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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	VID615/2020
File Title:	VICFORESTS v FRIENDS OF LEADBEATER'S POSSUM INC
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 18/03/2021 7:45:18 PM AEDT Registrar

Important Information

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Federal Court of Australia
Victorian Registry

No. VID 615/2020

VicForests
Appellant

Friends of Leadbeater's Possum Inc
Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS

INTRODUCTION

1. The appellant (**VicForests**) has filed an amended Notice of Appeal (**ANOA**) that identifies 29 grounds of appeal arising from three decisions and one ruling in the proceeding below. For the reasons outlined below, the respondent (**FLP**) contends that each of those grounds should be rejected, and the appeal dismissed with costs.

2. By way of background, the proceeding below was commenced on 13 November 2017.

3. On 2 March 2018, the Court delivered judgment and reasons in respect of a separate question in relation to the construction of s 38 of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (**EPBC Act**): *Friends of Leadbeater's Possum Inc v VicForests* (2018) 260 FCR 1 (**SQR**).

4. The subsequent trial ran for three weeks commencing on 3 June 2019.

5. On 7 June 2019, the trial judge delivered a ruling in relation to FLP's application to adduce tendency evidence (the **Tendency Evidence Ruling**).

6. During the trial, FLP relevantly called three experts: Dr Andrew Smith, an ecologist (who predominantly gave evidence in respect of the Greater Glider); Professor John Woinarski, a conservation biologist (who predominantly gave evidence in respect of the Leadbeater's Possum); and Dr Stephen Mueck (who predominantly gave evidence in respect of Tree Geebung and retained vegetation). VicForests relevantly called two lay witnesses: Mr William Paul (Manager, Environmental Performance, VicForests) and Mr Timothy McBride (Manager, Biodiversity Conservation and Research, VicForests). VicForests also

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relevantly called two experts: Dr Stuart Davey, a private forest consultant (who predominantly gave evidence in respect of the Greater Glider); and Professor Patrick Baker, Professor of Silviculture and Forest Ecology (mainly giving evidence in respect of the Leadbeater's Possum). A view of a number of representative coupes was conducted.

7. The trial judge delivered her judgment on liability on 27 May 2020: *FLP v VicForests (No 4)* [2020] FCA 704 (**J**). Her Honour delivered judgment on relief on 21 August 2020: *FLP v VicForests (No 5)* [2020] FCA 1199 (**RJ**).

8. The case that proceeded to trial turned upon two essential issues:

   (a) The first was whether VicForests, in the conduct of its forestry operations in the Central Highlands, had breached, or was likely to breach, clauses of the *Code of Practice for Timber Production* 2014 (Vic) (**Code**) and thereby lost the benefit of the exemption under s 38(1) of the EPBC Act. The primary breach alleged and found was a breach of cl 2.2.2.2 for failing to take a precautionary approach in forestry operations where the Greater Glider was present, which was alleged in both logged and scheduled (i.e. to be harvested) coupes. FLP also alleged five breaches of miscellaneous clauses of the Code and/or the Management Standards and Procedures (**MSP**) in logged coupes. On this issue, her Honour found five breaches of the Code and/or MSP: failure to protect mature Tree Geebung; failure to protect Zone 1A habitat; failure to identify a Leadbeater's Possum colony; failure to screen timber harvesting; failure to ensure gaps between retained vegetation were less than 150m.

   (b) If VicForests had lost the benefit of that exemption, whether VicForests' past and proposed forestry operations were actions that had had, or were likely to have, a significant impact on the Leadbeater's Possum and the Greater Glider, contrary to ss 18(2) and 18(4) of the EPBC Act respectively. Her Honour held that they were.

9. These submissions address the grounds of appeal in turn, grouped in the same way as VicForests' grouping in its ANOA and its submissions of 3 March 2021 (**VS**).

A LOSS OF EXEMPTION FROM PART 3 OF THE EPBC ACT

Ground 1 – construction of s 38 of the EPBC Act; VS [1]-[10]

10. Ground 1 is that the trial judge erred in her construction of s 38(1). Section 38(1) of EPBC

Act provides, simply, that "Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA".

11. The trial judge, consistently with the submissions of FLP, the Commonwealth (intervening) and State of Victoria (intervening), held that the phrase "in accordance with" in s 38(1) meant "consistently with", "in conformity with" or "in compliance with": SQR [24]; J [4], [106]. As her Honour wrote "whichever expression is chosen, the core element is that there was a requirement for forestry operations to conform with the terms in, and the regulatory scheme of, an RFA": SQR [24].

12. Her Honour held, unsurprisingly, that that construction was supported by the text of s 38 (SQR [196]-[201]), along with the use and meaning of the phrase in other parts of the EPBC Act and other legislation (SQR [202]-[218]), the place of s 38 in Pt 4 of Ch 4 of the EPBC Act and its relationship to s 6(4) of the *Regional Forests Agreement Act* 2002 (Cth) (**RFA Act**) (SQR [219]-[220]), the purpose of the EPBC Act ([221]-[223]), the scheme of the EPBC Act (SQR [224]-[227]) and the consequences of competing interpretations: SQR [228]-[237]. Her Honour also held that *Forestry Tasmania v Brown* (2007) 167 FCR 34 (***Brown***) supported that construction: SQR [264]-[271].

13. VicForests contends here, as it did below, that a forestry operation will be conducted "in accordance with" an RFA where it is conducted "in a region covered by an RFA, where those operations are not prohibited by that RFA": VS [2]. Yet that is not what the provision says. If such had been intended, it could readily have been stated, and in not many more words. The construction also lacks sense. VicForests accepts that a *prohibition* in an RFA would have to be given effect. Why then would a conditional prohibition – *do not engage in forestry operations unless you comply with these conditions* – not be given effect? In this important regulatory regime, the "sole focus" of which is "environment protection, biodiversity conservation and ecologically sustainable development in respect of matters of national significance" (SQR [197]), the Parliament should not be taken to have intended such a blunt, all-or-nothing, inapt approach.

14. VicForests submits at VS [4]-[5] that its construction is supported by the distinction drawn in the EPBC Act between forestry operations undertaken in regions covered by RFAs (Subdiv A, Div 4, Part 4, s 38) and forestry operations in regions that are not covered by

RFAs (Subdiv B, Div 4, Part 4, ss 39-41). It says that the trial judge's construction produces the anomaly that forestry operations in areas not covered by RFAs are subject to less stringent controls than forestry operations in areas where an RFA is in force. However, ss 39-41 were in effect interim provisions intended to provide for the fact that at the time that the EPBC Act was passed, not all States had negotiated an RFA with the Commonwealth: SQR [129]. In those regions where no RFA was yet in force, interim arrangements for the protection and management of forests were in place pending finalisation of an RFA: *Environment Protection and Biodiversity Conservation Bill 1998*, Explanatory Memorandum, pp 38-39. Once RFAs were negotiated, Subdiv B would cease to have any operation. As at the date of the separate question hearing, there was only one region in respect of which an RFA had not been negotiated: SQR [129].

15. VicForests then invokes s 42 of the EPBC Act at VS [6], which provides for an exception to the exemptions in ss 38-41 of the EPBC Act (i.e. it effectively reapplies the EPBC Act to certain forestry operations: see SQR [134]). It says that because s 42 does not contain the words "in accordance with", those words in s 38 should not be "given the extended meaning accorded to them by the primary judge". But there is no reason for that phrase to be in s 42, which in the identified circumstances disapplies the exemptions in ss 38-41 on a wholesale basis. No issue of acting "in accordance" with an RFA can then arise.

16. VicForests then submits at VS [7] that its construction is supported by the fact that VicForests is not a party to the CH RFA. That fact is neither surprising nor significant. The CH RFA is an intergovernmental agreement which replaces the regulatory scheme of the EPBC Act with a substitute regulatory scheme: J [150]. That agreement is between the Commonwealth and the State, not between the Commonwealth and the entities conducting forestry operations. The relevant obligations imposed on VicForests are statutory, not contractual. It is exempt from the obligations if and to the extent that it falls within the terms of s 38(1). Under the statutory scheme, that depends upon undertaking the forestry operation in accordance with an identified document, the RFA.

17. VicForests asserts at VS [8] that, on the trial judge's construction, the Commonwealth will be required to determine whether "routine forestry operations" comply with Victorian legislative instruments in order to determine whether s 38 applies, and that this is

inconsistent with the intention to devolve certain responsibilities under the EPBC Act to the States. It is not clear who "the Commonwealth" is in this scenario, or when or why "the Commonwealth" will be required to be involved. In any event, approval under Pt 9 of the EPBC Act will not be required for routine forestry operations so long as those operations are, to quote s 38(1), "undertaken in accordance with an RFA".

18. VF submits at VS [9] that the extrinsic materials support its construction. That is not correct. The extrinsic materials referred to relate to the RFA Bill and to s 39 of the EPBC Act, not s 38 of the EPBC Act. The passages cited are to the effect that the EPBC Act will not apply to RFA forestry operations in RFA regions. So much was accepted by all parties. The issue was relevantly the circumstances in which that exemption operates. The generalised statements in the extrinsic materials cited do not bear on that question.

19. At VS [10] VicForests invokes a passage in *Brown*. The trial judge's approach to s 38 is not inconsistent with that passage, and her Honour correctly rejected VicForests' submission that that passage means the conduct of RFA forestry operations was in all circumstances immune from the provisions of the EPBC Act: SQR at [263], [267]-[268]; see also *Bob Brown Foundation Inc v Commonwealth* [2021] FCAFC 5 (***Bob Brown***) at [44]. Her Honour's approach to s 38(1) is also correctly informed by a consideration of the content and purpose of the NFPS, including given an object of the RFA Act is to give effect to certain aspects of it: SQR [110-122], [136-139], [142], [176-177], [191], [193]; *Bob Brown* at [50].

Ground 2 – Clause 2.2.2.2 of the Code and certainty; VS [11]-[22]

20. Ground 2 is that the trial judge erred in holding that non-compliance with cl 2.2.2.2 of the Code results in a loss of the exemption under s 38(1) of the EPBC Act. The substance of this ground is somewhat illusive, but appears to turn on characterisation of cl 2.2.2.2.

21. VicForests' argument must be put in context. The logically prior question is what it means for a forestry operation to be conducted in accordance with an RFA, such that it has the benefit of the exemption. This issue was addressed in the SQR. FLP contended that all provisions of a Regional Forestry Agreement (**RFA**) must be complied with in order for a forestry operation to be conducted "in accordance with" the RFA. Her Honour rejected that contention. She held that a person conducting a forestry operation was only required to

comply with those clauses of an RFA that were capable of having a direct bearing on the conduct of forestry operations. In the case of the CH RFA, those clauses included cl 47, which accredited various components of the Victorian Regulatory System, including the systems and processes established by the Code: SQR [149]. Thus her Honour held that a person conducting a forestry operation must comply the Code in order to have the benefit of the exemption in s 38: SQR [149]-[150].

22. It is important to identify that anterior step because VicForests contends that, applying the SQR correctly, the trial judge ought to have held that s 38 did not require compliance with cl 2.2.2.2 on the basis that cl 2.2.2.2 involved questions of degree, perception and subjective judgment: VS [11]-[12]. However, the SQR did not hold that the application of s 38 turned upon whether a clause involved questions of degree, perception and subjective judgment, and VicForests has not challenged this aspect of the SQR.

23. So far as can be discerned, what VicForests does appear to argue at VS [11]-[22] is that cl 2.2.2.2 should be characterised as being incapable of judicial determination because it is insufficiently precise and too subjective, such that it should be treated in effect as merely exhortatory. Yet that submission is defeated by VicForests' own contention that in some circumstances cl 2.2.2.2 *can* be capable of founding injunctive relief: VS [22].

24. In any event, whatever quite the argument is, it should be rejected. It cannot be reconciled with the fact that cl 2.2.2.2 is designated a "Mandatory Action", and is expressed in mandatory terms, in a scheme which distinguishes such actions from a "Code Principal" or an "Operational Goal" (see Code cl 1.2.8). The fact that the application of a provision may involve questions of degree, perception and subjective judgment does not mean that a provision cannot be applied. 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]. A notable example is found in the common statutory defence of "reasonable excuse": note *Taikato v The Queen* (1996) 186 CLR 454 at 464-467. Australia knows no doctrine of statutory (or regulatory) uncertainty: *Brown v Tasmania* (2017) 261 CLR 328 at [149]; [306], [448]-[456]; see also [506]-[508].

25. Further, the distinction that VicForests seeks to erect between cl 2.2.2.2 and other

obligations in the Code is a false one: J [792]. Here, "[a]lmost all of the obligations [in the Code] involve some aspects of degree and subjective judgment when they are actually applied to 'real world' timber harvesting operations": J [792]; see also J [1186]. As her Honour said at J [795], the "content of the precautionary principle is no more a matter of 'degree and subjective judgment' than the concept of significant impact in Pt 3", as both "may have a qualitative or evaluative aspect, but making findings of that kind is a familiar task for a court, no different for example than deciding what is 'reasonable care'.

26. The preservation of flexibility in a regulatory provision does not mean that such a provision can be given no operation. Clause 2.2.2.2 requires both a process of evaluation and assessment, and an outcome on the ground that adopts management options designed to "wherever practical avoid serious damage to the environment": J [852]-[853], [988].

Ground 3 – TRP and definition of "forestry operations"; VS [23]-[32]

27. Ground 3 is that the trial judge erred in holding that "the harvesting of Forest Products" referred to in paragraph (c) of the definition of "Forestry Operations" in the CH RFA includes the preparation and promulgation of the Timber Release Plan (**TRP**). VicForests submits that this was an error because the preparation of the TRP should fall within the definition in paragraph (b), i.e. management of forest resources. That ground and submission mischaracterise the trial judge's reasons and fails to identify any error in what the trial judge actually held.

28. The trial judge held that although the preparation and promulgation of the TRP was *capable* of falling within paragraph (b) of the definition of "Forestry Operations" (managing of trees before they are harvested) in the CH RFA (J [414]-[418]), that paragraph "is not directed at conduct involved in the Timber Release Plan, but conduct anterior to that, when trees and the forest are being 'managed' in their growth phase (and after the planting phase, if that has occurred), prior to any harvesting decisions": J [729]. Moreover, FLP had not pleaded that the preparation or promulgation of the TRP was a forestry operation that must comply with cl 2.2.2.2 and accordingly the case could not be put on that basis: J [414]-[418], [716]. What had been pleaded, and what must be decided, was whether VicForests had "complied with the Code in the conduct of its forestry operations in the impugned coupes – that is, the harvesting of forestry products": J [718].

29. However, the trial judge said that the preparation and publication of the TRP was *relevant* to FLP's pleaded arguments, which concerned "what is done, in the forest, as part of timber harvesting": J [415], [730]. This was because those activities bore directly on what areas were harvested, how they were harvested, and how much was harvested – that is, "what is done in the forest also reflects what has been *planned* to occur, or what is *required* to occur, in the Timber Release Plan…": J [731]; see also J [717]-[722], [728], [730]-[731].

30. VicForests seeks to erect a strict and false division between planning or management of harvesting forest products on the one hand, and the harvesting on the other. That argument seems to be founded, in particular, on the fact that the preparation of Timber Release Plans are governed by the *Sustainable Forests (Timber) Act 2004* (Vic): VS [26]-[27]. But the provisions of a 2004 State Act are no aid to the construction of a definition found in the 1998 RFA. Further, the attempted distinction is divorced from the reality that, as the trial judge found, decisions made in planning the harvesting of forest products manifest on the ground into the physical such harvesting of those forest products. VicForests has seemingly not taken issue with the reasons of the trial judge for finding that the TRP was relevant to *and falls within* the harvesting of forest products: J [718]-[722], [728]-[731]. It has not established error as alleged by ground 3.

31. Separately, it is incorrect that FLP's pleaded case simply employed the concept of "forestry operation" as a synonym for "logging": cf VS [29]. FLP amended its pleadings to replace "logging" with the words employed in the statutory text and legislative scheme, in order properly to engage that scheme: see J [402]-[403]; note also J [729]-[731].

Ground 4 – Section 38 and "RFA Forestry Operation"; VS [33]-[38]

32. Ground 4 is that the trial judge erred in finding that a breach of the Code would lead to a complete loss of exemption in respect of the forestry operation. VicForests contends that the loss of the exemption in respect of a forestry operation should be limited to the scope of the breach that triggers the loss: VS [33]-[37].

33. VicForests' submission directs little attention to her Honour's reasoning or the issues of statutory construction in this regard. The trial judge's construction and application of s 38 was orthodox and correct, as follows:

    (a) s 38(1) operates on "an <u>RFA forestry operation</u>": J[787];

(b) the case as pleaded was that in each coupe, VicForests had conducted an RFA forestry operation, and that allegation covered all of VicForests activities within that coupe, before, during and after harvesting, as a single course of conduct and a single "RFA forestry operation": J[787]-[787];

(c) if that RFA forestry operation, as pleaded, was not undertaken "in accordance with" the Code, then the exemption was lost, for whatever, factually, was identified as the RFA forestry operation, and Pt 3 of the EPBC Act applied to that RFA forestry operation as an "action": J[789];

(d) Pt 3 does not apply to any particular "value"; there is nothing in the text, context or purpose of s 38(1) to put a gloss of that kind on it: J [789].

34. Section 38 turns upon the identification of an RFA forestry operation and the conduct of that operation in accordance with the RFA. Once an exemption is lost, Pt 3 of the EPBC Act picks up the RFA forestry operation as an action. In this way, there is a seamless transition between the operation of s 38 and s 18. The trial judge's construction and application of the provisions was correct.

Grounds 5-6; VS [39]

35. No separate argument has been put by VicForests to establish these grounds.

B THE PRECAUTIONARY PRINCIPLE

Ground 7 – correct construction of cl 2.2.2.2 of the Code; VS [40]-[53]

36. Ground 7 is that the trial judge erred in departing from Osborn J's approach to cl 2.2.2.2 in the absence of finding that his Honour was plainly wrong on the basis that the argument put to her had not been put by the parties in *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1: VS [40]-[41]. VicForests submits that whether a particular argument was raised before Osborn J did not relieve her Honour of the obligation to find that Osborn J was plainly wrong before departing from his decision.

37. That submission is both incorrect and a distraction. "Cases are only authorities for what they decide. If a point is not in dispute in a case, the decision lays down no legal rule concerning that issue": *Coleman v Power* (2004) 220 CLR 1 at [79] per McHugh J; see also *CSR Limited v Eddy* (2005) 226 CLR 1 at [13]-[14]; *Lazarus v ICAC* (2017) 94 NSWLR

36 at [87]; *Bob Brown* at [35]. And whether or not the trial judge needed to apply a "plainly wrong" standard, this Court need not.

38. The trial judge construed cl 2.2.2.2 by reference to its text and context, and was correct in her construction for the reasons she gave: J [822]-[843]. By contrast, Osborn J approached cl 2.2.2.2 not by reference to its text but by reference to the test adopted by Preston CJ of LEC in *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 at 269 (***Telstra***) at [128]-[183] in relation to s 6(2)(a) of the *Protection of the Environment Administration Act 1991* (NSW). Section 6(2)(a) was in different terms to the definition of the precautionary principle in the Code and cl 2.2.2.2 of the Code. To prefer paraphrases of statutory language in other statutory contexts to the text is to fall into the error identified in *Baini v The Queen* (2012) 246 CLR 469 at [14]; note also *McNamara v Consumer Tribunal* (2005) 221 CLR 646 at [40] (cf VS [50]-[52]). The principles of construction relied upon by VicForests at VS [42]-[53] cannot justify the departure from the text of cl 2.2.2.2 in the approach adopted by Osborn J. As to the re-enactment argument at VS [42]-[43], that argument has limited force where the only judicial decision is one at first instance (note *Murphy v State of Victoria* (2014) 45 VR 119 at [73] fn 77 (CA)), and of relatively recent origin.

39. In any case, the trial judge said that she would be satisfied that the precautionary principle was engaged even on Osborn J's approach: J [829], [850], [851], [1125]. VicForests has not sought to impugn this finding. That being so, this ground is without merit, as any error made by her Honour in construction was not material to the outcome.

Ground 8 – balancing of competing purposes within the Code; VS [54]-[55]

40. Ground 8 is that the trial judge erred in construing cl 2.2.2.2 as requiring that measures be taken that assist in arresting and reversing the decline of a threatened species: VS [55]. VicForests submits that the trial judge failed to take into account Osborn J's observations about the precautionary principle in *Telstra*, saying that the trial judge ought to have held that "the Code is not directed to the avoidance of all risks" (to quote ANOA [16]).

41. This ground in substance is a variant of ground 7, and should be rejected for the same reasons. VicForests' submissions make a brief complaint as to what is said to be implicit in her Honour's judgment, without any clear identification of error. The trial judge reached

the conclusion that the Code, including cl 2.2.2.2, contemplates that species be assisted to recover, on the basis of an orthodox process of statutory construction: J [629]-[632]. Her Honour did not find that *all risks* must be avoided. As noted above, her Honour considered that the precautionary principle was engaged even on Osborn J's approach. Her Honour's (unchallenged) statement at J [846] resonates here: "Despite the amount of time spent in submissions on this matter, I consider it is a relevantly straightforward proposition that there are threats of serious damage to the Greater Glider".

Ground 9 – the precautionary principle and damage; VS [56]-[58]

42. Ground 9 is that the trial judge erred in holding that the precautionary principle requires VicForests to take a precautionary approach when it is dealing with a situation where there are threats of serious or irreversible damage, irrespective of the source of those threats, and that Dr Davey's opinions were of marginal relevance because his opinion was limited to the threat posed by forestry operations. VicForests submits that the reference to "damage" in the definition of the precautionary principle in the Code is only intended to refer to the damage that may be inflicted by the decisions being contemplated.

43. VicForests' submission is based on an overly narrow view of the obligation imposed on it by cl 2.2.2.2, and also mischaracterises her Honour's reasons. The trial judge analysed the obligation imposed by cl 2.2.2.2 at J [831]-[858]. Her Honour first considered the operational goals of cl 2.2.2, which are to ensure that "[t]imber harvesting operations in State forests specifically address biodiversity conservation risks" and that "[h]arvested State forest is managed to ensure that forest is regenerated and the biodiversity of the native forest is perpetuated": J [831]-[837]. She then recognised that the Code stipulates mandatory actions which must be conducted in order to achieve that goal. Clause 1.2.8 states (trial judge's emphasis at J [838]):

> Timber harvesting managers, harvesting entities and operations **must** undertake **all relevant mandatory actions** to meet the objectives of the Code. Mandatory Actions are **focused on practices or activities**. Failure to undertake a relevant Mandatory Action would result in non-compliance with the Code.

44. The trial judge said that one such mandatory action is cl 2.2.2.2. Looking at the first sentence of the definition of the precautionary principle, the trial judge said that the obligation to apply the precautionary principle arises "whenever VicForests is

contemplating decisions in respect of timber harvesting operations (and planning for them) that will affect the environment": J [842].

45. As to what this required of VicForests "in its timber harvesting operations (and in planning for them)", it was to "carefully evaluate its management options to wherever practical avoid serious or irreversible damage to the environment (here, relevantly to the Greater Glider)", and "properly assess the risk weighted consequences of various options": J [843]; referred to again at J [849]. VicForests has not challenged J [843], which addresses VicForests having to consider damage (etc) *in undertaking (and planning for) its forestry operations*. The possible damage and the operations are not divorced.

46. The trial judge then turned to the second sentence of the definition of the precautionary principle, which is that "[w]hen 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". The trial judge said at J [845] that this sentence meant that:

> [i]f the circumstances of VicForests' forestry operations mean it is "dealing", objectively, with circumstances where there are likely to be threats of serious environmental damage, or threats of environmental damage, then in undertaking its evaluation and assessment of how (and if) those forestry operations should be conducted, VicForests cannot justify its lack of measures to prevent environmental degradation by relying on a lack of scientific certainty about what it needs to do.

47. It was in that context that the trial judge said that when VicForests is conducting timber harvesting operations in native forest where the Greater Glider is likely to be present, "VicForests is 'dealing' with that threat of serious damage. The threat of damage to the Greater Glider is present, and VicForests must 'deal' with it": J [849]. This analysis was correctly based on close attention to the text and context of cl 2.2.2.2 and the definition of the precautionary principle, rather than pre-conceived notions about what that principle is as determined in different statutory contexts (the submission at VS [57] echoes the submission on grounds 7-8, addressed above).

48. Further, VicForests' construction would fail to achieve a precautionary approach and would fail to achieve the operational goals of cl 2.2.2. The essence of what the trial judge held is that cl 2.2.2.2 imposes an obligation on VicForests when applying a precautionary approach to timber harvesting where the Greater Glider is present, to deal with that species in its

context, which includes all threats to the species. A timber harvesting operation that failed to take into account the risk and threat of fires to the Greater Glider, would fail to apply the precautionary approach that is mandated by cl 2.2.2.2 of the Code. For example, if VicForests harvested the balance of the Greater Glider's habitat in the Central Highlands on the assumption that the Greater Glider's habitat in other parts of Victoria would never be affected by bushfires, that would fail to take a precautionary approach, and would be entirely artificial.

49. The conclusions of the trial judge are entirely consistent with the case that was put by FLP. Dr Smith and Prof Woinarski both emphasised in their evidence that it was "critically important for the planning and conduct of forestry operations to take account of the risk of wildfire and the threats it poses to the Greater Glider": J [848], see also J [47], [74], [105(j)-(k)], [184(b)], [491], [503], [607], [615]-[616], [651-676], [850], [1421], [1425], [1448]. The trial judge identified numerous reasons for preferring the evidence of Dr Smith and Prof Woinarski to that of Dr Davey: J [23], [59], [250]-[255], [429]-[430], [556]-[557], [570]-[600], [648], [668], [970], [985], [1363], [1397], [1404], [1446]. VicForests complains that Dr Davey's evidence was not given sufficient weight, but fails to articulate how that should have led to a different result.

50. In any event, even if the trial judge did err (which is denied), it would not be a material error. The trial judge found that timber harvesting is, in and of itself, a sufficiently serious threat, to the Greater Glider: [38]-[39], [44]-[51], [55]-[64], [73]-[79], [489]-[501], [504]-[517], [570]-[600], [603]-[632], [829], [847], [850], [860]-[865], [937], [977], [1125], [1438]-[1442], [1449], [1454], [1165].

Ground 10 – whether the evidence was insufficiently certain; VS [59]-[66]

51. Ground 10 is that the trial judge erred in finding at [6(d)] and [1178] that, in undertaking forestry operations in the Scheduled Coupes, VicForests was not likely to apply the precautionary principle to the conservation of biodiversity values in those coupes as required by cl 2.2.2.2. The primary submission made in support of this ground is that the trial judge ought to have found that there were no sufficiently advanced plans for the scheduled coupes to enable the Court to resolve the question of whether timber harvesting may constitute a serious or irreversible threat to the Greater Glider: VS [59]-[60].

52. Ground 10 is a challenge to a finding of fact by the trial judge, being a fact found after a three week trial involving extensive witness and documentary evidence. The fact in question involves an assessment of likely future action, being a type of fact which inherently involves a degree of evaluation beyond that required for, say, some simple past fact. This Court on appeal should be cautious about too readily overturning the assessment of a trial judge who saw all the witnesses and was immersed in the milieu of the trial: see, eg, discussion in *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301 at [2]-[10] per Allsop CJ, [45]-[54] per Perram J, [169] per Markovic J; see recently eg *Queensland v Masson* (2020) 381 ALR 560 (HC) at [74]-[78], [119]. VicForests' submissions below on this issue relied significantly on the evidence of Mr Paul: see J [1118]-[1135]. The trial judge's observations of Mr Paul, and the nature, limitations and weight of his evidence, are important in this regard: J [256]-[263], and generally [256]-[357], and more specific points at J [446]-[448], [954], [992(g)], [1009], [1012]-[1015], [1027], [1052]-[1054], [1142]-[1144], [1201]-[1202].

53. Her Honour's finding at [1178] that VicForests was not likely to apply the precautionary principle was based on the substantial evidence, and relevant arguments, before the Court: see J [1118]-[1184]. VicForests does nothing to establish error in this reasoning: cf VS [59]-[61]. The decision of Osborn J in *MyEnvironment Inc v VicForests* [2012] VSC 91 was based on different evidence and arguments: J [1126]-[1127].

54. The submission made at VS [62], which is to the effect that VicForests relies on the evidence at C.2.3 of its closing submissions is not a submission that identifies error in the trial judge's reasons and this Court should not entertain a submission of that kind on appeal. If the Court is minded to entertain that submission, FLP relies on the evidence summarised at section C.iii.1 at [68]-[105] of its closing submissions, including that of Dr Smith in CRI Tab 91, and accepted at J [1038]-[1076]; the evidence accepted at J [1023]-[1076]; the evidence summarised at section C.iii.2 [106]-[174] and Appendix A of its closing submissions and [52]-[72] of its closing submissions in reply, including that of Dr Smith at CRI Tabs 52, 64, and 83; and the evidence summarised at C.iii.4.a [206]-[221] of its closing submissions as, and the findings at J [570]-[600].

55. VicForests puts in the "further alternative" that if the precautionary principle is engaged

and the threat is not negligible, that it will carefully evaluate management options in response, as supposedly evidenced by the fact that its practices are changing: ANOA [20(c)]; VS [63]-[66]. There is significant tension between this submission and its first two alternatives on this ground (and its other grounds), furiously denying the relevance and applicability of the precautionary principle. VicForests' proposed changes to its silvicultural systems was persuasively addressed at J [1157]-[1174] (see further ground 11, below). The trial judge nowhere "in effect construed the precautionary principle as though it was directed to the avoidance of all risks": cf VS [66]. Here, as for ground 8, VicForests does not identify any passage of judgment where this occurred.

Ground 11 – Use of less intensive silvicultural methods; VS [67]-[68]

56. Ground 11 is that the trial judge erred in finding that VicForests would not use the less intensive silvicultural methods outlined in the May 2019 Harvesting and Regeneration document, and erred in finding that the use of those methods would not produce any different or better compliance with cl 2.2.2.2 of the Code. In substance, this ground appears to again allege error going to a finding of a future fact. The submission made above at [52] applies.

57. In response to the submissions about the "additional coupes" and tendency evidence (VS [67]), FLP relies on what is submitted under ground 12 below. As to the submission that evidence of what occurred in the Logged Coupes could not rationally inform how any operations in the Scheduled Coupes may occur (VS [67]), as the trial judge found in respect of the additional coupes evidence (see [69] below), evidence about VicForests' actual timber harvesting was plainly relevant to the predictive exercise of what was likely to happen in the future. Why would evidence of past practice not be relevant to an assessment of the likely future actions of the same actor?

58. In response to the submission that the trial judge erred in relying on what had occurred in the Logged Glider coupes in light of the evidence that VicForests' methods were in the process of changing (VS [67]), FLP submits that that submission fails to address the trial judge's finding that VicForests would not implement any new or different silvicultural methods in the Scheduled Coupes: J [992]. In reaching that conclusion, her Honour relied upon the extensive evidence summarised at J [992] and discussed in detail by the trial judge

at [992]-[1037]. VicForests has not sought to establish that that finding was not properly open to the trial judge.

59. In response to the submission that the TRP only specifies the most intensive silvicultural system, and does not specify how forestry operations might otherwise occur (VS [67]), VicForests fails to deal with the trial judge's reasons for rejecting that submission below. The trial judge said (at [J [994]) that:

> whether or not VicForests is obliged … to specify a method in the Timber Release Plan is not the point. The fact is that in 2017 it did specify a method for the impugned coupes. Almost without exception, it specified clear-fell as the silvicultural method. The publication of the Timber Release Plan serves a public purpose – informing all of the Victorian community, and the spectrum of stakeholders with interests in what occurs in Victoria's native forests, about VicForests' plans for harvesting the timber which has been allocated to it. VicForests is dealing with a resource which is the property of the Crown in right of the State of Victoria, and in that sense a community resource. The Timber Release Plan is VicForests' public statement of intent (see s 41 of the SFT Act), and is an important public function performed by VicForests, as a statutory agency. There is public consultation about the Timber Release Plan. While VicForests may well be correct as a matter of law in its submission that it is not bound to use the silvicultural method specified in the Timber Release Plan, s 44 of the SFT Act does require VicForests to act "in accordance with" the Timber Release Plan. It would seem highly inappropriate for any aspect of the document to be misleading or inaccurate. If VicForests publishes the Timber Release Plan and thereby announces it will harvest coupes by a particular method, it would seem (at least) counterproductive and inappropriate if it does so in fact intending to use different methods.

60. VicForests in effect simply advances the same arguments that it argued below. It has failed to establish error in the conclusion and reasoning adopted by her Honour, taking account of the natural advantages of a trial judge.

61. VicForests does not substantiate the submission that it was not open to the trial judge to rely upon "structural and organisational features of VicForests, and of its conduct in this proceeding" with any analysis of the trial judge's reasons (VS [67]). The trial judge relied on the evidence in the proceeding and the inferences that could be drawn from it, both of which were plainly open to her Honour: J [997]-[1015].

62. VicForests submits it was not open to the Judge to draw any inference from VicForests refusal to agree to certain facts in a notice to admit (VS [76]). It is not clear why not, and in any event, in the very next paragraph of the judgment (J [1012]) her Honour referred to

Mr Paul giving direct evidence that VicForests did not accept the core relevant facts (e.g. that the Greater Glider population decline may be caused by forestry operations).

63. There was no error in the trial judge's finding that VicForests is a statutory agency charged with the conservation of biodiversity values based on relevant monitoring and research (cf VS [67]). As the trial judge held, "the Code is very clear about VicForests' conservation responsibilities as a statutory agency": J [998].

64. Finally, VicForests submits that, on a proper construction of the precautionary principle, the evidence established that VicForests was complying with the precautionary principle: VS [68]. In support of that submission, VicForests refers to a section of its closing submissions below. However reference to submissions made before the trial judge does not establish error in the trial judge's reasons. Further, this submission seems to depend upon the arguments made under grounds 7-8, as addressed above.

Ground 12 – Admission of tendency evidence; VS [69]-[73]

65. Ground 12 is that the trial judge erred in ruling that the "additional coupes evidence" was admissible evidence. VicForests' "primar[y]" argument is as to relevance per se under s 55 of the *Evidence Act 1995* (Cth) (see VS [69]-[72]), but it also submits that it did not have "significant probative value" as required by s 97(1)(b). At ANOA [24(c)] it refers also to s 135, but it does not develop the point in submissions.

66. To address this submission, it is necessary to set out the subject matter and conclusions of the trial judge in the Tendency Evidence Ruling. The tendency that FLP alleged was that "VicForests conducts forestry operations in the Central Highlands Regional Forestry Agreement area using clear fall, and seed tree retention and regrowth retention harvesting methods being the three existing systems identified in the relevant Timber Release Plans": T259, ll 39-42. The Notice of Intention to Adduce Tendency Evidence referred not only to the 2019 affidavits, but also to the coupe plans and post-harvest maps that were discovered in the proceeding pursuant to a ruling made on 17 May 2019, which documents identified the silvicultural methods used in those coupes.

67. That tendency was said to be relevant to two contentions which were central to VicForests' defence: *first*, that VicForests intends to move away from methods such as clear fell and intense regeneration burning to these more adaptive silvicultural systems and regeneration

treatments; *second*, that it is not possible for the applicant to prove how timber harvesting in the scheduled coupes in issue in this proceeding will be undertaken and, therefore, not possible to prove whether VicForests will fail to apply the precaution of principle in its forestry operations in the scheduled coupes as it is required to do by clause 2.2.2.2 of the Code: T260, ll 10-25. FLP challenged these contentions insofar as it was suggested by VicForests that there would be any "on the ground" implementation of the adaptive methods, and on the ground that the adaptive methods would still be likely to have a significant impact on the Greater Glider and Leadbeater's Possum: T 260, ll 29-38.

68. FLP contended (noted T 260-1) that the 2019 Affidavits were probative of: (a) the fact that VicForests has not changed its harvesting methods despite having plans to alter its silvicultural systems on the evidence now for some years, and despite having made some kind of decision in February 2019, on Mr Paul's evidence, to proceed with those plans; and (b) the use of the established systems and not any new systems, despite detections of threatened species having being made, reported to the Department, and the Department having passed on this information to VicForests.

69. Her Honour ruled that the 2019 Affidavits were directly relevant to the issues in the proceeding. Her Honour held that (as conceded by counsel for VicForests: T 246 l 36) the 2019 affidavits were directly relevant to [2.2] of the Reply (which alleged that VicForests had continued to use clear-fell and seed tree retention including in coupes where VicForests was aware of reported sighting of Greater Gilder, and where Greater Glider is present and Leadbeater's Possum is present): T262 ll 7-8. Further, her Honour held that the dispute before the court required a predictive exercise about what is likely to happen in the future in terms of VicForests actual timber harvesting, and evidence about harvesting operations and circumstances and coupes not in use in the proceeding were directly relevant to that: T262 ll31-41.

70. Her Honour further said that if she was wrong that the evidence was directly relevant, and that the evidence was tendency evidence, she was satisfied that the requirements of s 97(1) were met: T262 ll 45-47. This was on the following bases:

    a. The 2019 affidavits contained evidence of detections of Greater Glider and Leadbeater's Possum at the additional coupes, reporting of detections, the reaction of

the Department to those detections, and the observations of witnesses about the state of those coupes during or after logging: T263 ll 5-10.

b. Such evidence had significant probative value in its capacity to prove what the conduct of VicForests is "on the ground" in its timber harvesting operations in the Central Highlands Region in 2019 – since VicForests asserted a decision had been made to shift to its new silvicultural methods. It was specific, was based on direct observation, and was not sought to be challenged by cross-examination. It was especially probative where there was only more general evidence from VicForests about what it planned to do by way of methods of timber harvesting operations in the Central Highlands Region: T 260 ll 40-46, 262 ll 18-20, 263 ll 10-18.

c. The 2019 affidavits were capable of showing the same pattern of conduct as alleged by FLP in its pleadings, and of being significantly probative of the allegations made by FLP about what the court should find VicForests is likely to actually do in the conduct of its timber harvesting operations in the scheduled coupes. That was because the VicForests defence was put on a global basis and what was likely to happen globally in the Central Highland Region and beyond: T 263 ll 35-42.

71. In this context VicForests submissions under ground 12 cannot succeed.

72. VicForests submits that the 2019 Affidavits contained were not capable, on their own, of being relevant to the fact pleaded at [2.2] of the Reply because they concerned coupes that were not the subject of the proceeding and did not identify the silvicultural methods used in those coupes: VS [71]. This submission should be rejected on the basis that counsel for VicForests conceded in argument that the 2019 affidavits were directly relevant to the fact pleaded at [2.2]: T 246 l 36. In any event, the submission should be rejected because it is not a criterion of relevance that a particular affidavit, isolated from all other evidence, wholly prove a paragraph in a pleading. The 2019 Affidavits established detections, communications of those detections to VicForests, that coupes were logged, and observations of them in the aftermath. The trial judge was correct to hold that that was relevant to [2.2] of the Reply.

73. Further, the discovered coupe plans and post-harvest maps that were also the subject of the tendency notice proved the silvicultural methods that were employed in those coupes (and

the parties agreed the evidence of the harvest methods used in the additional coupes: see reference to Annexure C at J [1093], CRI Tab 26). That evidence was also relevant to [2.2] of the Reply, and her Honour relied on that evidence in her Reasons: J [1080]-[1117]. VicForests' submission at VS [71] that there was no evidence about the silvicultural systems used in those coupes is incorrect.

74. The 2019 Affidavits were not irrelevant by reason of the fact that VicForests did not plead that it had not used clearfell or seed tree silvicultural systems in any coupe where the relevant species were present (VS [71]). That was not the basis of admission.

75. In the context outlined, it was also correct to hold that the evidence had significant probative value for the purposes of s 97(1)(b). VicForests' submission at VS [73] that this could not be so "where the fact in issue is still hypothetical and may possibly never occur at all" wholly misses the point. That future fact, relating to practices to be employed in yet unlogged coupes, needed to be found. It is hardly surprising that account be taken of practices in harvested coupes in making that assessment.

76. In any event, her Honour's ruling on these issues could ultimately not amount to a material error on appeal. Her Honour held that even without the evidence of the "additional coupes", she would have reached the same conclusions, namely that VicForests was not likely to conduct its forestry operations in the Scheduled Coupes in a manner which complies with cl 2.2.2.2 of the Code: J [1078].

Ground 13 – uncertain evidence; VS [74]

77. FLP relies on its submissions made under Grounds 10, 11 and 12 above.

Ground 14 – THEZ and alleged denial of procedural fairness; VS [75]

78. Ground 14 is that the "trial judge erred in holding, at [1369], that VicForests had failed to comply with cl 2.2.2.2 of the Code in the conduct of its forestry operations due to a lack of practical, specific attention to the difficulties with THEZs (Timber Harvest Exclusion Zone) highlighted in Professor Woinarski's report". VicForests says that it was not open to the trial judge to consider that part of the report in that way: VS [75].

79. What is said in J [1369] must be read in context. The trial judge does not say that the effectiveness of THEZ was no part of FLP's pleaded case. That topic was a matter of

evidence going to whether or not the extensively pleaded allegation of significant impact on Leadbeater's Possum was made out. Her Honour was indicating that a breach of cl 2.2.2.2 in respect of Leadbeater's Possum was not pleaded. Nor did FLP put any argument to that effect at trial. And it was not the point her Honour was making at [1369]. Rather, her Honour made a factual observation about an aspect of the evidence which offered confirmatory support to findings, about pleaded matters at issue, reached on other grounds. That is an unremarkable use of evidence.

80. The evidentiary context was as follows. At J [1354]-[1355], the trial judge embarked upon consideration of VicForests' submission that its forestry operations did not or were not likely to have a significant impact on the Leadbeater's Possum because there were a range of protective prescriptions in place, including THEZs, and VicForests complied with those prescriptions. That submission was in large part based upon Dr Davey's evidence – called by VicForests – to that effect (First Davey CRI Tab 94 at [221]-[223], [226]-[229], [261(iv)-(v), (vii)], [263], [287(iv)-(v), (vii)], [289(v)]). VicForests also led lay evidence as to the effectiveness, and application, of THEZ: Second Paul CRI Tab 44 at [98]-[99], [136]-[139], WEP-29, WEP-30. In defence of the allegations of significant impact in the scheduled coupes, VicForests relied on the prescriptions and exclusions in the Code and its incorporated documents (including THEZ): Amended Defence Appeal Book Part A Tab 8 at [6.3(C)-(d)], [42]-[70B].

81. FLP had adduced evidence from Prof Woinarski that the existing prescriptions, including THEZs, were not effective to prevent VicForests' forestry operations from having a significant impact on the Leadbeater's Possum, and that VicForests in any event, did not always comply with those prescriptions: J [1356]-[1366]. That evidence was both in chief following VicForests' aforementioned lay evidence (First Woinarski CRI Tab 75 at [38]-[43] and [49]-[52]), and then in reply to Dr Davey's first report on that specific topic (Second Woinarski CRI Tab 81 at [28], [31]-[32], [35], [43], [46-47], [63-68]). Dr Davey then responded by subsequent report to Prof Woinarski's reply on the same point: Second Davey CRI Tab 127 at [29], [83], [126]-[127], [131], [141], [152], [229]-[236], [243-245], [263].

82. Dr Davey was cross-examined on the issue at trial: T 509.4-514.22. VicForests chose not

to cross-examine Prof Woinarski on that issue, despite saying in opening that the effectiveness of THEZ was a "highlight" of its evidence in answer to the case on significant impact: T 167.35-169.5. Perhaps for that reason, the trial judge in fact put key tenets of Dr Davey's opinion on the point to Prof Woinarski: T557.41-558.25; J [1363].

83. In these circumstances, a complaint of procedural fairness about the effectiveness of THEZ is not open – that issue was contested and addressed by both parties: J [242(b)]; cf VS [75]. Further and in any event, the finding made by her Honour confirmed a state of satisfaction already reached. Even if her Honour had erred, which is denied, it would not be an error capable of constituting a material error in the proceeding.

Ground 15 – Independence of VicForests witness Professor Baker; VS [76]-[80]

84. Ground 15 is that the trial judge erred in finding that Prof Baker was not an independent expert (J [234]-[235]) and that Prof Baker's evidence contained "serious flaws" and should be rejected (J [463]-[482]).

85. An expert should be independent of the party by whom they are called, and should not be an advocate for that party's cause, as set out in the Expert Witness Code of Conduct. It was open to her Honour to find that Prof Baker was not independent in circumstances where he had previously been a paid consultant of VicForests: cf VS [77]. No issue is taken with VicForests seeking expert advice in the conduct of its forestry operations; the issue is with calling that same expert as an independent expert in a legal proceeding.

86. The use of "we" was also a proper basis to find that Prof Baker was not entirely independent of VicForests. It is difficult to see how statements such as "[h]ere, historically, we've clear-felled" could be seen as referring to forest scientists or his team: cf VS [78]. It was well open to the trial judge to conclude that associating himself with the actions of VicForests was "hardly the mindset of an independent expert": J [235]. Further the trial judge's findings that Prof Baker was defensive (at J [233] and [235]) was quintessentially a finding of a trial judge who has the advantage of seeing the witness. Such findings should not be interfered with unless they are "glaringly improbable".

87. There is no inconsistency between finding that Prof Baker was not an entirely independent expert and finding that he was candid in a particular respect: cf VS [79]. That simply

illustrates that her Honour took his evidence fairly on its merits, even given her concerns about his independence. So, too, does the discussion at J [233] about whether and why Prof Baker was argumentative.

88. As to the submission that there was no basis to find that Professor Baker's evidence contained serious flaws, the trial judge found that Prof Baker's evidence was flawed because it relied upon desktop modelling to predict the presence of Leadbeater's Possums, and that modelling did not correlate with where Leadbeater's Possums were in fact detected: J [478]. That was plainly a serious flaw. VicForests' submissions do not establish error in this finding.

C MISCELLANEOUS BREACHES OF THE CODE

Ground 16 – not pressed

Ground 17 – Clause 4.3.1.1 and Tree Geebungs; VS [81]-[86]

89. Ground 17 is that the trial judge erred in finding that there had been a failure to comply with cl 4.3.1.1 and Table 14 of the MSP. The effect of cl 4.3.1.1 and Table 14 is that VicForests is required "to protect mature [Tree Geebung] individuals from disturbance where possible": J [1188]-[1189]. The issue was whether this had been done in the Skerry's Reach coupe: J [1198]. Her Honour held not: J [1213].

90. Although not entirely clear, VicForests seems to suggest at VS [82] that having found no breach of cl 2.2.2.4 of the Code as alleged by the FLP, it was not open to the trial judge to find a breach of cl 4.3.1.1 of the Management Procedures on the pleadings. That is not so. Compliance with the Management Procedures is required because it is incorporated in, and forms part of, the Code, and the "[t]he Management Standards and Procedures apply to all commercial timber harvesting operations conducted in Victoria's State forests where the Code applies": *Friends of Leadbeater's Possum Inc v VicForests (No 3)* [2018] FCA 652 at [33-34]; J [144]. Clause 2.2.2.4 of the Code deals with the planning stage, and while VicForests complied with *planning* in respect of mature Tree Geebung, it failed to then comply with *application* of management actions for mature Tree Geebung as required by cl 4.3.1.1 of the Management Procedures: J [1197-1198]. FLP's pleading particularised a breach of cl 4.3.1.1 in respect of Tree Geebung at the relevant coupe, as accepted at VS footnote 136. Accordingly VicForests were on notice of, and met, the case put in respect

of that clause – even if, as it happened, the trial judge held that a breach of cl 4.3.1.1 arose independent of the breach of cl 2.2.2.4 alleged in FLP's pleading.

91. Separately, while not directly subject of the error alleged at ground 17, FLP notes that Final Order 3 makes a declaration of non-compliance with cl 2.2.2.4 of the Code in respect of Tree Geebung, as well as cl 4.3.1.1 and Appendix 3 Table 14 of the MSP. The reference to cl 2.2.2.4 in that order ought perhaps be removed to properly reflect the reasons of the trial judge at J [1197]. As it happens, the reference to cl 2.2.2.4 was in fact inserted by the Appellant into a proposed form of that order ultimately agreed between the parties.

92. VicForests submits at VS [85] that the evidence was that "two Tree Geebung had been removed to create a snig track, and that where mature Tree Geebung are identified, they will be incorporated into buffers and boundaries where possible". This submission mischaracterises the evidence and fails to deal with the trial judge's reasons for concluding that VicForests had not complied with cl 4.3.1.1.

93. VicForests' evidence was that "where mature individuals are detected within the harvestable area … and it is not practical to include them in exclusion areas, avoiding any disturbance is in many cases not possible. Whilst mechanical disturbance is avoided where possible, these individuals will almost certainly be disturbed by fire during regeneration burning": J [1200]. Thus the evidence was that VicForests would only protect Tree Geebung where it decided that it was "practical" to include them in exclusion areas.

94. The trial judge accepted VicForests' submission (repeated here) that the words *where possible* "affords a degree of latitude, no doubt recognising that there will be some operational constraints on retention in some circumstances": J [1212]. However, the trial judge determined that VicForests had breached cl 4.3.1.1 because there was no evidence whatsoever that VicForests had sought to avoid the destruction of the mature Tree Geebung in question: J [1212]. VicForests has not demonstrated any error in that reasoning.

95. VicForests makes a secondary submission at VS [86] that the trial judge had regard to a damaged Tree Geebung, the maturity of which was uncertain, and that "consideration of that specimen was irrelevant to the primary judge task". It was permissible for her Honour to consider the evidence before her, which included the videos and photos of Tree Geebung. That evidence was relevant to an allegation in the proceeding (whether VicForests had

contravened cl 4.3.1.1) and the trial judge acknowledged that the maturity of that particular specimen was uncertain, having previously found that a mature Tree Geebung had clearly been damaged by VicForests' forestry operations: J [1209], and see First Mueck CRI Tab 65. There was no error in the trial judge's consideration of that evidence. Even if there had been, this point relates to just one tree, where her Honour's finding was based on a number.

Ground 18 – MSP Clause 4.2 and Leadbeater's Possum Zone 1A habitat; VS [87]-[91]

96. Ground 18 is that the trial judge erred in finding that VicForests had failed to comply with cl 2.2.2.4 of the Code in that it had failed to identify and protect Zone 1A habitat in Blue Vein coupe. Zone 1A habitat is defined as an areas where "there are more than 10 hollow bearing trees per 3 ha in patches greater than 3 ha": J [1214]-[1217] and see Table 12.

97. The premise of this ground (see VS [90]) is that DEWLP had a policy that provided that an area would not constitute Zone 1A habitat unless the hollow bearing trees were within 100m of each other. VicForests essentially submits that because DEWLP would have determined, according to its own policy, that there was no Zone 1A habitat in the coupe, the trial judge erred in finding that there was.

98. This submission fails to deal with the trial judge's reasons on this issue. Her Honour said at J [1247] that what mattered for the purposes of s 38 was the Code and the MSP (which includes the Planning Standards), that those documents had a clear prescription about Zone 1A habitat, and they said nothing about the need for less than a 100m gap between hollow-bearing trees. Thus the trial judge found that the 100m requirement was not part of the legal definition of Zone 1A habitat. The legal definition of Zone 1A habitat prevails over inconsistent departmental policies, as the s 38(1) exemption was not conditioned on such policies, but was conditioned on the other documents. Her Honour's reasoning was correct.

99. Nor can compliance with cl 2.1.1.3 of the Management Procedures be obviated by VicForests' hypotheses as to how the Secretary might determine its application required to be made pursuant to that clause: J [1247-1248]; cf VS [90].

100. What is submitted at VS [91] does not fall within Ground 19. In any event, it was open to the trial judge to have regard to VicForests' non-compliance with provisions of the Code in concluding that VicForests would not, of its own volition, adopt an approach to its forestry operations which complied with cl 2.2.2.2 of the Code.

Ground 19 – not pressed

Grounds 20 and 21 – cl 5.3.1.5 of the MSP and vegetation buffer; VS [92]-[96]

101. Ground 20 is that the trial judge erred in finding that cl 5.3.1.5 was a prohibition that applied to all timber harvesting operations in the CH FMAs. VicForests contends that it relevantly only required a 20m vegetation buffer where a new coupe or road is within 0-500m of, and may be visible from, a sensitive landscape feature: VS [95].

102. Clause 2.5.1.1 of the Code provides that "Planning and management of timber harvesting operations must comply with relevant coupe management measures specified in the Management Standards and Procedures". Clause 5.3.1.5 of the Management Standards is a relevant coupe management measure. It creates an obligation in the Central Highlands to:

> Screen timber harvesting operations (except selective harvesting 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 the Planning Standards.

103. The trial judge construed this prescription, correctly, at [1270] as follows:

> The context is a series of prescriptions designed to protect certain landscape values from the effects of forestry operations. Clause 5.3 deals with three absolute prescriptions about retention of mature trees and 50 m buffers in three specific locations, not presently relevant. However, the absolute nature of the prescription is clear from the language. Further, the specific buffer prescribed is considerably larger than the 20 m buffer the rest of the prescription refers to. Then the remainder of cl 5.3.1 (dealing with the CH FMA, which is the same as the CH RFA region) divides the prescription into what it calls "foreground" protections and "middle ground" protections; describing these as between 0 m and 500 m and between 500 m and 6.5 km respectively. Clause 5.3.1.4 imposes a specific prescription relating to "scenic drives and designated lookouts in table 9". Unlike cl 5.3.1.4, cl 5.3.1.5 contains a general prescription in the first sentence, which is then qualified in two ways. The first is by reference to the minimum size of the buffer, set at 20 m. The second qualification refers to table 9. Its meaning is plain in my opinion – all timber harvesting operations (and new road alignments) are to be screened from view, and the minimum screening is 20 m. In addition, by reference to table 9 and for "sensitive landscape features" set out in table 9, additional screening is required, over and above the 20 m minimum.

104. VicForests's construction is inconsistent with the text. Clauses 5.3.1.4 and 5.3.1.6 both contain express references to specific features in Table 9 of the Planning Standards. By contrast, cl 5.3.1.5 does not. Instead it simply states the imperative that all timber harvesting operations and new road alignments must be screened from view. The fact that

reference to the features in Table 9 in cl 5.3.1.5 are present in surrounding clauses indicates that their omission from cl 5.3.1.5 was deliberate. It provides no basis to read those features into cl 5.3.1.5.

105. Ground 21 is based upon ground 20, and should be rejected for the same reasons.

Ground 22 – Clause 4.1.4.4 of the MSP and retained vegetation; VS [97]-[99]

106. Ground 22 is that the trial judge erred in finding that VicForests failed to comply with cl 2.2.2.1 of the Code and cl 4.1.4.4 of the MSP in the 113F coupes. VicForests submits that the trial judge erred in failing to construe "retained vegetation" as meaning "hollow-bearing trees": VS [98].

107. Part 4.1.4 of the Management Standards provides as follows:

> 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 is to be greater than 150m.
>
> 4.1.4.5 Retain habitat trees where they can be most easily protected from damage

108. It is apparent from the context of the clause that "retained vegetation" in cl 4.1.4.4 is a reference to the retention of either single habitat trees or to the retention of hollow-bearing ash eucalypts in clumps as referred to in cl 4.1.4.3. That is to say cl 4.1.4.4 should be read as referring to the retained vegetation referred to in the immediately preceding paragraphs. The reason that the words "retained vegetation" are used is that the preceding provisions refer to retention of both individual trees and clumps of trees. "Vegetation" is thus used as a catch all to refer to both habitat trees and clumps. The trial judge accepted that this was the correct way to construe cl 4.1.4.4: J [1285].

109. VicForests contends that the trial judge erred in doing so and that "retained vegetation" should be read "harmoniously with" Table 12 of Appendix 3 as referred to in cl 4.1.1.1. Retained vegetation in cl 4.1.4.4 should be read in its immediate context. There is no reason to read it inconsistently with that context in order to read it consistently with a Table referred to in a different clause. Her Honour did not err in construction of cl 4.1.4.4.

110. The relevance of VS [99] is not clear. As recorded by the trial judge at J [1284] and [1286], FLP relied on the evidence of Ms Mitchell and VicForests' own coupe plans to establish that the distance between retained vegetation was greater than 150m. The coupe plans demonstrated no retained trees whatsoever within the *harvested part* of the coupe, and that the gaps between such retained areas was far greater than 150m: J [1284], [1286].

Paragraph [34(c)], [36(c)], [38(c)], [42(c)] and [44(d)] of NOA; VS [100]

111. The submissions made under this heading are not referable to any identifiable ground. In any event, VS [100] demonstrates VicForests' erroneous approach to the legislative scheme under which it operates. The miscellaneous breach allegations went to whether VicForests lost the benefit of the exemption under s 38. Once it lost that benefit, the question for the Court was whether the forestry operation in each, some or all of the coupes, as an action, had a significant impact on a listed species. There was no need to prove that the miscellaneous breaches had a significant impact on a listed threatened species.

D SIGNIFICANT IMPACT

Grounds 23 and 29 – sufficiency of evidence/findings as to future conduct; VS [101]

112. FLP relies on the submissions made under Grounds 10 and 11 above for these grounds.

Grounds 24 and 25 – Findings of significant impact; VS [102]-[106]

113. Ground 24 is that the trial judge erred in finding that VicForests' forestry operations in the Scheduled and Logged coupes are likely to have a significant impact on the Greater Glider as a species and Leadbeater's Possum as a species.

114. VS [103] is not clear. For the avoidance of doubt, the trial judge found that FLP's case was concerned with the "impact on two threatened species, at the species level, and not at the individual member of the species level", and that the expert evidence was directed towards that case: J [1307].

115. VicForests submits at VS [104] that for the reasons that it traverses at Ground 10 and 11 (and repeats for Grounds 23 and 29) it was not open to the trial judge to make factual findings about significant impact in respect of the Scheduled Coupes either at an individual level, coupe group level or the totality of the Logged and Scheduled Coupes. For the

reasons that FLP says Grounds 10 and 11 should be dismissed, FLP contends that Grounds 24 and 25 should likewise be dismissed (see also J [1293]).

116. As noted at VS [102], whether an impact is significant must be assessed having regard to its context and intensity. The trial judge found, correctly, that forestry operations in each individual coupe, at the geographic coupe level, and for the totality of logged and scheduled coupes, have had or are likely to have a significant impact, having regard to its context and intensity: [1342]-[1347], [1455]-[1457]. This finding involved careful and considered analysis of the reasons for: listing and population decline of both species (J [44]-[54], [602]-[611], [617]-[626], [1348]-[1353], [1374]-[1382]); the threats to their sustainability and recovery (J [55]-[66], [96]-[103], [651]-[676], [1425]); their particular ecology, characteristics and habitats (J [67]-[79], [104]-[105], [484]-[523], [570]-[600], [612]-[616]); VicForests harvesting methods (J [264]-[275], [314]-[357], [987]-[1076]); the reliability of habitat and presence mapping for the Greater Glider and effectiveness of VicForests' Interim Greater Glider Strategy (J [420]-[454], [866]-[942); the existence of reserves and national parks and other prescriptions (J [965]-[977], [1354]-[1382], [1426]-[1430], [1446]-[1451], [524]-[569]); and the significant impact guidelines and draft recovery plans for both species (J [65], [81], [252], [1319], [1361], [1370]-[1373], [1380]-[1421]). VicForests points to no error in this analysis, and instead appears just to rely on its argument that its operations are not sufficiently certain to draw findings of the likely impact.

117. The submission at VS [105] to the effect that Dr Smith did not consider the impact on Greater Glider having regard to its distribution across Australia including in NSW, Queensland and East Gippsland, is incorrect. Dr Smith had regard to the complete distribution of the species – including reproducing a map of its total Australian distribution in his report and specifically referring to the populations both interstate and in East Gippsland: First Smith (**S1**) CRI Tab 52 p11, 30-31, 51. VS [105] mischaracterises, and gives a selective reading of, the transcript at T399.40-43 and 432.32-34. Dr Smith there said he considered the Central Highlands' population as an important population in isolation (T 399.40-44). Self-evidently, identifying an important population involves distinguishing – or "isolating" – such a population from the rest. He reasoned in his report

that the Central Highlands is an important population by reference to the particular characteristics of the population and its habitat, as distinguished from the characteristics and habitat of other populations of Greater Glider: S1 CRI Tab 52 p15-17, 19. Further, Dr Smith's written evidence specifically refers to the other populations of Greater Glider in Victoria and other States, and the differing threat levels posed by timber harvesting to the species across the 3 States in which it occurs: S1 CRI Tab 52 p11, 27, 30-31, 51.

118. Moreover, in cross-examination Dr Smith 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: T431.36-432.2.

119. In any event, it is not necessary to establish threat across total distribution and range. Section 18(1) speaks of a "significant impact on a listed threatened species"; it does not contain the additional words "viewed across the species as a whole", or the like. The notion is inherently fact-specific and contextual; it is not hemmed in by conditions. Were it otherwise, it would require an action which threatens the entire remaining population, thus allowing step by significant step of harm, to the substantial detriment of the species. An action can have a significant impact on a listed threatened species if, for example, it has such an impact on a distinct and significant community.

120. The trial judge carefully considered, and rejected, the submissions and evidence from VicForests that pointed to populations of, and habitat for, Greater Gliders elsewhere in an answer the impact of its operations in the impugned coupes: J [59], [602]-[625], [965]-[977], [1446]-[1451]. VicForests points to no error in this reasoning.

121. Finally, Dr Smith's opinions as to the impact of harvesting in the impugned coupes cannot fairly be characterised as "limited" (VS [105]) on any reading of his reports. They disclose that his opinion was informed by forensic detail, down to the numbers of habitat and feed trees per hectare, the forest type and structure, the calculation of Gliders present, an examination in the field of the almost all impugned Glider coupes, and the complex and careful context in which he considered these matters geographically, at multiple scales, as well as temporally, in terms of the specific ecology, threats and population trends of the species, and the significant impact guidelines: S1, Third Smith, Fourth Smith CRI Tabs 52,

83, 91 J [244]-[245].

Grounds 26, 27 and 28 – Findings of significant impact: VS [107]-[111]

122. Ground 26 is that the trial judge erred in finding that VicForests' forestry operations in Ginger Cat and Blue Vein coupes were likely to have had a significant impact on the Greater Glider in circumstances where "Dr Smith offered no opinion on the significant impact of forestry operations in those coupes": VS [107]-[109]. Grounds 27 and 28 are that the trial judge erred in making a finding of significant impact in 13 Scheduled and 24 Logged Leadbeater's Possums coupes in circumstances where Professor Woinarski "only gave direct evidence concerning significant impact on the Leadbeater's Possum in 10 Scheduled Coupes, and did not give direct evidence as to significant impact in relation to" four logged Leadbeater's Possum coupes: VS [110]-[111]. VicForests says that there was no evidentiary basis for any of the trial judge's findings of significant impact.

123. A close reading of J [1454] and [1457], however, reveals that VicForests mischaracterises the evidence and the reasons of the trial judge. Her Honour there:

(a) relied upon the findings she had made on various aspects of the evidence for her conclusions at the individual coupe level;

(b) in general, accepted the contentions of the applicant and the evidence on which they were based, which included giving significant weight to the opinions of Dr Smith and Prof Woinarski, including what they said about individual coupes;

(c) said that the fact that there were a small number of coupes which the experts did not visit, or about which they did not express an opinion of significant impact, did not persuade the trial judge that no findings of significant impact should be made in those coupes – the more general level findings that the trial judge had made were equally applicable to such coupes; and

(d) gave weight to the fact that there were detections of one or both species in or close to each of the 66 impugned coupes, as well as *clear evidence* about the nature of the suitable habitat present in all of the coupes.

124. Thus for those coupes for which the experts did not express an opinion of significant impact, the trial judge relied upon the specific evidence as to the impact on the species of forestry

operations in coupes containing the species and habitat type there found, and the findings that the trial judge had made in that respect, accepting the opinions of Prof Woinarski and Dr Smith that her Honour held were equally applicable to such coupes.

125. There was a sound evidential basis for her Honour's finding. The evidence was that the relevant coupes contained Leadbeater's Possum, as well as habitat constituting 1939 Ash, uneven-aged Ash, or old growth Ash. That included habitat which Dr Smith described as "highly suitable" for Leadbeater's Possum, "extremely rare", and a "critical resource" based on field inspection (J [1408], Agreed maps 7.5-7.8C CRI Tab 230-267, 7.11C CRI Tab 303, 7.14C CRI Tab 339, 7.15C CRI Tab 351, 7.17-21C CRI Tab 374-423, 7.24-25C CRI Tab 458-471, S1 CRI 52 Appendix 1 p74-103). Prof Woinarski opined in respect of that habitat as follows:

(a) Harvesting in any coupe in which Leadbeater's Possums occurs modifies, destroys, removes and decreases the availability or quality of habitat immediately and into the future. Given Leadbeater's Possum is Critically Endangered and undergoing decline – with its current small population size and decline pivoting largely on the sparse and declining availability of large old hollow-bearing trees – any factor that causes modification, destruction, removal, and decrease in the extent and quality of suitable forested habitat will contribute further – now and into the future – to the decline of the species: Second Woinarski (**W2**) CRI Tab 81 [33].

(b) All current and prospective suitable habitat is critical for survival of Leadbeater's Possum, and necessary for its recovery, given its Critically Endangered status and its predicted severe ongoing decline, including significant risks of extinction (Draft Leadbeater's Possum Recovery Plan CRI Tab 76.21 p38; TS 555.1-556.5).

(c) The cohort of trees regrowing after the 1939 wildfires (which are especially targeted for harvesting) is a critical resource. These generally do not have hollows now, but in the future these will provide the next major source of hollows: W2 CRI Tab 81 [13], [42] and [27]. Any factor such as harvesting of trees that currently provide hollows, or will do so in the foreseeable future, will contribute to this regional-scale ongoing reduction in hollow availability, and hence will consolidate and exacerbate the long-term decrease in Leadbeater's Possum population size: W2 CRI Tab 81 [27].

(d) There is a real chance that actions that cumulatively and continually reduce the extent and quality of its habitat now and into the future, such as harvesting, will reduce the likelihood and rate of (i.e. interfere with) any recovery: W2 CRI Tab 81 p14.

(e) In relation to impacts on occurrences of Leadbeater's Possum within proximity to the coupe, a 200 metre protective (exclusion) buffer around a sighting may not encompass all the area in which individuals of that possum colony move (and all of the habitat on which that colony depends): Third Woinarski CRI Tab 88 [40]. Relative to a Leadbeater's Possum population living in an extensive continuous forest, a population contained within a 200 metre radius THEZ, surrounded or nearly so by harvested areas, is far more likely to face decrease in population size: W2 CRI Tab 81 [28]. 200m buffers only provide a low-medium impact on reducing extinction risk, low impact on retaining quality and extent of habitat, and medium impact on retaining the number of individuals. 500m buffers provide medium impacts on these matters. A one km buffer was predicted to have generally 'high' benefits including on reducing extinction risk: LPAG Technical Report CRI Tab 739 p42; W2 CRI Tab 81 p25-26 [66f]. Dr Davey agreed with these ratings (T510.10-40).

(f) The trial judge accepted and made findings consistent with this evidence: J [1348]-[1432], see also [94], [97(j)], [99], [105(h)-(k)], [512], [570]-[600], [617]-[632], [646], [1262].

126. Similarly, in relation to Ginger Cat and Blue Vein, the evidence was that the habitat in these coupes was uneven aged old growth and 1939 Ash. Dr Smith considered that such habitat was critical to the survival and recovery of the species: J [509]-[516], [1443]-[1445]; S1 CRI Tab 52 p18-21, 34 and 74-75. The trial judge made findings as to the impact on the species of harvesting such areas, in fact inhabited: J [1438]-[1442], [1454]; see also [55]-[64], [73], [75], [489]-[501], [504], [505]-[517], [570]-[600], [602]-[632], [646].

127. VicForests has not advanced any submission as to why a finding on this basis was not open to the trial judge and has not established error in her reasons. Further, VicForests' submission should be understood in a context where Dr Davey visited no coupes whatsoever, while FLP's experts provided opinions informed by extensive coupe inspections, albeit not visiting every single coupe.

128. Insofar as VicForests appears separately to contend at VS [108] that the trial judge erred in preferring the opinions of FLP's experts to those of VicForests, that submission is neither within the scope of Grounds 26, 27 or 28, nor substantiated by the identification of any basis for the assertion of that error.

E RELIEF

Ground 30 – Relief; VS [112]-[115]

129. Ground 30 is that the trial judge erred in the exercise of the discretion to grant prohibitory injunctive relief pursuant to s 475(2) of the EPBC Act restraining VicForests from conducting further forestry operations in the Logged Coupes.

130. VicForests submits first that the trial judge erred because FLP did not seek injunctive relief in its pleading: VS [113]. Yet VicForests conceded during the final hearing that it was not prejudiced in any material way by the seeking of that relief after the hearing of the trial: RJ [108]. This is not a basis upon which VicForests can allege error.

131. VicForests then contends that the fact that there was no evidence of any intention on the part of VicForests to further harvest the Logged Coupes, and had offered an undertaking not to do so, was a "powerful discretionary consideration" against the grant of injunctive relief: VS [114]. That is not a submission that rises to the level of identifying or even alleging error in the trial judge's reasons, let alone error of a *House v The King* kind.

132. In any event, VicForests mischaracterises the evidence and fails to identify the true evidential basis on which the order was made. What the trial judge in fact found is that a substantial amount of habitat remained in the Logged Coupes, and it "was not clear on the evidence specifically what VicForests intends to do in the Logged Coupes in the future, including in relation to the retained habitat": RJ [35], generally [31]-[35]. Her Honour therefore considered that it was appropriate to grant injunctive relief over the Logged Coupes to protect what habitat remained and to ensure that there was no further damage (for example, from burning): RJ [36]. VicForests also ignores the significance of s 479(1)(a) of the EPBC Act; note RJ [27], [30]. It fails to establish error.

133. Thirdly, VicForests contends at VS [115] that the order for injunctive relief was made in error because it was not aimed at preventing significant impact but FLP was motivated to use it as a springboard for an order under s 475(3). There is nothing in the RJ that suggests

that the order was made on that basis, and no orders were in fact made under s 475(3). Whatever FLP's motivations, no error by her Honour is established.

Ground 31 – Terms of injunction in respect of scheduled coupes; VS [116]

134. Ground 31 is that the trial judge erred in granting unconditional injunctive relief in respect of the Scheduled Coupes. VicForests refers to other cases where injunctive relief has been granted in conditional terms, and says that such an order would be consistent with Order 17: VS [116].

135. The trial judge gave two reasons for making an unconditional order at RJ: [57]-[70]. First, her Honour said that, unlike in the decisions in which conditional orders had been made, VicForests had adduced no evidence that it intended to seek approval under Pt 9 of the EPBC Act, and it was therefore no more than a hypothetical possibility that VicForests would do so. Her Honour said that hypothetical possibilities should not be included in injunctive orders: RJ [62]. Second, her Honour said that including a condition would introduce uncertainty into the operation of the injunction which was undesirable and not appropriate in the context of the particular proceeding, where the parties agreed on very little, particularly in circumstances where contravention of an injunction may expose a party to a prosecution for contempt: RJ [63]-[66]. Her Honour said that the better approach in the context of the proceeding was to make an unconditional order which VicForests could apply to have discharged: RJ [67].

136. The order was appropriately made for the reasons given by her Honour. VicForests has not addressed these reasons, let alone established any *House v The King* error.

18 March 2021

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