

<u>Ground</u>	<u>Decision</u>	<u>Key Para.</u>	<u>Supporting reasons (excerpts)</u>
1	the primary judge's finding that the actual conduct of forestry operations must be undertaken in accordance with the contents of the CH RFA – that is, in accordance with any restrictions, limits, prescriptions, or contents of the Code – in order to secure the benefit of the exemption in s 38(1) cannot be sustained. Ground 1 of the appeal must succeed.	130	<p>11. on the proper construction of s 38(1) of the <i>EPBC Act</i>, the forestry operations conducted by VicForests were undertaken in accordance with the contents of the CH RFA and were therefore exempt from the operation of Pt 3 of the <i>EPBC Act</i>.</p> <p>19. Despite the clear and pressing need to protect these two species, particularly in the Central Highlands of Victoria, this appeal turns on a technical question of statutory construction.</p> <p>102. The primary judge rejected VicForests' submission below that "in accordance with" meant "conducted under", preferring the construction contended for by FLP, and the intervenors (the Commonwealth and the State of Victoria, neither of whom is a party to the appeal)</p> <p>113. s38(1) does not impose any legal obligations on a person conducting a forestry operation in an RFA region.</p> <p>114. The exclusion of those operations from Pt 3, by a provision in a separate Division altogether from that which contains Pt 3, reinforces the conclusion that the words "in accordance with" are merely descriptive and not intended to be a class of exemption like the other provisions.</p> <p>115. For the reasons given, neither the text, structure nor history of the provision suggest that the primary focus of the provision is on anything other than the geographical area the subject of the relevant RFA and then on the forestry operations undertaken within that geographical area.</p> <p>119. the purpose of s 38(1) is to "prevent[ing] the application of Commonwealth environmental and heritage legislation as they relate to the effect of forestry operations where an RFA, based on comprehensive regional assessments, is in place"</p> <p>126. Through the process of negotiating the CH RFA, the Commonwealth has accepted its reliance on the State processes and management approaches as being sufficient to accommodate the Commonwealth's interest.</p>
2	Ground 2 of the appeal must be rejected.	144	<p>139. FLP's submissions must be accepted. The primary judge did not err as proposed in Ground 2.</p> <p>141. VicForests' submissions are inconsistent with the terms of the Code.</p> <p>142. VicForests' argument relating to Ground 2 is also logically incoherent.</p> <p>144. We also agree with FLP that the distinction which VicForests attempts to draw between provisions of the Code requiring subjective evaluation and those said by VicForests to be "of clear and objective practical application" should not be accepted.</p>
3	Ground 3 of the appeal must be rejected	150	<p>148. Ground 3 is misconceived. There is no inconsistency in her Honour's reasoning, nor any denial of procedural fairness by her Honour.</p> <p>148. The primary judge did not misunderstand VicForests' case. She simply rejected that argument.</p>
4	Grounds 4 to 6 of the appeal must be dismissed.	160	158. VicForests' contentions relating to Grounds 4-6 are unsustainable for the reasons given by the primary judge. Her Honour's reasoning in this regard involves no error.
5	- do -		
6	- do -		
7	Ground 7 cannot succeed.	184	183. The primary judge held that, even applying the approach taken by Osborn J, she would have found that the precautionary principle was engaged as forestry operations in the CH RFA region do pose a serious threat to the Greater Glider
8	Ground 8 of the appeal must be rejected.	191	<p>186. The primary judge did not find that all risks must be avoided. To the extent that an implication to that effect is sought to be found in the Principal reasons,</p> <p>190. To perpetuate biodiversity, including the long-term survival of the Greater Glider and Leadbeater's Possum, it is necessary to arrest and reverse their rate of population decline. If this is not done it will not be possible for the biodiversity of the native forest to be perpetuated without measures to assist the populations of these threatened species to recover.</p>
9	Ground 9 cannot succeed.	197	197. We accept FLP's submission that there was no error in the primary judge's reasons relating to this issue.
10	Ground 10 cannot succeed.	213	<p>204. VicForests has not come close to satisfying the requisite standard for appellate correction of any fact finding error by the primary judge.</p> <p>209. VicForests' attempt to rely on its submissions before the primary judge about evidence which it contends the primary judge should have accepted is misconceived</p> <p>210. VicForests has not explained why her Honour erred in her conclusion, nor can it be said that her Honour at any time assumed that the precautionary principle required that all risks be avoided.</p> <p>211. Her Honour explained why the habitat mapping was unreliable. She explained why the alleged "abundance" of Greater Gliders in reserves and national parks was not proven. VicForests' contrary submissions are rejected.</p> <p>213. No error is shown in the primary judge's reasoning that led to the finding that VicForests is not likely to comply with cl 2.2.2.2 of the Code in its forestry operations in the Scheduled Coupes</p>

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11	Once these principles are understood it is obvious that VicForests' submissions in respect of Ground 11 are untenable.	218	217. VicForests' contentions are untenable. It has failed to appreciate that evidence need not make a fact in issue more probable than not to be relevant and admissible under s 55 of the Evidence Act. It need only affect, directly or indirectly, the assessment of that probability. 219. It was rational for the primary judge to use evidence of VicForests' past conduct in assessing probabilities relating to its future conduct. 220. It is not possible to accurately summarise these closely reasoned paragraphs which expose precisely why the primary judge could and did reach the conclusion she did by an impeccable chain of logical reasoning. 222. Her Honour's process of reasoning consistently exposes the logical connection between the evidence and her findings: 223. The primary judge's description of VicForests is not 'telling' of error at all. 226. No error on the part of the primary judge has been established in relation to Ground 11.
12	Abandoned		
13	Ground 13 must be dismissed.	234	233. The closely reasoned passages at [1077]-[1117] of the Principal reasons repeatedly demonstrate the logical connection between the evidence about the additional coupes and the primary judge's conclusion that VicForests was not likely to comply with cl 2.2.2.2 of the Code in the future. This may explain why VicForests did not in fact put to the primary judge that the evidence about the additional coupes was irrelevant under s 55 of the Evidence Act as apparent from the Principal reasons at [1083]-[1090]. As a result, it cannot now contend that the primary judge erred by relying on the evidence.
14	Ground 14 must be dismissed.	240	238. FLP's submissions must be accepted. At [1369] of the Principal reasons the primary judge observed that FLP had not pleaded that VicForests had breached cl 2.2.2.2 of the Code in respect of the Leadbeater's Possum. It had, however, pleaded that VicForests' conduct involved a significant impact on the Leadbeater's Possum. 239. In these circumstances, there can be no practical injustice to VicForests even if her Honour's conclusion involved a denial of procedural fairness to VicForests (which it did not). The contention that these circumstances involve any possible denial of procedural fairness to VicForests is unpersuasive, to say the least.
15	Ground 15 cannot be sustained.	243	242. As FLP submits, a trial judge's assessment of a witness, expert or lay, is quintessentially a finding for a trial judge who has the advantage of seeing their evidence. There is no inconsistency between the finding that Professor Baker was not entirely independent and that he was candid in particular respects. The primary judge's finding as to why she preferred the evidence of those who had directly observed the habitat of the Leadbeater's Possum rather than the theoretical evidence given by Professor Baker based upon desktop modelling cannot be impugned.
16	Abandoned		
17	Abandoned		
18	Ground 18 is rejected.	254	253. The primary judge did not err in finding that the 100 m requirement was not part of the legal definition of Zone 1A habitat. The Departmental policy could not prevail over the legal definition of Zone 1A habitat.
19	Abandoned		
20	no appealable error has been established	259	260. As FLP submitted, cl 5.3.1.5 simply states an imperative that all timber harvesting operations and new road alignments must be screened from view. It contains no explicit geographic range for such screening. Rather, the requirement is absolute.
21	Ground 21 must also be rejected.	262	
22	Abandoned		
23	Ground 23 must also be dismissed.	265	265. In support of Ground 23 of the appeal, VicForests relied on its arguments under Ground 10. The arguments in support of Ground 10 have been rejected above. Their restatement under Ground 23 is of no assistance.
24	Grounds 24 and 25 must also be rejected.	266	266. In support of Grounds 24 and 25 of the appeal VicForests relied on its arguments in support of Grounds 10 and 11 which have been rejected above and, accordingly, must be rejected again.
25	- do -		268. The primary judge was not obliged to accept VicForests' contention that the evidence did not support a finding that its conduct could not constitute a threat of serious irreversible damage to the Greater Glider when considered across its species distribution and range across Australia. The primary judge did not err in rejecting that contention. Professor Woinarski gave similar evidence about the importance of local populations of Leadbeater's Possum (Principal reasons at [610]-[611]). This culminated in the primary judge's unimpeachable conclusion at [616] of the Principal reasons: 269. Grounds 24 and 25 cannot be sustained in the face of the primary judge's reasoning. Her Honour's reasoning is cogent and persuasive.

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26	Abandoned		
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29	Ground 29 must also be rejected.	271	271. VicForests acknowledges that Ground 29 rises or falls on the outcome of Grounds 10 and 11. Accordingly, since both those grounds have been rejected, Ground 29 must also be rejected.
30	there is no need to consider these grounds.	272	272. Grounds 30 and 31 are pressed only in the event that all the grounds in Sections A – E are rejected.
31	- do -		

Summary of outcomes

Grounds abandoned before hearing	8
Ground successful	1
Grounds failed -	
Rejected - 8	
Dismissed - 6	
Cannot succeed - 3	
Untenable - 1	
Cannot be sustained - 1	
No appealable error - 1	
Total failed	20
Not considered	2
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