [139]**). To a large extent, what it requires is a process – the process of carefully evaluating and properly assessing management options to avoid serious or irreversible damage where practicable. If there is evidence of a good faith attempt to engage in that process, there will likely be compliance. The difficulty for VicForests is that there has been <u>no</u> good faith attempt to engage in that process. It therefore seeks to argue the Court that cl 2.2.2.2 should be given no operation. Questions about the margins of the operation of cl 2.2.2.2 do not arise (cf **VCS [140]**).

25. Contrary to its own submissions, VicForests acknowledges cl 2.2.2.2 exists and operates with sufficient clarity and certainty in a State legislative context (**VCS [141]-[143]**). *Brown*

Mountain is a good example. It is not clear how VicForests can admit the clause has a sufficiently clear operation in that context, but deny that it has that operation in the federal context. It may be the case that there are many ways to satisfy cl 2.2.2.2 (**VCS [138]**) – indeed that is doubtless the purpose of framing cl 2.2.2.2 in broad terms. However, the fact that a regulatory provision reserves flexibility to the person regulated as to how to comply does not mean the provision should be given no operation.

The correct test for the precautionary principle

26. The Applicant can establish a breach of the precautionary principle whether it is construed as the Applicant contends or as it was in *Brown Mountain* (cf **VCS [178]**).

27. *Australian Conservation Foundation Incorporated v Minister for the Environment* (2016) 251 FCR 308 (**VCS [196]-[202]**) does not assist VicForests to establish that cl 2.2.2.2 should be construed in the manner that Osborn J held that it should. It concerns a different statutory expression of the precautionary principle (in s 3A(b)). While that decision may be relevant to cl 2.2.2.2 insofar as the two provisions have common elements, on each occasion the question must be, what does the text of the relevant statute require.

28. VicForests' submission that a textual analysis supports the conditions precedent identified in *Brown Mountain* (**VCS [204]-[210]**) fails to have regard to the text of cl 2.2.2.2 or the definition of the precautionary principle in the Code.

    a. Uncertainty is in the final sentence of the definition. It is not a precondition, it is a matter that cannot be used as an excuse to fail to take precautions.

    b. As to the threat of serious or irreversible damage, the word "threat" is not used in the definition in the Code – rather the obligation is to properly evaluate and assess management options "to wherever practicable avoid serious or irreversible damage to the environment". This is clearly distinct from the test applied by Osborn J.

29. VicForests' submission must fail to the extent that they insist that cl 2.2.2.2 contains preconditions that are not to be found in the text of either cl 2.2.2.2 or the definition of the precautionary principle. The context cannot change the express terms of the text in cl 2.2.2.2 or the definition of "precautionary principle" in the Code: cf **VCS [209]-[210]**.

Competing objectives

30. VicForests repeatedly submits that legislation regulating forestry operations has multiple purposes and is directed to achieving a balance between ecological objectives and timber production: e.g. **VCS [148]-[149], [215]**. This submission appears to be intended to characterise the Applicant's case and construction of provisions as ones which prioritises conservation of threatened species at the complete expense of timber production. But that is not the Applicant's

case, it does not suggest that forestry operations must cease completely. The Applicant seeks protection for vulnerable species where forestry operations will cause serious or irreversible damage or will have a significant impact. Relief is sought in 66 out of over 1000 coupes on the TRP. The Applicant's case reflects the compromise in the legislation between the objectives of conservation and exploitation of timber resources – it allows timber harvesting to continue with modification as appropriate to provide for conservation. In truth it is VicForests' case that seeks a construction that permits exploitation of forest resources at the complete expense of the conservation of biodiversity – as the evidence of Mr Paul made plain, VicForests does not even accept that its activities "might" harm the Greater Glider.

31. **VCS [221] and [229]** re-state an excerpt of *MyEnvironment v VicForests* [2012] VSC 91 (***MyEnvironment***) of little relevance to the present proceeding. That statement was made in a case that concerned application of precautionary principle to a species which *had* been considered during the planning process with a prescription and reserves developed for it. None of that has occurred for the Greater Glider, to which no consideration was given during planning of reserves and prescriptions in the CH RFA Area, or at all since its listing.

"Gaps disclosed in legislation"/judicially constructed policy

32. The Applicant does not seek to "fill gaps" in legislation (cf **VCS [223]**) but simply to apply cl 2.2.2.2. VicForests seeks to read the provision out of existence and give it no work to do.

33. The Applicant does not seek to effect a policy change: **VCS [225]-[231].** It simply asks the Court to determine whether the process mandated by cl 2.2.2.2 has been undertaken. Where that process has not been undertaken, the exemption provided for in s 38 falls away.

Sufficiently advanced plans

34. VicForests seeks to make much of their assertion that the TRP only designates the most intensive silvicultural method that may be used and that planning for the scheduled coupes is now stale and out of date (**VCS [233]-[235], [289]**). The first assertion is contrary to what the TRP actually states (CB 6.8 p5). The second is a product of VicForest's own conduct, it is of no significance whether a less intensive method may be used when it has been established by the evidence that <u>each of the proposed methods</u> that may be used causes the relevant damage/has the relevant impact.

35. The case is entirely different to *MyEnvironment*, c.f **VCS [234]**. The allegations of fact in *MyEnvironment* turned on the method of silviculture (the evidence was that clearfelling posed the relevant threat, but not that retention harvesting would (*MyEnvironment* [280-281], [287], [304] and [307])) and the application of prescriptions for the species in a coupe plan affecting the configuration of logging (protection of Zone 1A (*MyEnvironment* at [258]-[259])). Here, the evidence is that <u>all</u> proposed methods will cause the relevant damage/impact and there are

no effective prescriptions that will be applied to configure logging to ameliorate the impact of those methods on the Greater Glider. There are key factual differences, here, the Greater Glider is proved to be present in substantial numbers in each coupe, in *MyEnvironment*, Osborn J placed weight in finding no threat on there being no direct observation of Leadbeater's Possum or its nest trees in Gun Barrell, combined with application of prescriptions and reserves developed for the species (*MyEnvironment* at [278 (d)], [283], [288]-[290]).

36. It is irrelevant whether the coupes selected and scheduled for harvesting are "imminently" exposed to harvesting (**VCS [241]-[242], [249]**). The April 2019 TRP is the best evidence of VicForests' current proposed conduct for the scheduled coupes. At its highest, VicForests says its intention *may* change over the life of the TRP (VCS [242]), and "there is a possibility" the coupes will not be returned to the schedule for harvesting (VCS [249]). That is not sufficiently probative to displace the contemporaneous, formally proposed conduct in the April 2019 TRP, particularly given the express refusal to provide relevant undertakings.

37. **VCS [10a], [615] and [617]** submits the Applicant must establish the 'precise nature and extent of proposed conduct' in the scheduled coupes, and describes its plans as hypothetical. There is no such test. In *Wielangta* the trial judge found there was some uncertainty *concerning the extent of operations in individual coupes*, but nevertheless found the proposed forestry operations was an action likely to have a significant impact on relevant species on the evidence in that case (see [60]-[66],[102],[111], [137],[146],[162]). There is nothing "hypothetical" about the selection of coupes for timber harvesting stated on the TRP. The parties' experts were comfortable opining on whether the proposed conduct in the scheduled coupes posed a threat and was likely to have a significant impact. The Court can and should make findings of fact on the basis of that evidence.

Applicant's use of tendency evidence

38. VicForests cites principles relating to inferences and the balance of probabilities: **VCS [250]-[256]**. However the authorities cited by VicForests demonstrate this simple point: the Applicant need only establish **that it is more probable than not** that VicForests will continue to use the traditional silvicultural methods or rebadged versions of them in coupes where the Greater Glider is present.

39. Put simply, the evidence is that VicForests has designated the scheduled coupes for harvesting by the traditional methods; has continued to harvest surrounding coupes where Greater Gliders are present by those methods notwithstanding its purported commitment to shift to a more adaptive suites of methods. It has been saying since 2007 that it will shift to more environmentally friendly methods to obtain FSC but has not done so: ACS [340]-[358]. The 2014 Audit stated VicForests should continue to explore alternative harvesting systems, ie it

had already been 'exploring such systems' prior to 2014 (CB 11.22 p22-23). In its submissions, VicForests points to the 2017 HCV and Systems documents at that time "under development" and "changeable" (**VCS [277]**). The August 2019 versions of the documents do not provide for new methods that will be used in the Central Highlands. There are no prescriptions designated to or which will or may have the effect of ameliorating the impact of forestry operations on the Greater Glider. For each of methods 1 to 4, "prescriptions" in the previous drafts have been replaced with "guidelines"[9]. An amendment adopted in the August 2019 HCV document refers to the notion of "increasing" tree retention levels where "feasible and practicable", this, in the context of "commercial viability" as a desired outcome and objective[10] In the circumstances the Court should readily conclude that it is more probable than not that VicForests will harvest the scheduled coupes using clearfell, seed tree or regrowth retention harvesting or methods that are the functional equivalent of those methods.

40. The Respondent's summaries of the matters established by the tendency coupes at **VCS [257]-[275]**, and that contained in Annexure C to the ACS (agreed for the purposes of s 50 of the *Evidence Act* 1995 (Cth)) demonstrate six matters.

41. *First*, the net harvest area listed on the TRP establishes the minimum area that is more likely than not to be harvested within each scheduled coupe. The net area harvested or stated on the coupe plan to be harvested in 11 tendency coupes either closely aligns with, or is larger than, that stated on the TRP.[11] In six tendency coupes a smaller net area was logged or is stated on the coupe plan to be logged than stated on the TRP.[12]

42. *Second*, the only likely basis on which a smaller area might be harvested than that listed on the TRP is Leadbeater's Possum THEZ, and so this possibility only arises in Ash scheduled coupes. In five of the six coupes where a smaller area was logged, this was due to THEZ for Leadbeater's Possum in Ash. Smith's evidence is that these areas are not likely to be suitable for Greater Glider due to differences in habitat requirements for the species (Smith (3) CB 4.10.1 p11 at [Q1a]; Smith (4) CB 4.12.1 p24, Davey agreed: VCS Sch 1 second row).

43. *Third*, no exclusions for Greater Glider or its habitat will be applied to the scheduled coupes. Only Puerile coupe is alleged to have had areas excluded for Greater Glider. That coupe had a far greater area harvested than listed on the TRP: 37ha of 47ha was logged by seed tree method (i.e. the ordinary 25% was excluded), compared to the scheduled 29ha net area on the TRP. The inference from that coupe is that VicForests will intensify its harvesting in coupes where

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9 See, eg, August 2019 Systems document, version 1.2, p17.
10 Section 4.1.1, p11.
11 Closely aligns in: Fire Scan, Below Learmonth, Tropical, Floater, Ivanhoe; Net area logged larger than TRP in: Pamir, Twisting, Puerile, Simpson's road, Squeezee, Dejavu, see Ann. C ACS.
12 Pieces of Eight, Teamwork, Flow Zone, Impala, Bayern Munich, Lure: see Ann. C ACS.

Greater Glider occurs and then label existing Code exclusions as "GG habitat".

44. *Fourth,* a larger area than that listed on the TRP may be logged in the scheduled coupes. The 5 other coupes where a larger area was logged than stated on the TRP, or is so directed on the coupe plan, each contained multiple Greater Glider detections.[13]

45. *Fifth,* traditional methods will be used and the system listed on the TRP establishes the system more likely than not to be applied to each scheduled coupe. In 11 of the tendency coupes the silvicultural system used aligned with the TRP, in 2 coupes STR was used in coupes listed on the TRP as CFE, and in 5 coupes RRH was used in coupes listed on the TRP for CFE.

46. *Sixth,* the reliance sought to be placed on the distinction between gross and net coupe areas is reliance on no more than the set of existing Code prescriptions (as described at VCS [257]-[275]), none of which is designed for Greater Glider, and which will not prevent the relevant threat or impact (see ACS [57], [438], [175]-[190], [656]–[680], and below at [64]). Further, such reliance must be understood by reference to VicForests' methods for inflating gross coupe boundaries to intentionally include exclusion areas such as SPZ (ACS [88] – [89]).

Surveys

47. **VCS [281]-[289]** asserts that the Court may infer that the scheduled coupes will be surveyed for Greater Glider by the Department or VicForests. The August 2019 HCV document acknowledges a lack of resourcing in DELWP leading to a failure to update the zoning scheme[14]. The same document now asserts there will be a "representative sample" of post harvest surveys by VicForests to compare with pre harvest DELWP surveys[15]. VicForests makes no commitment to survey all coupes where the Greater Glider is or may be present prior to harvesting. No positive inference that all coupes will be surveyed is available. Despite the Department's survey program, Castella, the show coupe, was not surveyed by it for Gliders, yet McKenzie detected an abundance of the species (see ACS [269]). VicForests did not survey a single logged coupe for Greater Glider. VicForests says Paul's evidence is that under the new regime coupes will be surveyed differently and in more detail (**[VCS [77], [288]**). His evidence is unreliable and cannot be acted[16] on and the documents detailing the 'new regime' expressly adopt VicForests' existing survey procedures, which were applied to the logged coupes and failed to detect a single Greater Glider (see ACS [273]–[281]).

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13 Pamir, Twisting, Simpson's Road, Squeezee and Dejavu: See Ann C to ACS.

14 At p8.

15 At p26.

16 It is sufficient to find such evidence unreliable, to find that Mr Paul was dishonest or to make an adverse credit finding, as per **VCS [233]** is unnecessary. The assertions as to limits on cross examination at VCS footnote [61] are without substance.

48. **VCS [341]** says it is not known whether survey findings of Greater Glider will result in protection of areas for the Greater Glider. That must be rejected. VicForests will not exclude habitat for Greater Glider even if it is found in a coupe: the Interim Strategy says so and no such habitat was excluded in any logged or tendency coupes[17].

Other uncertainties

49. **VCS [290]-[292]** asserts that timber harvesting will be subject to the Systems Document and the 2017 HCV document, the TRP, legislation/regulations, the results of pre-harvest surveys/opportunistic sightings of threatened flora or fauna, and the CH RFA. This is assertion that is not substantiated with any references to evidence, and the significance of which is not explained. In any event, it is that pleaded approach to its future harvesting which was the subject of Smith and Woinarski's findings of threat/significant impact[18].

50. **VCS [292]** submits that the TRP does not provide sufficient detail as to how operations might occur in the coupe. However in a case where there is no effective prescription for the Greater Glider, the coupe plan will make no difference. There is no prescription to be applied to ameliorate the effects of harvesting on the Greater Glider. That is why it suffices for the Court to know the silvicultural method that <u>will</u> – or indeed the range of silvicultural methods that <u>may</u> be used. Where each of those methods causes the relevant damage or impact, it does not matter which method is in fact selected and it does not matter that there is no coupe plan because there is no effective prescription to be implemented. See also [37] above.

51. **VCS [293]** submits the findings in *Brown Mountain* and *MyEnvironment* in respect of coupes with finalised plans demonstrates that its approach to the present litigation is not 'shielding its operations from scrutiny'. Yet in this proceeding, 7 coupes[19] had finalised coupe plans and *imminent or active operations* during the proceeding – precisely as in those two cases. Yet VicForests claims the Court cannot make factual findings in respect of its further conduct <u>*even in these coupes*</u>, apparently now because those coupe plans have become 'stale'. Contrary to its submission, VicForests approach to the litigation is intended to shield its conduct from the scrutiny that occurred in *MyEnvironment* and *Brown Mountain*.

Threat of serious or irreversible damage and significant impact to Greater Glider

52. **VCS [317] and [326]** submits populations and habitat across the east coast distinguish Greater Glider from findings of threat to Spot-tailed Quoll, Giant Burrowing and Large Brown Tree

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17 Also see above at [2.d], [43] and ACS [284]-[287], [292]-[295].

18 See ACS [106]-[200], [604]-[605], [606]-[696], below at [57]–[72] and [97]–[104], Woinarski (1) 4.7.1 p25 at [86]-[87]; Woinarski (3) 4.11.1 p21 [9]-[13] and p5-6 [Q3]-[19]; Smith (1) 4.2.1 p53-54 at [31], Ltr EJA to Smith CB 4.2.7, Smith (4) 4.12.1 p23 [Q5], p25 [Q3].

19 c.f **VCS [245]** alleging 5 such coupes, 2 further coupes were subject of the 15 Nov 2017 interlocutory injunction application and part-harvested: Chest and Epiphanie with coupe plans at CB 8.29 and 8.31.

Frog in *Brown Mountain*. Those same facts align Greater Glider with positive findings of threat for Powerful and Sooty Owl, both found to have large areas of occupancy across multiple states and extending to New Zealand (*Brown Mountain* at [525][526], [531]). Further, most facts recounted at **VCS [306]** in support of threat in *Brown Mountain* apply equally or more persuasively to Greater Glider on the evidence in this case.

53. **VCS [315], [316], [323], [346]-[347], [546] and [556]** assert that Smith did not take populations in other states and East Gippsland into account, that his evidence as to threat and impact is limited geographically and there is no evidence of such impacts 'across the species distribution and range', and that Smith's opinions were limited to the coupe rather than the species as a whole. Each is plainly wrong.

54. *First*, regarding other states, it is a selective reading of the transcript reference given T399.40-43. Smith there said he considered the Central Highlands' population as an important population in isolation (T 399.40-44). He reasoned in his report that the Central Highlands is an important population ***expressly by reference to*** the populations and habitats of Greater Glider elsewhere in Victoria and Australia: see ACS [146(a),(d),(f),(g),(h)]. Further, Smith's written evidence goes into some depth about the other populations of Greater Glider in Victoria and other States: Smith (1) CB 4.2.1 p11, p 27, pp 30-31.

55. *Second*, it is not necessary to establish threat *across total distribution and range*. If it were, it would require an action which destroys the entire remaining population.

56. *Third*, in cross-examination Smith expressly rejected the proposition that he did not take into account impacts on the species as a whole in respect of the logged and scheduled coupes[20].

57. *Fourth*, threats to a population necessary for the species long-term survival, recovery and maintenance of genetic diversity (being those Smith found were 'important populations'), constitute threats of serious or irreversible damage to that species given such populations are precisely those required for long-term survival and maintenance of the species as a whole. Because Smith reasoned that the Central Highlands population is important, it follows that all impacts he describes in the logged and scheduled coupes are impacts on the species as a whole. Death of substantial numbers of, and long-term habitat loss for, a population necessary for the species long-term survival, recovery and maintenance of genetic diversity is important, notable or of consequence for the species as a whole.

58. *Fifth*, Smith's evidence on the population in the Central Highlands as a whole arising from harvesting in the logged and scheduled coupes was:

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20 "No. I think I've taken into account the context of the impact where I've assessed the affects of the logging is likely to irreversible. I have assumed that that has contributed to the cumulative impact of the species as a whole in the central highlands and will contribute and cause ongoing decline of the greater glider population." (T431.36-432.2)

a. Forestry operations in each scheduled coupe are likely to adversely affect the Greater Glider both individually and collectively (Smith (4) CB 4.12.1 p23).

b. Greater Gliders are likely to be permanently lost from all logged coupes and this negative effect on the Greater Glider population as a whole will be one of cumulative ongoing decline (Smith (1) CB 4.2.1 p56; T432.26-30).

c. Greater Glider population size and distribution in the Central Highlands will continue to be reduced by on-going removal of critical habitat (old growth trees with hollows and uneven-aged old growth forest) in timber production forests under current management, which will ultimately lead to the species extinction in the Central Highlands and the loss of broad genetic diversity inherent in this population (Smith (1) CB 4.2.1 p52 at [29f]).

d. Gliders in clearfelled forest will die, and overall Glider numbers and population size in the logged forest will decline after each harvesting event, and will continue declining due to the cumulative increase in the net area of forest clearfelled in space and time (Smith (3) CB 4.10.1 p11).

e. There is good scientific evidence that timber harvesting under System 1 (clearfelling and seed tree harvesting) in Mixed Species and Ash forests of the Central Highlands removes critical habitat for the Greater Glider and is causing the species long term decline (Smith (4) CB 4.12.1 p14).

f. All proposed Systems (1-5, March Systems document) are likely to modify or remove habitat critical to the survival of Greater Gliders and cause a long term decrease in the size of the Greater Glider population in the Central Highlands both at the coupe level and collectively at the regional level. (Smith (4) CB 4.12.1 p13, p26).

59. As to recolonisation, the Court ought to prefer **ACS [130]-[140],** Smith (3) 4.10.1 p66-67 [1f], Smith (4) 4.12.1 p24-25 [i], and [65]-[67] below which details the essential preconditions for recolonisation that are not met (retained trees, corridors and Glider reserves), over the selective account of Davey's evidence at **VCS [325], [545] and [554(a)-(c)]**. Smith disagreed with Davey's conclusions because the studies Davey relied on were of selective harvesting not comparable with intensive harvesting practices in the Central Highlands (Smith (3) CB 4.10.1 p18 at [Q6]).

60. **VCS [330], [346] and [546]** asserts that Smith only had regard to the reserve system in a limited way if at all. The reference given (T427.6) supports no such conclusion. It is plainly wrong given Smith's oral evidence (for eg T431.20-34) and his reports which detail his consideration of the layout and failings of the reserves: ACS [175]-[190]; Smith (1) CB 4.2.1 p19-20, p26-27, p50 [29c]; Smith (3) CB 4.10.1 p6, pp9-12). Smith's reference to "broad SPZ mapping" is made in the context of his previous answer that "there is no map which shows me that there are

wildlife corridors connecting logging coupes with these reserves and SPZ which contains greater gliders…", ie the SPZ mapping is itself broad and does not evidence a functional wildlife corridor and reserve system (T426.39-.47).

61. At **VCS [333]-[338]** and **[545]** and Tables A-C, VicForests seeks to rely on descriptions of in-coupe and landscape protections to support inferences that the scheduled coupes are flanked by reserves and net areas will be small or 'smaller'. The descriptions are submissions with no reference to Davey's evidence, and Smith's evidence negates the inferences agitated.

62. *First*, in respect of landscape protections, the expert evidence as to why the reserves cannot defeat a finding of threat or significant impact is at ACS [175]-[190]. Smith rejected the proposition that there are reserves in close proximity to the logged and scheduled coupes: "generally they are actually quite distant" (T441.11-19).

63. *Second*, the reliance on a "relatively smaller portion of the coupe" is no more than reliance on existing prescriptions, it should be rejected for the reasons at [41] - [46] above and [64] below. VicForests says Smith accepted the difference between net and gross areas as relevant – in fact he said it is only relevant provided you have an understanding that the difference is going to be permanent through time, and he did not have that understanding and subject to future logging, that difference may diminish (T444.34-41). In any event, Smith considered gross/net areas on the TRP in opining on impact for existing and "new" systems (Smith (1) 4.2.1 p53 at [31(b)], CB 4.2.7, Smith (4) 4.12.1 p23 [Q5] p25 [Q3]), and those are the minimum areas more likely than not to be harvested in the scheduled coupes, see [41] above.

64. *Third*, existing in-coupe prescriptions are ineffective to mitigate threat, Smith's evidence is:

    a. current habitat tree and large tree protection measures and other mandatory management measures will have little or no conservation benefit for protection of Greater Gliders in forest subject to timber harvesting (Smith (3) CB 4.10.1 p11).

    b. Greater Glider populations are likely to be permanently eliminated from all areas of forest managed under clearfell (including seed tree) silviculture on short rotations, irrespective of prescriptions and measures proposed under the Interim Strategy because they prefer old growth or uneven-aged old growth and current intensive clearfell harvesting eliminates such forests (Smith (1) CB 4.2.1 p52 at [Q29c]).

    c. Greater Gliders in any narrow (<50m wide) retained areas will likely die due to lack of adequate foraging area, but under current harvesting practices many retained areas are very narrow (20m or less) and unlikely to be adequate to retain resident Greater Glider populations (Smith (1) 4.2.1 p18 & p48 at [Q28d]).

    d. The level protection of unlogged forests in streams and drainage lines is insufficient to satisfy cl 2.2.2.8 (wildlife corridors) (Smith (1) 4.2.1 p34 at [f]).

e. Even if 25% or 30% of trees are retained, many are subsequently killed by burning, or subsequently required to be felled for safety reasons (as observed in Castella). Trees left have a high likelihood of loss to windthrow (Smith (4) CB 4.12.1 p23-24). 25% or 30% protection on coupes is of little or no value to mitigate impacts unless connected to one another and nearby reserves by corridors. Remaining habitat is fragmented without corridors that would allow recolonisation (Smith (4) CB 4.12.1 p24).

f. There is no evidence that the retained forest in each coupe will be suitable for Greater Glider, and no system in place to survey for the best Greater Glider habitat and protect it (Smith (4) CB 4.12.1 p24 at (e)).

g. Some coupes contain large patches of forest retained to protect Leadbeater's Possum habitat, but much of this habitat is likely to be unsuitable for Greater Gliders (Smith (4) CB 4.12.1 p24, see [42] above).

65. **VCS [351] and [546]** further assert that Smith described his assessment as not detailed, very general and not highly precise. That is a selective reading of his evidence. In fact he said his assessments of the significance of logging impact were not precise *for the reasons that he had given* – and repeated, the lack of corridor mapping and lack of knowledge of Greater Gliders and their habitat in the reserves (T432.44-433.5), with which Davey agreed: ACS [186], [199], [176]. His preceding response had in fact explained in minute detail his impact assessment in Mont Blanc and the relevant uncertainties as to corridors applied to that coupe (T432.20-30). He explained that he could be more specific in terms of numbers or percentages *on individual coupes*, if he was taken to them (T440.32-34) – but he was not. He continued to explain that the uncertainty is in the capacity of the Greater Glider population to re-invade a logged coupe at some point in the future and its recovery (T440.32-44, see also Smith (3) 4.10.1 p66-67 [1f], Smith (4) 4.12.1 p24-25 [i] as to preconditions for recolonisation).

66. **VCS [352], [546] and [556]** assert that Smith accepted that impact assessment could not be undertaken where there is no certainty as to the extent and method of operations in each coupe. In fact, Smith expressly rejected that proposition (T450.18-23).

67. Smith's repeated evidence as canvassed above was that the *duration* and *irreversibility* of the damage is uncertain (and not precise) due to the absence of a mapped corridor system and knowledge of Greater Glider abundance and habitat in the reserves. That evidence establishes uncertainty as to the damage - the second condition precedent to the precautionary principle (on Osborn J's test), contrary to **VCS [356]-[358] and [556]**.

68. **VCS [367], [368(b)-(h)], [544], [547]-[553], [555(b)] and [559]** assert no threat to Greater Glider in the logged coupes nor significant impact in the scheduled coupes relying on aspects of Davey's evidence. Smith said that conclusion was not justified by reference to facts or criteria

for impact assessment and is inconsistent with the scientific evidence and observed facts (Smith (3) CB 4.10.1 p20). He expressly disagreed with each of Davey's findings referred to (Smith (3) 4.10.1 p7-9, p19-20). Smith's evidence ought to be preferred (see ACS [191]-[200]). Notably:

a. Contrary to there being appropriate planning and satisfactory retention through the Code for Greater Glider, see [64] above, ACS [175]-[190] and Smith (3) 4.10.1 p8 at [iii];

b. Smith disagreed that local population losses could occur without resulting in regional population decline (Smith (3) CB 4.10.1 p19) or causing a long term decrease in Greater Glider numbers, and said such a conclusion was inconsistent with regional surveys evidencing that Greater Glider numbers have declined in logged forests (Smith (3) 4.10.1 p7). See also [57]-[58] above.

c. Smith said area of occupancy is not maintained where timber harvesting reduces spatial coverage of habitat, and harvesting eliminates habitat and causes fragmentation threatening populations in reserves (Smith (3) CB 4.10.1 p6, 8, 9-10, 12, 16-17, 19; ACS [148]-[155], at [179]).

d. In respect of critical habitat, refer to ACS [204]-[221] which establishes that there is a real, not remote, possibility that forestry operations in the logged and scheduled coupes adversely affected critical habitat. The issue with use of the term 'old growth' raised at **VCS [350]** is irrelevant: it is the characteristics of the forest described by Smith as comprising critical habitat and the presence of such forest in the subject coupes that is relevant (**ACS [208]-[209]**), regardless of whether that forest ought to be labelled 'old growth' or not. So much was accepted by Davey (T492.31-42).

e. Smith said Davey's conclusion that operations in logged coupes have not modified, destroyed, removed, isolated or decreased the availability of habitat causing Greater Glider population decline is inconsistent with the scientific evidence that Greater Gliders are killed and eliminated from clearfelled coupes and do not recover, if at all for about 40 plus years, and that clearfelling will continue to cause a gradual cumulative decline in Greater Glider population size in the Central Highlands (Smith (3) 4.10.1 p8-9).

f. Regarding interference with recovery, Smith said Davey gave no proof that current systems are effective and he is not aware of any data which shows that current systems have either maintained or improved Glider numbers. He said available scientific assessments indicate that the Glider population has declined, which demonstrates that the current systems have failed to sustain Glider populations. Logging in Victoria and

other States is causing on-going decline in Glider numbers and Victoria is likely by far the greatest contributor to this overall decline (Smith (3) 4.10.1 p9, 20; ACS [394]).

g. Smith said Davey's assessments were based on incorrect assumptions regarding recolonisation, relocation, and the adequacy of parks and SPZs, and were unreliable due to lack of on-site assessment (Smith (3) 4.10.1 p4-6).

69. Davey's evidence that planning will be appropriate in the scheduled coupes was based on the erroneous assumption that VicForests would survey the coupes for Greater Glider, which Davey said was required (**VCS [544],** ACS [300]-[301]). Davey assumed habitat trees would be retained consistent with the Code, yet see [64] above and ACS [129], [136], [604k]. Smith disagreed that planning would be appropriate, rather current observed and prescribed practice will result in a permanent and significant decline in Glider numbers (Smith (3) 4.10.1 p20), and see ACS [69]-[105]. Further, the planning Davey said is required in the scheduled coupes in order to minimise impacts referred to at **VCS [555(a)]** will not be undertaken: the approach to the logged and tendency coupes and Interim Strategy establish that VicForests will not inform its plans for the scheduled coupes by surveys for Greater Glider (even if they happen to occur).

70. The repeat references at VCS part C.2.3.6 and E.2 (significant impact) confirm that the real dispute at the foundation of the differences between the experts was whether existing reserves and prescriptions were sufficient to prevent serious/irreversible damage and significant impact. In fact, that is the only reasoning provided for any of Davey's opinions. Smith's evidence should be accepted for the reasons at ACS [175]-[200], [389]–[412] and [64] above. Contrary to **VCS [321]** as to decline, Smith said Lumsden's surveys *were* accurate but her models *were not* (T397.35-39).

71. Smith disagreed with Davey's opinion at **VCS [331**] that Victoria has good systems for conservation pending finalisation of the Glider Recovery Plan. He said no justification was provided and it is inconsistent with the scientific facts that Glider numbers are declining in production forests (Smith (3) CB 4.10.1 p13 at [Q3]; ACS [175]-[190]). Further, the reference to the draft Action Statement "providing guidance" must be rejected given that draft of the document provides no such guidance whatsoever and the status of it is entirely unknown: who drafted it, was it outright rejected within the Department, are there later drafts, what is its date.

72. The proposition at **VCS Sch 1** that Gliders can survive and move out of their home range ought to be rejected: ACS [115]-[124] and [140].

Alternatively, careful evaluation of management options will be undertaken

73. The Court can have no confidence in VicForests' assertion at **VCS [359]** that careful evaluation of management options will be undertaken. At **VCS [361]**, the highest that VicForests can put it is to say that the adaptive systems are "in development" and will "likely involve identification

of and greater protection of HCVs, including Greater Gliders". That review process has been in place at least since 2016, the August 2018 versions of the HCV and Systems documents, now adopted, have failed to produce any prescription that provides any protection to the Greater Glider. The only content specific reference to Greater Glider management in any of the new systems documents appeared in the 2017 version of the HCV document was removed in 2019 and is not found in the August 2019 version. In any case, it simply restated the content of the Interim Strategy as constituting VicForests management plan for the species (CB 3.6.120 p67-68).

74. Those developments are not evidence of compliance with cl 2.2.2.2, they are evidence of VicForests seeking FSC certification in order to obtain the economic benefits of that certification (cf **VCS [362]**). Moreover, VicForests has previously tried and failed to achieve that certification, with auditors concluding that VicForests' assertions about improved practices are not implemented on the ground: see ACS [338]-[341].

75. Contrary to **VCS [364]**, Smith did not advocate a zero risk approach and measures proportionate to the threat are those which will facilitate the species recovery – i.e. removal of the species from the vulnerable list: see ACS [439]-[444], [461]-[468] and [447]-[448].

76. **VCS [365]** seeks to rely on other Code prescriptions applied to the logged coupes as evidence of appropriate cautiousness. That proposition gives no work to do to the precautionary principle if it can be discharged through no more than compliance with other provisions.

Miscellaneous allegations in the logged coupes

77. **As to Tree Geebung, VCS [373]-[383]** ignores those labelled "DDD" recorded on 7-8 Feb 2018, which McKenzie said included damaged individuals, and which were found by Mueck to include individuals both mature and damaged: ACS [483]-[487]. Further, substantial compliance is not compliance (cf **VCS [385]**).

78. **As to Zone 1A, VCS [416]-[418]** refers to Baker's attack on Shepherd's Z1A map in defence of his own model that predicted no Z1A in Blue Vein, and asserts "patches" are easily manipulated to produce a desired result. In that exchange, Baker accused Shepherd of "bias" (a witness whose evidence was not contested), on the basis that Shepherd had not drawn the patch of Z1A with 'straight lines' and in a 'proper circle', and had minimised the patch size relative to the trees to achieve a desired result (T620.28-624.1).

79. Both assertions were wrong. *First*, as Osborn J found in *MyEnvironment* at [253], a patch need not be regular in configuration. It ought not be drawn in 'straight lines' and with 'proper circles'. *Second*, expanding the distance between the trees and the edge of the patch artificially and impermissibly precludes identification of Z1A that factually meets the Code definition, because an inflated patch size reduces the relative density of HBTs. In fact Shepherd ***had inflated*** the

patch compared to VicForests' and the Department's approach: both apply 10m buffers from trees to the edge of the patch (CB 3.4.49 p20 at [Aii]), yet Shepherd used 15m buffers in the example Baker criticised and still found Z1A (CB 4.6.5 p8; T621.35-37).

80. The Applicant's position is that Z1A is found with ***no buffer at all*** between the trees and the edge of the patch (see Shepherd's Method 2 patches at CB 4.6.1 pp 13 – 15; ACS [519] – [521]). Interpretation that mandates any such buffer (or 'tree protection zone') impermissibly prevents identification of Z1A on a plain text reading of the prescription by adding a further hurdle (as with the 100m rule), which reduces the incidence of Z1A and therefore the total forest it protects, and generates uncertainty as to what the standard requires. Z1A arises at Blue Vein even with 10m and 15m buffers so applied.

81. It is not to the point that interpretation or parameters are required to apply Z1A (**VCS [418**]). The question is whether VicForests' interpretation leads to a failure to identify Z1A which meets the prescription. If that is the case then that interpretation (or parameter) is incorrect.

82. Baker's model was plainly wrong at Blue Vein, predicting 0-2 and 2-5 HBTs/3ha, in the area where agreed facts as to HBTs found *in the field* that were simply GIS analysed by Shepherd, demonstrate more than 10 living HBTs per 3ha (ACS: [516]-[525]). Baker's refusal to concede the point (as he later did for other coupes) was unreasonable.

83. The obligation to identify Z1A falls on VicForests, and as Osborn J found, the Department's survey methodology cannot be resolutive of the interpretation of that prescription (*MyEnvironment* [332]-[333]) (cf **VCS [419]**).

84. **As to 20m buffers, VCS [433]-[437]** asserts a lack of evidence but ignores Smith's observations, the view and VicForests' own coupe plans. The only coupes for this allegation for which there is no direct observation of absent 20m buffers are the Rubicon coupes.

85. **VCS [448]** asserts that no connection can be made between 20m visual screens and Greater Glider. That is mistaken. A corridor system along roads would mitigate impact and reduce fragmentation (ACS [441]; Smith (4) CB 4.12.1 pp24-25 at [i]). This further demonstrates that the set of prescriptions cannot be siloed: breach of any prescription causes impacts to other aspects of the ecosystem and results in loss of exemption for all purposes.

86. **As to 150m gaps addressed at VCS [462]**, Mueck's opinion as to interpretation is not relevant – that question is for the Court. The issue taken with his interpretation had no bearing on Mitchell's maps which simply measured the distance across harvested areas. Her evidence was accepted, and VicForests own coupe plans reveal that no trees were retained in the harvested areas of most such coupes (ACS [571]). As to Ginger Cat, **VCS at [461]** ignores the post-harvest map (CB 8.5A) showing more than 150m across the harvested area. The evidence establishes gaps greater than 150m between retained vegetation.

87. **VCS [463]** contends 'retained vegetation' means 'hollow-bearing' or 'potential hollow-bearing' trees, and there is no evidence such trees were present in the relevant coupes being 1939 Ash. Even if retained vegetation carries that meaning (which it does not: ACS [568]-[569]), 'potential hollow-bearing tree' simply means 'other trees most likely to develop hollows in the short term' (per the CH FMP CB 6.15 p26; Management Standards 6.10 p75). It is a relative term meaning those trees more likely to develop hollows *than other trees present*, and such trees are always present. In any event, the evidence is that 1939 Ash ***are precisely those trees*** most likely to develop hollows in the short term (Woinarski (1) 4.7.1 p9 at [24(b)]; Woinarski (2) 4.9.1 pp5-6 at [13]; T647.4-.8; Smith (1) 4.2.1 p21, p27-28).

"Coupe groups"

88. Contrary to **VCS [484]**, there is no uncertainty about the concept of coupe groups.

89. At [9] and [10] of the 3FASOC, the Applicant identifies the coupes by individual name and number (e.g. Glenview 298-516-0001 and Flicka 298-519-0003), but also groups the coupes by geographic location where those coupes are in a patch (e.g. Mount Despair logged coupes). There is absolute clarity as to what is constituted by a coupe group because the coupe groups are described with precision in [9] and [10]: cf **VCS [486]**.

90. In the paragraphs that plead significant impact, the Applicant pleads that impact by reference to each coupe by name, as well as pleading impact by reference to some or all coupes. There is no reference in those paragraphs to any "coupe groups". VicForests is mistaken if it considers that a "coupe group" refers to anything but patches of coupes (e.g. Mount Despair Logged coupes). That said, a coupe group does constitute "some coupes". But "some coupes" is not limited to "coupe groups" so described at [9] and [10]. For example, the Court might assess the impact of logging the Mount Despair logged coupes and the Starlings Gap logged coupes and that would be within both the scope of "some coupes" and the pleading.

91. VicForests says the concept of "coupe groups" only emerged during the running of the trial. But "coupe groups" is simply a convenient way of referring to coupes in a group or a patch. VicForests cannot claim to have been surprised or taken off guard by what is no more than a simple use of English language: cf **VCS [484]-[486]**. VicForests did not raise any issues about the pleadings being insufficiently clear in this respect prior to trial nor did they raise it as a pleading issue during the trial. The point is of no merit.

Proper construction of "impact" and "significant impact"

92. Sections 18 and 38(1) are not co-extensive: see [8]-[9] above (cf **VCS [493]-[494]**). A series of forestry operations may lose the exemption under s 38(1). The Court can then consider that series of activities (or project, or undertaking) as one action having one significant impact.

93. Contrary to **VCS [474], [475], [483] and [532]**, the Applicant's pleading of significant impact is not limited to the Guidelines: the test as stated in *Booth* is pleaded as a separate particular, being sub-paragraph **(h)** at 3FASOC [32], [73], [105D], [22], [42], [71], [105B].

94. As accepted by VicForests at VCS [503], "likely" to have a significant impact means "a real or not remote chance or possibility". In *Booth*, Branson J observed that this is a lower standard than 'more likely than not'. The Applicant need only establish that there is a real or not remote chance or possibility of a significant impact in the scheduled coupes whichever silviculture method is used, and that impact need not be a "more than 50%" chance (*Booth* at [97]-[98]; EPBC Guidelines p3).

95. The references to *Booth* at **VCS [511]-[514]** support a finding of significant impact in this case on both Greater Glider and Leadbeater's Possum because the Spectacled Flying Fox was not itself a listed species (it was part of the World Heritage Property). An impact on a species already facing a high risk of extinction will be important, notable or of consequence at a lower threshold than a species not already facing such risk.

Leadbeater's Possum

96. At **VCS [570]-[573] and [576]**, VicForests submits surveys and THEZ are effective for Leadbeater's Possum. Woinarski said notwithstanding technical advances and the tenacity of researchers, Leadbeater's Possum can be elusive and timid, and not readily detected, so it is highly likely that some populations in coupes are not detected and hence not protected. The facts at Blue Vein and other coupes such as Greendale where the THEZ was harvested prior to detection, seriously subverting its conservation value and affecting the viability of the colony, demonstrate the point (Woinarski (2) 4.9.1 at [24]), noting that Blue Vein was the subject of a pre-harvest survey that detected a colony in the north but failed to detect (and hence protect) the colony in the south. See also ACS [665]-[671].

97. The proposition at **VCS [578(f)]** that the species is at highest density in young (i.e. 20-40 year old) stands is directly contrary to the expert evidence that the species is dependent on hollow-bearing trees: ACS [618], [652]-[653], [661], [687]. It should be rejected.

98. The Conservation Advice states that harvesting is a serious threat to the species (CB 6.23, e.g. at pp6-7, cf **VCS [580]**). The expert evidence was that harvesting causes direct and indirect loss of hollow-bearing trees: ACS [616(b), (g)], [652]-[655]).

99. As to harvesting generating one of the 2 habitat components (**VCS [579])**: that does not assist VicForests. Harvesting generates the abundant habitat component at the expense of, and by causing current and future long-term loss of, the limited and declining habitat component (hollow-bearing trees). Only the decline and lack of the latter element threatens the species. See ACS: [616(b), (f)], [684]-[688].

100. **VCS [518]** says an area is potential habitat for Leadbeater's Possum within 7 years of harvesting if there are sufficient hollow-bearing trees, however Woinarski emphasised that 'sufficient' is not just one or two (T543.5-14), and both his and Smith's evidence was that harvesting accelerates the loss of such trees even where retained due to damage from burning and windthrow (ACS: [652], [129]). Baker agreed (Baker (1) 5.2.1 at [158] and T653.42 – T654.27). In those circumstances, the weight of the evidence is that *there are unlikely to be sufficient hollow-bearing trees* in an area in the years following harvesting, even if some are immediately retained. Smith's observations of retained tree damage and the same on the view at Guitar Solo and Mont Blanc coupes confirm this.

101. The statements at **VCS [583]-[586]** are not an accurate account of Woinarski's evidence as to the congruence of Leadbeater's Possum detections and Baker's modelling. The transcript reference does not support the proposition for Blue Vein at [583(a)]. Woinarski said many records are in areas Baker modelled as low suitability and we don't know enough about the movement patterns of the species to understand how many of them move up to 600 metres. That may well be exceptional, in which case anything more than, say, 200 metres would be unhelpful for the model to predict the occurrence of Leadbeater's Possum (T551.38-552.4)

102. As to the assertion at **VCS [587]** that there was no opposing expert on modelling to Baker and his evidence should therefore be accepted – that cannot be so. Woinarski's evidence directly responded to Baker's modelling, finding it unreliable, and contradicted Baker's opinions as to impact. Woinarski's evidence as to impact is more probative given his expertise in the relevant species, his field inspections of 11 coupes and his consideration *of actual detections*, rather than reliance only on modelling shown to be unreliable and without apparent regard to the species actual presence in the coupes: ACS [723], [622], [697]-[714].

103. As to inferences from Tables A-C agitated at **VCS [589]**, Woinarski's evidence negates the inferences VicForests seeks to draw: as to reserves see ACS [658]-[664]. As to 'relatively smaller' net areas, such reliance is no more than on existing prescriptions: see ACS: [656]–[680]. Further, the net areas of each relevant coupe were expressly considered by Woinarski in forming his opinions (Woinarski (2) 4.9.1 p15-16 at [36]). As to the use of less intensive methods, Woinarski said there has been no documentation in the peer-reviewed literature (or unpublished reports) reporting on the relative extent of mitigation delivered by these options, they have not been demonstrated to be effective or subject to relevant tailored studies or surveys, and there is not a high degree of certainty about the extent to which they will reduce impacts of timber harvesting on Leadbeater's Possum beyond that imposed by conventional harvesting techniques. He concluded that none of the given harvesting systems change the conclusion that harvesting at many of the individual coupes and across the set of all coupes will

have a significant impact on Leadbeater' Possum, and render it more likely that the species will be made extinct. (Woinarski (3) 4.11.1 at [5]-[6], [11]).

Prohibitory injunctive relief based on past conduct

104. **VCS [604]-[605]** emphasises that the Court can only restrain the conduct that was found to constitute the contravention. This is a matter to be addressed at the penalty not the liability phase. Briefly stated for present purposes, if VicForests is found to have conducted forestry operations in coupes in the Central Highlands where the Greater Glider is present in a manner that breached the Act, the Court can injunct VicForests from engaging in the same conduct in other coupes in the Central Highlands where the Greater Glider is present.

Prohibitory injunctive relief based on proposed conduct

105. **VSC [614]** submits that the TRP cannot be characterised as proposed conduct. That is correct. The TRP is evidence of what VicForests proposes to do.

106. **VSC [623]-[624]** submits that a declaration will produce no foreseeable consequence for the parties. This is again a matter to be addressed at the penalty phase. However the Applicant observes that, similarly to what was said by the High Court in *M61 v Commonwealth* (2010) 243 CLR 319 at [103], it cannot be said that in the circumstances of this case, a declaration will produce no foreseeable consequences for the parties. In this case the Applicant alleges that VicForests, a State government agency, is failing to comply with the law in the conduct of its forestry operations. If the Court declares that VicForests conduct has been and will be unlawful, VicForests, as a State government agency, will comply with any declaration made by the Court (notwithstanding that they were previously unaware of their obligations to comply with model litigant guidelines). There is a considerable public interest in State agencies conducting themselves lawfully and in the lawful exercise of government power. Further, there is a considerable public interest in the conservation of Australia's native fauna, which is a public resource, which has no ability to protect itself, and in respect of which the Department of Environment, Land, Water and Planning has been found to have failed in its duty to protect that resource.

Date: 4 September 2019

Jim Delany

Julia Watson

Tanya Skvortsova