FEDERAL COURT OF AUSTRALIA

VicForests v Friends of Leadbeater's Possum Inc [2021] FCAFC 66

Appeal from:	*Friends of Leadbeater's Possum Inc v VicForests (No 6)* [2020] FCA 1199
File number(s):	VID 615 of 2020
Judgment of:	**JAGOT, GRIFFITHS AND SC DERRINGTON JJ**
Date of judgment:	10 May 2021
Catchwords:	**ENVIRONMENT LAW** – statutory interpretation of exemption from Part 3 of the *Environmental Protection Biodiversity Act 1999* (Cth) (*EPBC Act*) set out in s 38(1) the Act – whether conduct of forestry operations must be undertaken in accordance with any restrictions, limits, prescriptions, and contents of the Central Highlands Regional Forest Agreement (CH RFA) and the Code of Practice for Timber Production 2014 (Code) to secure the benefit of the exemption **ENVIRONMENT LAW** – alternative grounds of appeal relating to loss of exemption from Part 3 of the *EPBC Act* – whether failure to apply the precautionary principle as required by clause 2.2.2.2 of the *Code* resulted in the loss of the s 38(1) exemption – whether the preparation and promulgation of a Timber Release Plan is a 'forestry operation' as defined in the CH RFA – whether s 38(1) exemption is lost for every aspect of a forestry operation if the operation is not undertaken 'in accordance with' the Code in at least one respect – whether any of the impugned coupes are subject to the s 38(1) exemption **ENVIRONMENT LAW** – alternative grounds of appeal relating to construction and application of precautionary principle in the Code – whether precautionary principle is subject to two conditions precedent – whether precautionary principle requires that measures be taken to avoid all risks to threatened species – whether VicForests likely to comply with precautionary principle – whether error in the primary judge's assessment of expert evidence **ENVIRONMENT LAW** – alternative grounds of appeal relating to miscellaneous alleged breaches of the *Code* and Management Standards and Procedures for Timber

	Harvesting Operations in Victoria's State Forests – whether primary judge erred in finding that there was sufficient evidence to make findings relating to statutory prohibition against taking action likely to have significant impact on listed threatened species
Legislation:	*Acts Interpretation Act 1901* (Cth) *Endangered Species Protection Act 1992* (Cth) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) *Environment Protection (Impact of Proposals) Act 1974* (Cth) *Environmental Reform (Consequential Provisions) Act 1999* (Cth) *Evidence Act 1995* (Cth) *National Environment Protection Council Act 1994* (Cth) *Regional Forest Agreements Act 2002* (Cth) *Conservation Forests and Lands Act 1987* (Vic) *Flora and Fauna Guarantee Act 1988* (Vic) *Forests Act 1958* (Vic) *State Owned Enterprises Act 1992* (Vic) *Subordinate Legislation (Legislative Instruments) Regulations 2011* (Vic) *Sustainable Forests (Timber) Act 2004* (Vic) *Rio Declaration on Environment and Development 1992* (Report of the United Nations Conference on Environment and Development, 3-14 June 1992, Annex 1)
Cases cited:	*Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301 *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042; (2016) 251 FCR 308 *Boensch v Pascoe* [2019] HCA 49; (2019) 375 ALR 15 *Booth v Bosworth* [2001] FCA 1453; (2001) 114 FCR 39 *Branir Pty Ltd v Owston Nominees Pty Ltd (No 2)* [2001] FCA 1833; (2001) 117 FCR 424 *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2020] FCAFC 192; (2020) 384 ALR 668 *Environment East Gippsland Inc v VicForests* [2010] VSC 335; (2010) 30 VR 1

Evans v The Queen [2007] HCA 59; (2007) 235 CLR 521
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 250 CLR 503
Forestry Tasmania v Brown [2007] FCAFC 186; (2007) 167 FCR 34
Fox v Percy [2003] HCA 22; (2003) 214 CLR 118
Friends of Leadbeater's Possum Inc v VicForests [2018] FCA 178; (2018) 260 FCR 1
Friends of Leadbeater's Possum Inc v VicForests (No 3) [2018] FCA 652; (2018) 231 LGERA 75
Friends of Leadbeater's Possum Inc v VicForests (No 4) [2020] FCA 704; (2020) 244 LGERA 92
Friends of Leadbeater's Possum Inc v VicForests (No 6) [2020] FCA 1199
Monis v The Queen [2013] HCA 4; (2013) 249 CLR 92
MyEnvironment Inc v VicForests [2012] VSC 91
Papakosmas v The Queen [1999] HCA 37; (1999) 196 CLR 297
Polaris Coomera Pty Ltd v Minister for the Environment [2021] FCA 254
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
Queensland v Masson [2020] HCA 28; (2020) 381 ALR 560
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362
Taikato v The Queen [1996] HCA 28; (1996) 186 CLR 454
Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133; (2006) 67 NSWLR 256

Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	274
Date of hearing:	12-14 April 2021
Counsel for the Appellant:	Mr J Kirk SC and Ms J Watson
Solicitor for the Appellant:	Environmental Justice Australia
Counsel for the Respondent:	Mr I Waller QC with Mr H Redd and Ms R V Howe
Solicitor for the Respondent:	Baker & McKenzie

ORDERS

VID 615 of 2020

BETWEEN:	**VICFORESTS** Appellant
AND:	**FRIENDS OF LEADBEATER'S POSSUM INC** Respondent

ORDER MADE BY: **JAGOT, GRIFFITHS AND SC DERRINGTON JJ**

DATE OF ORDER: **10 MAY 2021**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 1-19 and 21-22 of the orders made on 21 August 2020 be set aside.
3. In lieu thereof order that the proceeding be dismissed.
4. The respondent is to file and serve a proposed order for costs in respect of the hearing below (excluding the separate question hearing) and the appeal, and submissions in support not exceeding 3 pages within 7 days of the date of these orders.
5. The appellant is to file and serve a proposed order for costs in respect of the hearing below (excluding the separate question hearing) and the appeal, and submissions in support not exceeding 3 pages within a further 7 days thereafter.
6. The respondent is to file and serve any submissions in reply relating to costs within a further 3 days thereafter.
7. Costs be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

INTRODUCTION [1]

THE PROCEEDINGS IN CONTEXT [12]

SUMMARY OF THE LEGISLATIVE FRAMEWORK [27]

The RFA Act [51]

The EPBC Act [59]

The Code [70]

The Management Standards and Procedures [87]

GROUNDS OF APPEAL [93]

A. Ground 1 – Loss of exemption from Part 3 of the EPBC Act [98]

B. Grounds 2 to 6 – Alternative grounds to Ground 1 [132]

C. Grounds 7 to 15 – The precautionary principle [161]

D. Grounds 18, 20 and 21 – Miscellaneous breaches of the Code [244]

E. Grounds 23-25 and 29 – Significant impact [263]

RELIEF [272]

CONCLUSION [273]

COSTS [274]

THE COURT:

INTRODUCTION

1 Friends of Leadbeater's Possum Inc (**FLP**) is an environmental group, which commenced proceedings against **VicForests**, a Victorian statutory agency whose purpose is the management and sale of timber resources in Victorian State forests on a commercial basis.

2 The proceedings concern forestry operations in 66 specified native forest coupes (an area or patch of forest in which logging occurs) in the Central Highlands region of Victoria and the effect of those forestry operations on two native fauna species, the Greater Glider (*Petauroides Volans*) and the Leadbeater's Possum (*Gymnobelideus leadbeateri*). Both are listed as threatened species under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (***EPBC Act***): the Leadbeater's Possum in the critically endangered category and the Greater Glider in the vulnerable category.

3 The forest in question is included within the region covered by the Central Highlands Regional Forest Agreement, being an agreement entered into between Victoria and the Commonwealth in 1998, and subsequently varied on 26 March 2018. It was varied again, subsequent to the trial of these proceedings, on 30 March 2020, with an extension until 30 June 2030. The relevant version, for the purposes of the proceedings, is that as amended by the 2018 variation (**CH RFA**).

4 There were two essential issues in the case that proceeded to trial:

(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* (the **Code**) and thereby lost the benefit of the exemption under s 38(1) of the *EPBC Act*; and

(b) if VicForests had lost the benefit of that exemption, whether VicForests' past and proposed forestry operations were actions that 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.

5 In reasons delivered on 27 May 2020, *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704; (2020) 244 LGERA 92 (**Principal reasons**), the primary judge held that FLP had established its pleaded case and made findings, inter alia, that:

(a) VicForests did not, and is not likely to, apply the precautionary principle to the conservation of the Greater Glider in certain coupes; accordingly, in relation to the forestry operations undertaken by VicForests in those coupes, its conduct was not covered by the exemption in s 38(1) of the *EPBC Act* (Principal reasons at [6(b) and (d)]);

(b) miscellaneous breaches of the Code result in the loss of exemption under s 38(1) of the *EPBC Act* in respect of forestry operations in the coupes where the breaches occurred (Principal reasons at [6(c)]);

(c) none of the 66 impugned coupes are subject to the s 38(1) exemption (Principal reasons at [6(e)]);

(d) the findings in 6(b)-(d) of the Principal reasons do not result in only a qualified loss of the s 38(1) exemption restricted to the impact of the forestry operations on the Greater Glider (Principal reasons at [6(f)]);

(e) for the purposes of s 18 of the *EPBC Act*, each forestry operation in each of the 66 impugned coupes, each series of forestry operations in each coupe group, the forestry operations undertaken in the Logged Coupes (collectively) (as defined in the Principal reasons), the forestry operations proposed to be undertaken in the Scheduled Coupes (as defined in the Principal reasons), and the forestry operations in all of the 66 coupes (collectively), constitute an action (Principal reasons at [6(g)]); and

(f) in relation to the actions so identified, VicForests' conduct of forestry operations is likely to have had, or is likely to have, a significant impact on the Greater Glider and/or the Leadbeater's Possum such as to contravene, or engage, s 18 of the *EPBC Act* (Principal reasons at [6(h)]).

6 These findings were made after a 12 day hearing, involving voluminous documentary evidence, in addition to the oral evidence of seven witnesses and a view of some of the relevant forest regions in the Central Highlands. A third further amended statement of claim and amended originating application were filed on the first Monday of the trial, their contents having been foreshadowed only late in the afternoon of the previous Friday (Principal reasons at [20]). The Principal reasons extend to some 1464 paragraphs and involve a detailed and careful analysis by the primary judge of the evidence and the submissions, the last of which were filed some three months after the last day of the hearing.

7 As the primary judge observed in the Principal reasons, the proceedings had already been the subject of two published decisions, one of which established the framework for the issues to be determined in the Principal reasons, *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178; (2018) 260 FCR 1 (**Separate Question reasons**), and one granting interlocutory injunctions until the hearing and determination of the proceeding, *Friends of Leadbeater's Possum Inc v VicForests (No 3)* [2018] FCA 652; (2018) 231 LGERA 75 (**Injunction reasons**).

8 This is an appeal from the substantive orders made by the primary judge in *Friends of Leadbeater's Possum Inc v VicForests (No 6)* [2020] FCA 1199 which was delivered on 21 August 2020. Orders 1 to 19, which were amended on 21 April 2021 (**Final orders reasons**), are as follows:

> **Declarations**
>
> *Declarations that forestry operations not covered by exemption*
>
> 1. In undertaking a forestry operation in each of the Logged Glider Coupes, including the planning and preparatory phases for that forestry operation, VicForests did not comply with cl 2.2.2.2 of the Code, and accordingly, the exemption in s 38(1) of the Act did not apply to those forestry operations.
>
> 2. VicForests is likely to undertake a forestry operation in each of the Scheduled Coupes, including the planning and preparatory phases for that forestry operation, in a manner that will not comply with cl 2.2.2.2 of the Code, and accordingly, the exemption in s 38(1) of the Act will not apply to those forestry operations.
>
> 3. In undertaking a forestry operation in coupe 462-504-0004 (Skerry's Reach), including the planning and preparatory phases for that forestry operation, VicForests did not comply with cl 4.3.1.1 and Appendix 3 Table 14 of the Management Standards in respect of mature Tree Geebung, and accordingly, the exemption in s 38(1) of the Act did not apply to those forestry operations.
>
> 4. In undertaking a forestry operation in coupe 348-506-0003 (Blue Vein), including the planning and preparatory phases for that forestry operation, VicForests did not comply with cl 2.2.2.4 of the Code, cl 2.1.1.3, cl 4.2.1.1 and Table 13 of the Management Standards and Table 4 of the Planning Standards, in respect of Leadbeater's Possum Zone 1A habitat, and accordingly, the exemption in s 38(1) of the Act did not apply to those forestry operations.
>
> 5. In undertaking a forestry operation in coupe 345-505-0006 (Hairy Hyde), including the planning and preparatory phases for that forestry operation, VicForests did not comply with cl 2.2.2.4 of the Code, cl 2.1.1.3, cl 4.2.1.1 and Table 13 of the Management Standards and Table 4 of the Planning Standards, in respect of a Leadbeater's Possum colony, and accordingly, the exemption in s 38(1) of the Act did not apply to those forestry operations.
>
> 6. In undertaking forestry operations in coupes 309-507-0001 (Mont Blanc), 309-507-0003 (Kenya), 307-507-0004 (The Eiger), 344-509-0009 (Ginger Cat), 290-527-0004 (Camberwell Junction), 307-505-0011 (Guitar Solo), 462-507-0008 (Estate), 298-516-

0001 (Glenview), 298-519-0003 (Flicka), 348-515-0004 (Greendale), 462-504-0004 (Skerry's Reach), 463-504-0009 (De Valera), 345-503-0005 (Bullseye), 345-506-0004 (Opposite Fitzies), 317-508-0008 (Professor Xavier), including the planning and preparatory phases for those forestry operations, VicForests did not comply with cl 2.5.1.1 of the Code and cl 5.3.1.5 of the Management Standards, in respect of screening timber harvesting operations from view, and accordingly, the exemption in s 38(1) of the Act did not apply to those forestry operations.

7. In undertaking forestry operations in coupes 344-509-0009 (Ginger Cat), 348-515-0004 (Greendale), 288-516-0007 (Golden Snitch), 288-516-0006 (Hogsmeade), 287-511-0006 (Houston), 287-511-0009 (Rocketman), 463-504-0009 (De Valera), 317-508-0008 (Professor Xavier), including the planning and preparatory phases for those forestry operations, VicForests did not comply with cl 2.2.2.1 of the Code and cl 4.1.4.4 of the Management Standards, in respect of gaps between retained vegetation, and accordingly, the exemption in s 38(1) of the Act did not apply to those forestry operations.

*Declarations that VicForests contravened s 18 in **each** of the coupes*

8. In undertaking a forestry operation in each of the Logged Coupes, including the planning and preparatory phases for that forestry operation, VicForests took an action that is likely to have had a significant impact on:

    a. the Greater Glider, a listed threatened species included in the vulnerable category, contravening s 18(4)(a) of the Act; and/or

    b. the Leadbeater's Possum, a listed threatened species included in the critically endangered category, contravening s 18(2)(a) of the Act.

9. In proposing to undertake a forestry operation, including the planning and preparatory phases for that forestry operation, in each of the Scheduled Coupes, VicForests is proposing to take an action that is likely to have a significant impact on:

    a. the Greater Glider, a listed threatened species included in the vulnerable category, contravening s 18(4)(b) of the Act; and/or

    b. the Leadbeater's Possum, a listed threatened species included in the critically endangered category, contravening s 18(2)(b) of the Act.

*Declarations that VicForests contravened s 18 in **each** of the **Coupe Groups***

10. In undertaking the series of forestry operations in each of the Cambarville, Matlock, Rubicon Coupe Groups, including the planning and preparatory phases for those forestry operations, VicForests took an action that is likely to have had a significant impact on:

    a. the Greater Glider, a listed threatened species included in the vulnerable category, contravening s 18(4)(a) of the Act; and/or

    b. the Leadbeater's Possum, a listed threatened species included in the critically endangered category, contravening s 18(2)(a) of the Act.

11. In proposing to undertake the series of forestry operations in each of the Beech Creek, Mount Bride, Nolan's Gully, Snobbs Creek, South Noojee, Sylvia Creek, Torbreck River Coupe Groups, including the planning and preparatory phases for those forestry operations, VicForests is proposing to take an action that is likely to have a significant impact on:

    a. Greater Glider, a listed threatened species included in the vulnerable category,

contravening s 18(4)(a) of the Act; and/or

b. the Leadbeater's Possum, a listed threatened species included in the critically endangered category, contravening s 18(2)(a) of the Act.

12. In undertaking the series of forestry operations in the Acheron, Ada River, Ada Tree, Baw Baw, Big River, Hermitage Creek, Loch, Mount Despair, New Turkey Spur, Noojee, Starlings Gap Coupe Groups, including the planning and preparatory phases for those forestry operations, VicForests has been taking and proposes to continue taking an action that is likely to have had, and is likely to have, a significant impact on:

    a. the Greater Glider, a listed threatened species included in the vulnerable category, contravening s 18(4)(a) of the Act; and/or

    b. the Leadbeater's Possum, a listed threatened species included in the critically endangered category, contravening s 18(2)(a) of the Act.

*Declarations that VicForests contravened s 18 in the **Logged** Coupes **as a whole***

13. In undertaking forestry operations in all of the Logged Coupes, including the planning and preparatory phases for those forestry operations, VicForests has taken an action that is likely to have had a significant impact on:

    a. the Greater Glider, a listed threatened species included in the vulnerable category, contravening s 18(4)(a) of the Act; and/or

    b. the Leadbeater's Possum, a listed threatened species included in the critically endangered category, contravening s 18(2)(a) of the Act.

*Declarations that VicForests contravened s 18 in the **Scheduled** Coupes as a **whole***

14. In proposing to undertake forestry operations in all of the Scheduled Coupes, including the planning and preparatory phases for those forestry operations, VicForests is proposing to take an action that is likely to have a significant impact on:

    a. the Greater Glider, a listed threatened species included in the vulnerable category, which would constitute a contravention of s 18(4)(b) of the Act; and/or

    b. the Leadbeater's Possum, a listed threatened species included in the critically endangered category, which would constitute a contravention of s 18(2)(b) of the Act.

*Declaration that VicForests contravened s 18 in the **Logged** and **Scheduled** Coupes as a **whole***

15. In undertaking the series of forestry operations in the 66 impugned coupes, including the planning and preparatory phases for those forestry operations, VicForests has been taking and proposes to continue taking an action that is likely to have had, and is likely to have, a significant impact on:

    a. the Greater Glider, a listed threatened species included in the vulnerable category, contravening s 18(4)(b) of the Act; and/or

    b. the Leadbeater's Possum, a listed threatened species included in the critically endangered category, contravening s 18(2)(b) of the Act.

Injunctions

16. Subject to order 17 below, and on the basis of orders 9, 11, 12, 14 and 15, pursuant to

s 475(2) of the Act, VicForests whether by itself, its agents, its contractors or howsoever otherwise is restrained from conducting forestry operations in the Scheduled Coupes.

17. Nothing in order 16 above prevents VicForests from planning forestry operations in the Scheduled Coupes for the purpose of participating in any process under the Act which provides for Pt 3 of the Act being rendered inapplicable to forestry operations in the Scheduled Coupes.

18. Subject to order 19 below, and on the basis of orders 8, 10, 12, 13 and 15, pursuant to s 475(2) of the Act, VicForests whether by itself, its agents, its contractors or howsoever otherwise is restrained from conducting any further forestry operations in the Logged Coupes.

19. Nothing in order 18 above prevents VicForests from conducting regeneration activities other than burning for the purpose of compliance with Pt 2.6.1 of the Code within only that part of each of the Logged Coupes that is in fact already harvested.

9 These reasons adopt the same defined terms as those used in the primary judge's Principal reasons and Final orders reasons.

10 VicForests also appeals the order that it pay the respondent's costs of the proceeding, fixed by way of lump sum and an order that, absent agreement, the question of an appropriate lump sum be referred to a Registrar for determination.

11 For the reasons that follow, the appeal must be allowed on the basis that, on the proper construction of s 38(1) of the *EPBC Act*, 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 *EPBC Act*.

THE PROCEEDINGS IN CONTEXT

12 The Greater Glider was listed in the vulnerable category under the *EPBC Act* effective 5 May 2016 and on the Threatened List under the *Flora and Fauna Guarantee Act 1988* (Vic) effective 14 June 2017 (Principal reasons at [30]). It is the largest gliding possum in Australia and its longevity is estimated at 15 years. Its generation length is likely to be 7-8 years (Principal reasons at [31]). It is a nocturnal marsupial and, in the region covered by the CH RFA, its habitat is the Mixed Species and Ash forests which serve both as a source of food and of denning and resting (Principal reasons at [32]). During the day, it shelters in tree hollows, with a particular selection for large hollows in large old trees (Principal reasons at [34]).

13 The Greater Glider was assessed as meeting the criteria for listing in the vulnerable category as a threatened species on the basis of its "Population size reduction (reduction in total numbers)" (Principal reasons at [44]). The primary judge set out (Principal reasons at [51]) the

Conservation Advice, issued by the Threatened Species Scientific Committee, established pursuant to s 502 of the *EPBC Act*, which stated that:

- despite the absence of robust estimates of total population size or population trends across the species' total distribution, declines in numbers, occupancy rates and extent of habitat have been recorded at many sites, from which a total rate of decline can be inferred;
- the most comprehensive monitoring program for Greater Gliders is in the Central Highlands, having been monitored annually since 1997, and over the period from 1997 to 2010, the average population decline is an average of 8.8% per year;
- if that rate is extrapolated over the 22 year period relevant to this assessment, the rate of decline is 87%; and
- higher rates of decline were recorded in forests subject to logging than in conservation reserves; declines are also associated with major bushfires and lower than average rainfall.

14 The Leadbeater's Possum is a small, nocturnal, arboreal possum which lives in colonies of between two to twelve individuals, including one breeding pair. It shelters in hollow trees during the day and occupies territories that contain multiple den sites. The adult Leadbeater's Possum lives for approximately 10 years and the first breeding age is typically two years. The Leadbeater's Possum reproduces twice a year and has more than one young. Generational length for Leadbeater's Possum is six years (Principal reasons at [82], [85]-[87]).

15 The Leadbeater's Possum habitat is usually defined as Montane Ash forest dominated by Mountain Ash, Alpine Ash and Shining Gum with a dense understorey of Acacia and an abundance of large hollow-bearing trees (Principal reasons at [89]).

16 The Leadbeater's Possum is listed as critically endangered under the criterion of "An observed, estimated, inferred, projected or suspected population reduction where the time period must include both the past and the future (up to a max of 100 years in future), and where the causes of reduction may have ceased OR may not be understood OR may not be reversible" based on "an index of abundance known to the taxon" and "[p]opulation reduction, projected or suspected to be met in the future (up to a maximum of 100 years) based on an index of abundance appropriate to the taxon" (Principal reasons at [81]).

17 The primary judge also set out the 2015 Conservation Advice, issued by the Threatened Species Scientific Committee, relating to the Leadbeater's Possum (Principal reasons at [94]), which included that it has a probability of extinction within the next 100 years of at least 10%, and concluded "[t]he Committee considers the most effective way to prevent further decline and rebuild the population of Leadbeater's Possum is to cease timber harvesting within montane ash forests of the Central Highlands" (Principal reasons at [102]).

18 The primary judge noted the observation made by one of the expert witnesses, Dr Smith, that: "We are now at the point where the same mistakes that were made with respect to Leadbeater's Possum can and are being made with respect to the Greater Glider, potentially driving it from vulnerable to endangered" (Principal reasons at [1452]). The primary judge said (Principal reasons at [1453]-[1454]):

> Based on the views I have formed of the evidence, that observation has force. The evidence of Professor Woinarski paints a grim picture for the Leadbeater's Possum: if the present trajectory continues, it may well become extinct in the wild…
>
> There is room for more optimism for the Greater Glider if the threats to its survival and recovery in the wild are mitigated. There can be no doubt that forestry operations are one of the key threats.

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. Resolution of this question requires a consideration of whether the *EPBC Act* (as FLP contends) or Victoria's statutory forest management system described in the CH RFA (as VicForests contends) applies to VicForests' past and proposed conduct. As noted, the Greater Glider and Leadbeater's Possum are protected under both statutory regimes. This Court has jurisdiction over the regime under the *EPBC Act* and the Victorian Supreme Court has jurisdiction over the regime under the Victorian law.

20 The question is whether the primary judge's construction of s 38(1) of the *EPBC Act*, as found in the Separate Question reasons and as adopted in the Principal reasons, is correct, such that, in order to have the benefit of that exemption (and so avoid the approval process in Pt 9 of the *EPBC Act*), a forestry operation must be compliant with each element of Victoria's forest management system, including the systems and processes established by the Code, which incorporates the "**Management Standards and Procedures** for timber harvesting in Victoria's State forests 2014". The primary judge said (Principal reasons at [681]):

> In the Separate Question reasons (at [155]) I set out my findings about the consequence of the accreditation of the Code under the CH RFA. In substance, I accepted the

> submissions put on behalf of the Commonwealth about how the legislative schemes were indeed to operate. As I set out there, where a regulatory mechanism such as the Code has a direct bearing on the conduct of forestry operations, then the intention of s 38 and the [*Regional Forest Agreement Act 2002* (Vic) (RFA Act)], read with (relevantly here) the CH RFA, is that forestry operations must be undertaken "in accordance" with such a regulatory mechanism to maintain the benefit of the exemption in s 38. I found (at [202]) that the phrase "in accordance with" meant "consistently with" or "in conformity with". In this way, the EPBC Act, the RFA Act and the RFAs create a substitute regime of regulation not intended to be any less effective in protecting matter of national environmental significance that the scheme in the EPBC Act itself.

21 The consequence of this construction is that a person can become liable to civil or criminal penalty under ss 18 or 18A of the *EPBC Act* for taking an action in circumstances where it is established that the forestry operation which was undertaken in purported accordance with a Regional Forest Agreement (**RFA**) is not compliant with each element of a State's forest management system (as referred to in the relevant RFA) and where the person did not otherwise seek approval of the taking of the action under Pt 9. In other words, the only way a person could be confident that it avoids liability under ss 18 or 18A is to apply in every case for approval under Pt 9 of the *EPBC Act*, thereby rendering the substitute regime of regulation under the RFAs, and s 38(1) itself, redundant.

22 If, contrary to the preferred construction of the primary judge, the forestry operations undertaken by VicForests were permitted without an approval under Pt 9 of the *EPBC Act*, because they were governed by the substitute Victorian statutory forest management system described in the CH RFA, then s 38(1) is not displaced, and s 18 is not contravened because it does not apply to an action if Pt 4 lets the person take the action without an approval under Pt 9 (s 19(3)(a)). The consequences that then flow from any breach of the Code (and the Management Standards and Procedures) are those provided for in Pts 6, 7 and 8 of the *Sustainable Forests (Timber) Act 2004* (Vic) (***SFT Act***), which are discussed below.

23 The construction of s 38(1) of the *EPBC Act* was not, in fact, the direct subject of the separate question before the primary judge. Rather, as set out in the Separate Question reasons, the separate question considered by the primary judge was:

> Was the logging of the Logged coupes, and will the proposed logging of the Scheduled Coupes be, RFA forestry operations undertaken in accordance with the Central Highlands Regional Forestry Agreement such that those forestry operations are exempt from the application of Part 3 of the *Environment Protection Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**), pursuant to either s 38(1) of the **EPBC Act** or s 6(4) of the *Regional Forest Agreements Act 2002* (Cth)?

24 The answer given by the primary judge was (Order 1, 20 April 2018):

> Insofar as logging in the coupes described in the separate question has been carried out, or will be carried out, the exemptions in s 38(1) of the *Environment Protection and Biodiversity Conservation 1999* (Cth) and s 6(4) of the *Regional Forest Agreements Act 2002* (Cth) are not rendered inapplicable to that logging by the failure to carry out reviews of the performance of the Central Highlands Regional Forest Agreement within the relevant time, as contemplated by cl 36 of the Central Highlands RFA.

25 That answer was a successful outcome for VicForests in as far as the primary judge concluded that the exemptions afforded by s 38(1) and s 6(4) respectively continued to apply in respect of the identified forestry operation. Thus, VicForests was not obliged to seek approval for those forestry operations pursuant to Pt 9 of the *EPBC Act*. In those circumstances, no appeal was brought from the Separate Question reasons.

26 The challenge to the reasoning of the primary judge which led to her preferred construction of s 38(1) of the *EPBC Act* and s 6(4) of the *Regional Forests Agreement Act 2002* (Cth) (***RFA Act***) arises for the first time in this appeal. Many of the arguments raised in the appeal were not raised before the primary judge. Indeed, many of VicForests' ultimate arguments in the appeal were not articulated until late in the hearing of the appeal and, only then, in response to questions from the Bench. To a large extent, VicForests' submissions about construction of s 38(1) of the *EPBC Act* were unhelpful and, no doubt, the same circumstance prevailed before the primary judge. As a consequence of this fact, FLP argued that, in the alternative, the proper construction of RFA forestry operation in s 4 of the *RFA Act* led to the same result as that determined by the primary judge. FLP also indicated that it wished to be heard in relation to costs, if unsuccessful in the appeal. Given VicForests' belated identification of a tenable construction of s 38(1) of the *EPBC Act*, FLP should be permitted to raise this new argument. VicForests' apparent inability to articulate a cogent construction of s 38(1) of the *EPBC Act* before the primary judge and for most of the hearing of the appeal is also relevant to the issue of costs.

SUMMARY OF THE LEGISLATIVE FRAMEWORK

27 The resolution of the essential issues that were before the primary judge depended, in large measure, on the construction and interpretation of the legislative scheme, which was devised over 20 years ago between the Commonwealth and the States, and which continues to be adapted and amended to meet emerging environmental issues.

28 In 1998, the State of Victoria and the Commonwealth entered into an intergovernmental agreement, which has since been amended, called the CH RFA. Similar agreements were entered into between other States and the Commonwealth.

29 The purpose of these agreements (**RFAs**) was to establish between the Commonwealth and the States a framework for the management and use of native forests. RFAs were intended to provide for the conservation of forests, and the flora and fauna found in them, while allowing for ecologically sustainable management and use of those forests. RFAs were concluded after a process of environmental assessment conducted by the Commonwealth to determine that State forest management systems would provide adequate protection to the environment. This included implementation of a Comprehensive Adequate and Representative (**CAR**) **Reserve System**, and implementation of ecologically sustainable forest management (**ESFM**).

30 The 'forest management system' relevant to the CH RFA was originally defined to mean "the State's suite of legislation, policies, codes, plans and management practices and processes as described in the *Victorian Statewide Assessment of Ecological Sustainable Management* published by the Commonwealth and Victorian RFA Steering Committee in 1997 as varied by this Agreement" (CH RFA cl 2). At that time, the suite of State legislation comprised some 27 statutes including, most relevantly, the *Forests Act 1958* (Vic), the *Conservation Forests and Lands Act 1987* (Vic), and the *Flora and Fauna Guarantee Act 1988* (Vic).

31 By cl 46 of the CH RFA, the:

> Parties agree that Victoria's forest management system (including its legislation, policies, Codes, plans and management practices) as described in the Statewide Assessment of Ecologically Sustainable Forest Management and including responses reported in Chapter 5 of the Central Highlands RFA Directions Report provides for continuing improvement in relation to ESFM.

32 By cl 47 of the CH RFA, the Commonwealth accredits Victoria's forest management system for the Central Highlands, where this system is said to include:

- the Forest Management Plan and the process for its review;
- the *Flora and Fauna Guarantee Act 1988* (Vic);
- the process for forecasting sawlog sustainable yield in the Central Highlands; and
- the systems and processes established by the Code and the Code of Practice for Fire Management on Public Land.

33 Provision is made for Codes of Practice in Pt 5 of the *Conservation Forests and Lands Act 1987* (Vic) (***CFL Act***). Such Code is made pursuant to the power given to the Minister by s 31 of the *CFL Act.* Section 31 also empowers the Minister to specify standards and procedures for the carrying out of any of the objects or purposes of a relevant law and, by s 31(2), a Code of Practice may apply, adopt or incorporate any such standard. Clause 1.2.6 of the relevant Code provides that:

> 1.2.6 The *Management Standards and Procedures for timber harvesting in Victoria's State forests* (Management Standards and Procedures) are incorporated into this Code to provide detailed mandatory operational instructions, including region specific instructions for timber harvesting operations in Victoria's State forests.

34 Section 39 of the *CFL Act* provides that compliance with a Code of Practice is not required unless it is incorporated in or adopted by a relevant law. Section 46 of the *SFT Act* provides, inter alia, that VicForests must comply with any relevant Code of Practice relating to timber harvesting. VicForests may be subject to audits of its compliance with the Code (s 47) and is required to respond in writing to any adverse findings (s 48). Any response must be available for public inspection and may be published on the internet (s 49). It is an offence under the *SFT Act* to undertake unauthorised timber operations (s 45) or to fail to comply with a suspension notice (s 75), which may be issued to any person who is undertaking timber harvesting operations in a State forest (s 70), by an authorised officer who is of the opinion that continuation of the operation would cause imminent damage to the environment or a serious risk to the safety of any person (s 71).

35 It is within the Code that one finds the expression of the precautionary principle (cl 2.2.2.2) which VicForests was found to have breached, or to be likely to breach. VicForests was also found to have breached various miscellaneous provisions of the Code, and various provisions of the Management Standards and Procedures.

36 Subsequent to the decision by the Commonwealth and the States to pursue a national system of RFAs, the Commonwealth enacted the *EPBC Act* which, in part, exempts forestry operations in regions covered by RFAs from the operation of federal environmental legislation. It also contains a series of prohibitions on conduct that has, or is likely to have, a significant impact on matters of national environmental significance, including those contained in ss 18(2) and 18(4) in relation to listed threatened species.

37 The legislative history is instructive. Section 38 of the *EPBC Act*, at the time of its commencement, provided:

> **Division 4 – Forestry operations in certain regions**
>
> **Subdivision A - Regions covered by regional forest agreements**
>
> **38 Approval not needed for forestry operations permitted by regional forest agreements**
>
> (1) A person may undertake RFA forestry operations without approval under Part 9 for the purposes of a provision of Part 3 if they are undertaken in accordance with a regional forest agreement.
>
> (2) In this Act:
>
> ***Regional forest agreement*** has the same meaning as in the *Regional Forest Agreements Act 1999*.
>
> ***RFA forestry operations*** has the same meaning as in the *Regional Forest Agreements Act 1999*.

38 The *Regional Forest Agreements Act 1999* (Cth) was never enacted.

39 The Regional Forest Agreements Bill 1998 (Cth) (the **Bill**) defined a regional forest agreement in precisely the same terms as ultimately enacted by the *RFA Act.*

40 Regional forestry operations were, however, defined in slightly different terms from those that appear in the *RFA Act*. Section 3 of the Bill provided:

> ***RFA forestry operations*** means forestry operations that:
>
> (1) are conducted in relation to land in a region covered by an RFA (being land where those operations are not prohibited by the RFA); and
>
> (2) are conducted in relation to a forest (within the meaning of the RFA).

41 This provision indicates that the scope of forestry operations was defined in geographical terms – by reference to the region "covered" by an RFA and where the forestry operations are not prohibited by the RFA (an example of such a prohibition being rainforest). The land in the region covered by the CH RFA is defined in cl 4 of that agreement to be "the Central Highlands Region as shown in Map 1 accompanying this Agreement".

42 Section 5 of the Bill provided:

> **Certain Commonwealth Acts not to apply in relation to RFA wood or RFA forestry operations**
>
> …
>
> (3) The effect of RFA forestry operations must be disregarded for the

purposes of the following:

(a) section 30 of the Australian Heritage Commission Act 1975;

(b) approved procedures under section 6 of the Environment Protection (Impact of Proposals) Act 1974 (**EPIP Act**);

(c) section 11 of the Environment Protection (Impact of Proposals) Act 1974;

(d) section 6 of the World Heritage Properties Conservation Act 1983.

43 Section 11 of the *Environment Protection (Impact of Proposals) Act 1974* (Cth) (***EPIP Act***) provided, inter alia, that for the purposes of procedures approved under the Act or for achieving the object of the Act, the Minister may direct that an inquiry be conducted in respect of all or any of the environmental aspects of a matter referred to in any of the paragraphs of s 5, whether or not an environmental impact statement has been furnished to the Minister.

44 The use of the language "must be disregarded" in s 5 of the Regional Forests Agreement Bill (Cth) makes clear that the intention of the proposed *Regional Forest Agreement Act 1999* (Cth) was to ensure that the Minister did not direct that an inquiry be conducted in respect of the environmental matters referred to in s 5 in respect of RFA forestry operations.

45 Section 5 of the *EPIP Act* provided that the object of the Act was to ensure, to the greatest extent that practicable, that matters affecting the environment to a significant extent are fully examined and taken into account in relation to, relevantly: the formulation of proposals; the carrying out of works and other projects; and, the negotiation, operation and enforcement of agreements and arrangements (including agreements and arrangements with, and with authorities of, the States).

46 Section 5A provided, inter alia, that a matter is taken to be a matter affecting the environment to a significant extent if it could threaten with extinction, or significantly impede, the recovery of a listed native species or a listed ecological community, as defined by the *Endangered Species Protection Act 1992* (Cth).

47 The *EPIP Act* was repealed by the *Environmental Reform (Consequential Provisions) Act 1999* (Cth) consequent upon the enactment of the *EPBC Act*. Section 8 of Sch 1 of the *Environmental Reform (Consequential Provisions) Act 1999* (Cth) provides that Pt 3 of the *EPBC Act* does not apply in relation to the negotiation and making of a regional forest agreement for an area described in s 41(1) of that Act when it commenced if the negotiation and making of the agreement is an EPIP activity (being an activity described in s 5(1) of the *EPIP Act*).

48 In 2002, the Commonwealth enacted the *RFA Act.* Section 6(4) of that Act provides:

> (4) Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

49 Clause 1 of Sch 1 to the *RFA Act* also repealed and substituted s 38 of the *EPBC Act* to provide, as from 3 May 2002,

> **Division 4 - Forestry operations in certain regions**
>
> **Subdivision A - Regions covered by regional forest agreements**
>
> **38 Part 3 not to apply to certain RFA forestry operations**
>
> (1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.
>
> (2) In this Division:
>
> ***RFA*** or ***regional forest agreement*** has the same meaning as in the *Regional Forest Agreements Act 2002*.
>
> ***RFA forestry operation*** has the same meaning as in the *Regional Forest Agreements Act 2002*.

50 It is desirable to describe some aspects of the legislative framework in further detail.

The *RFA Act*

51 The *RFA Act* does not give statutory force to any of the obligations imposed on a State by an RFA. Nor is the object of the *RFA Act* to give effect generally to the provisions of an RFA. Rather, the objects of the *RFA Act*, as stated in s 3, are:

(a) to give effect to *certain obligations of the Commonwealth* under Regional Forest Agreements (emphasis added);

(b) to give effect to certain aspects of the National Forest Policy Statement; and

(c) to provide for the existence of the Forest and Wood Products Council.

52 The obligations of the Commonwealth are threefold:

(1) to remove "RFA wood" or "RFA forestry operations" from the ambit of certain Commonwealth Acts (s 6). In particular, s 6(4) provides that Part 3 of the *EPBC Act* does not apply to an RFA forestry operation that is undertaken in accordance with an RFA;

(2) to require the Commonwealth to terminate an RFA only in accordance with the termination provisions of the RFA (s 7); and

(3) to require the Commonwealth to pay compensation that it is required to pay to a State in accordance with the compensation provisions of an RFA (s 8).

53 Section 4 defines an ***RFA*** or ***Regional Forest Agreement*** to mean:

> an agreement that is in force between the Commonwealth and a State in respect of a region or regions, being an agreement that satisfies all the following conditions:
>
> (a) the agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions:
>
> (i) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;
>
> (ii) indigenous heritage values;
>
> (iii) economic values of forested areas and forest industries;
>
> (iv) social values (including community needs);
>
> (v) principles of ecologically sustainable management;
>
> (b) the agreement provides for a comprehensive, adequate and representative reserve system;
>
> (c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions;
>
> (d) the agreement is expressed to be for the purpose of providing long-term stability of forests and forest industries;
>
> (e) the agreement is expressed to be a Regional Forest Agreement.

54 Section 4 also defines ***RFA forestry operations***, relevantly, to mean:

> (a) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and New South Wales) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or
>
> (b) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Victoria) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA) (emphasis added); or
>
> (c) harvesting and regeneration operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Western Australia) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or
>
> (d) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA).

55 As defined in the CH RFA as in force on 1 September 2001 between the Commonwealth and Victoria, "***Forestry operations***" means (CH RFA cl 2):

> (a) the planting of trees; or

(b) the managing of trees before they are harvested; or

(c) the harvesting of Forest Products.

56 "***Forest Products***" means all live and dead trees, ferns or shrubs or parts thereof (CH RFA cl 2).

57 Section 6 of the *RFA Act* makes provision for certain Commonwealth Acts not to apply in relation to RFA wood or RFA forestry operations. Specifically, as noted above, s 6(4) precludes the operation of Pt 3 of the *EPBC Act* in relation to RFA forestry operations undertaken in accordance with an RFA.

58 Additionally, the *RFA Act* provides for the publication of RFAs once they have been entered into, or have ceased to be in force (s 9), and for the tabling of RFAs, amendments thereto, and annual and review reports (s 10). These provisions contemplate that RFAs, additional to the five RFAs specifically mentioned in s 4, will be entered into between the Commonwealth and a State.

The *EPBC Act*

59 The objects of the *EPBC Act* are stated in s 3(1):

> The objects of this Act are:
>
> (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
>
> (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
>
> (c) to promote the conservation of biodiversity; and
>
> (ca) to provide for the protection and conservation of heritage; and
>
> (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
>
> (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and
>
> (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
>
> (g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

60 Chapter 2 of the *EPBC Act* sets out provisions with respect to the protection of the environment.

61 Specifically, Pt 3 within Ch 2 prescribes "*Requirements for Environmental approvals*". Pt 3, Div 1, Subdiv C is titled "*Listed threatened species and communities*". Within this subdivision, s 18(2) provides, relevantly,

Critically endangered species

(2) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the critically endangered category; or

(b) is likely to have a significant impact on a listed threatened species included in the critically endangered category.

Civil penalty:

(a) for an individual – 5,000 penalty units;

(b) for a body corporate – 50,000 penalty units.

…

Vulnerable species

(4) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the vulnerable category; or

(b) is likely to have a significant impact on a listed threatened species included in the vulnerable category.

Civil penalty:

(a) for an individual – 5,000 penalty units;

(b) for a body corporate – 50,000 penalty units.

62 The phrase "significant impact" is not defined in the *EPBC Act*, but it has been held to mean an "impact that is important, notable or of consequence having regard to its context or intensity": *Booth v Bosworth* [2001] FCA 1453; (2001) 114 FCR 39 at [99]-[100]; *Polaris Coomera Pty Ltd v Minister for the Environment* [2021] FCA 254 at [36].

63 Section 19 provides, in the following terms, that "*Certain actions relating to listed threatened species*" are not prohibited:

(1) A subsection of section 18 or 18A relating to a listed threatened species does not apply to an action if an approval of the taking of the action by the person is in operation under Part 9 for the purposes of any subsection of that section that relates to a listed threatened species.

…

(3) A subsection of section 18 or 18A does not apply to an action if:

(a) Part 4 lets the person take the action without an approval under Part 9 for the purposes of that subsection; or

(b) there is in force a decision of the Minister under Division 2 of Part 7 that the subsection is not a controlling provision for the action and, if the decision was made because he Minister believed the action would

be taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner; or

…

64 Part 4 of Ch 2 provides for "*Cases in which environmental approvals are not needed*". These include actions covered by bilateral agreements (Div 1), actions covered by Ministerial declarations and accredited management arrangements or accredited authorisation processes (Div 2), actions covered by Ministerial declarations and bioregional plans (Div 3), actions covered by conservation agreements (Div 3A), and forestry operations in certain regions (Div 4). It is in Div 4 that s 38 appears.

65 Section 38(1) is in essentially the same terms as s 6(4) of the *RFA Act*.

66 Subdivision B concerns regions subject to a process of negotiating a regional forest agreement.

39 Object of this Subdivision

The purpose of this Subdivision is to ensure that an approval under Part 9 is not required for forestry operations in a region for which a process (involving the conduct of a comprehensive regional assessment, assessment under the *Environment Protection (Impact of Proposals) Act 1974* and protection of the environment through agreements between the Commonwealth and the relevant State and conditions on licences for the export of wood chips) of developing and negotiating a regional forest agreement is being, or has been, carried on.

40 Forestry operations in regions not yet covered by regional forest agreements

(1) A person may undertake forestry operations in an RFA region in a State or Territory without approval under Part 9 for the purposes of a provision of Part 3 if there is not a regional forest agreement in force for any of the region.

(2) In this Division:

forestry operations means any of the following done for commercial purposes:

(a) the planting of trees;

(b) the managing of trees before they are harvested;

(c) the harvesting of forest products;

and includes any related land clearing, land preparation and regeneration (including burning) and transport operations. For the purposes of paragraph (c), ***forest products*** means live or dead trees, ferns or shrubs, or parts thereof.

RFA region has the meaning given by section 41.

…

67 Section 42 defines, in geographical terms, regions that are RFA regions.

68 Subdivision C puts limits on the application of Div 4. It provides:

> **42 This Division does not apply to some forestry operation**
>
> Subdivisions A [s 38] and B [ss 39-41] of this Division, and subsection 6(4) of the *Regional Forest Agreement Act 2002*, do not apply to RFA forestry operations, or to forestry operations, that are:
>
> (a) in a property included in the World Heritage List; or
>
> (b) in a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention; or
>
> (c) incidental to another action whose primary purpose does not relate to Forestry.

69 None of the forestry operations the subject of these proceedings is within the categories described by s 42.

The Code

70 The CH RFA, in cl 67, provides that State forest outside of the CAR Reserve System is available for timber harvesting in accordance with, relevantly, the Code of Forest Practices for Timber Production (defined to mean a version of the Code as in force in 1996). By cl 3(c) of the CH RFA, a reference to a statute or ordinance includes, relevantly, any replacement thereof and any regulations and instruments made under them (thereby including the defined Code of Practice).

71 The Code, made under the power conferred by the *CFL Act* as discussed above, specifies "standards and procedures for the carrying out of any of the objects or purposes of a relevant law" (s 31).

72 An earlier version of the Code, made in 2007, was the version considered in *Environment East Gippsland Inc v VicForests* [2010] VSC 335; (2010) 30 VR 1 (***Brown Mountain***) and ***MyEnvironment*** *Inc v VicForests* [2012] VSC 91. There is no relevant distinction for the purposes of the issues in these proceedings between the key provisions relating to the precautionary principle in the two versions of the Code (Principal reasons at [124]). However, the CH RFA refers to the Code of Forest Practices for Timber Production Revision No 2 1996, a document which makes no reference to the precautionary principle. Express reference to the precautionary principle was introduced by the Code of Practice for Timber Production 2007 (the **2007 Code**) and reiterated in the 2014 version of the Code. However, it was not until

amendments were made to the CH RFA in March 2020 (after the conclusion of the trial) that reference to the 2014 Code was included.

73 VicForests raised, for the first time in its written submissions in reply, the contention that the 2014 Code is not contemplated by the terms of the CH RFA. This was not a matter raised before the primary judge. Given there is no material difference between the relevant provisions of the 2007 Code and the 2014 Code, it is unnecessary to decide whether the 2014 Code is comprehended by the terms of the CH RFA. Nevertheless, we proceed on the basis that cl 3(c) of the CH RFA operates in accordance with its terms (set out above) irrespective of the apparently more confined language of cl 3(d) of the CH RFA (which provides "a reference to a code or other instrument includes any consolidations **or amendments thereof**" (emphasis added), and would be sufficient to incorporate the terms of the 2014 Code. VicForests ultimately accepted this proposition during the hearing of the appeal and abandoned its contention to the contrary.

74 The Code is a Code of Practice within the meaning of Pt 5 of the *CFL Act* and is a prescribed legislative instrument pursuant to item 8.1 of Sch 2 of the *Subordinate Legislation (Legislative Instruments) Regulations 2011* (Vic). As such, it is subject to the principles concerning the proper construction of legislation.

75 VicForests is defined to be the "Managing Authority" in the Code for timber harvesting operations conducted under an allocation order (an order by which timber resources are allocated to VicForests from the Crown in right of the State of Victoria).

76 Although s 46 of the *SFT Act* is the express source of the obligation imposed on VicForests to comply with the Code, that obligation is also recognised in the relevant allocation orders and timber release plans. Further, the CH RFA specifically refers to Victoria's forest management system as including the Code (CH RFA cl 47).

77 Incorporated into the Code are the Management Standards and Procedures.

78 The Code defines the precautionary principle in the Glossary in these terms:

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

79 The Code provides (emphasis in original):

> **1.2.4**: … The Code applies to the planning and conducting of all commercial timber production and timber harvesting operations on both public and **private land** in Victoria …
>
> **1.2.5**: … The Code applies to all land in the State of Victoria that is either being used for or is intended to be used for **timber production** or **timber harvesting operations** …

80 The Code describes itself as containing at least three tiers of mechanisms (emphasis in original):

> **1.2.8 Terminology**
>
> The following terms are used in the Code to provide a structure for the Code's intended outcomes and the mechanisms within the Code to achieve these. The glossary provides further definitions.
>
> A Code Principle is a broad outcome that expresses the intent of the Code for each aspect of sustainable forest management.
>
> An Operational Goal states the desired outcome or goal for each of the specific areas of **timber harvesting operations**, to meet the Code Principles.
>
> Mandatory Actions are actions to be conducted in order to achieve each operational goal. **Timber harvesting managers**, **harvesting entities** and **operators** must undertake all relevant mandatory actions to meet the objectives of the Code. Mandatory Actions are focussed on practices or activities. Failure to undertake a relevant Mandatory Action would result in non-compliance with this Code.

81 At cl 1.3, the Code then sets out "Code Principles":

> **1.3 Code Principles**
>
> Timber production on all native forest and plantations in Victoria are guided by the Code Principles described in Table 1. The Code Principles express the broad outcomes of the intent of the Code for each aspect of sustainable forest management.
>
> The six Code Principles are developed from the internationally recognised Montreal Process criteria, and are consistent with the objectives of the *Sustainability Charter for Victoria's State forests*. Reporting mechanisms such as *Victoria's State of the Forests Report* use the same principles, and demonstrate Victoria's commitment to being an international leader in sustainable forest management.
>
> The six Code principles are that:
>
> 1. Biological diversity and the ecological characteristics of native flora and fauna within **forests** are maintained.
>
> 2. The ecologically sustainable long-term timber harvesting capacity of **forests** managed for timber harvesting is maintained or enhanced.
>
> 3. Forest ecosystem health and vitality is monitored and managed to reduce pest and weed impacts.
>
> 4. Soil and water assets within forests are conserved. **River health** is maintained

or improved.

5. Cultural heritage values within forests are protected and respected.

6. Planning is conducted in a way that meets all legal obligations and operational requirements.

Timber production must always be planned and conducted according to knowledge developed from research and management experience so as to achieve the intent of the Code Principles. Application of this knowledge will ensure that timber can continue to be utilised while ensuring that impacts on soil, water, **biodiversity**, forested landscapes and significant archaeological, historic and other cultural heritage sites are avoided or minimised.

In Table 1, the Operational Goals of the Code are aligned with each Code Principle. These Operational Goals are repeated in the body of the Code, with a variety of Mandatory Actions to achieve each Goal. This framework translates the high level Principles into on-ground action.

82 The relevant parts of Table 1 are set out below:

Extract from Table 1 of the Code

Code Principles	Operational Goals	Section
Biological diversity and ecological characteristics of native flora and fauna within forests is maintained.	Timber harvesting operations in State forests specifically address biodiversity conservation risks and consider relevant scientific knowledge at all stages of planning and implementation. Timber harvesting operations in private native forests specifically address the conservation of biodiversity, in accordance with relevant legislation and regulations, and considering relevant scientific knowledge at all stages of planning and implementation.	2.2.2 and 3.2.2 Conservation of Biodiversity 2.1.1, 2.3.1 and 3.1.1 Forest Planning
The ecologically sustainable long-term timber production capacity of forests managed for timber harvesting operations is maintained or enhanced.	Timber harvesting operations are planned and conducted to maintain a long-term ecologically sustainable timber resource.	2.1.1 and 2.3.1 Forest Planning
	Harvested native forest is managed to ensure that the forest is regenerated and the biodiversity of the native forest is perpetuated.	2.6.1 and 3.5.1 Regeneration
Planning is conducted in a way that meets all legal obligations and operational requirements.	Long-term forest management planning maintains an ecologically sustainable timber resource that mitigates the impacts on all forest values. Effective and inclusive planning processes are used for timber harvesting operations to meet the requirements of this Code and the Management Standards and Procedures	2.1.1 and 2.3.1 Forest Planning

83 This last Code Principle also relevantly requires that a "Forest Coupe Plan which specifies operational requirements is prepared in accordance with this Code prior to the commencement of each timber harvesting operation".

84 Chapter 2 is then divided into a number of topics. The second topic is relevant to the issues in these proceedings. It is titled "Environmental Values in State forests", and begins with the statement that:

> Timber harvesting operations in native forests may have local impacts on environmental values such as water quality and **biodiversity**. Appropriate planning and management through the lifecycle of the timber harvesting operation can minimise these impacts. This section includes requirements that must be observed during planning, roading, harvesting, tending and regeneration of native forests.

85 After dealing with water quality, river health and soil protection, in cl 2.2.2 the Code then deals with "Conservation of Biodiversity".

> **2.2.2 Conservation of Biodiversity**
>
> **Operational Goal**
>
> **Timber harvesting operations** in **State forests** specifically address **biodiversity** conservation risks and consider relevant scientific knowledge at all stages of planning and management.
>
> Harvested State forest is managed to ensure that the **forest** is regenerated and the biodiversity of the **native forest** is perpetuated.
>
> The natural floristic composition and representative gene **pools** are maintained when regenerating native forests by protecting long-lived **understorey** species and using appropriate seed sources and mixes of dominant species.
>
> Forest health is monitored and maintained by employing appropriate preventative, protective and remedial measures.
>
> Chemicals are only used where appropriate to the site conditions and are conducted with due care for the maintenance of forest health, water quality, biodiversity and soil values.
>
> **Mandatory Actions**
>
> ***Addressing biodiversity conservation risks considering scientific knowledge***
>
> 2.2.2.1 Planning and management of timber harvesting operations must comply with relevant biodiversity conservation measures specified within the **Management Standards and Procedures**. **(The subject of Order 7)**
>
> 2.2.2.2 The **precautionary principle** must be applied to the conservation of biodiversity values. The application of the precautionary principle will be consistent with relevant monitoring and research that has improved the understanding of the effects of forest management on forest ecology and conservation values. **(The subject of Orders 1 and 2)**
>
> 2.2.2.3 The advice of relevant experts and relevant research in conservation biology and flora and fauna management must be considered when planning and conducting timber harvesting operations.
>
> 2.2.2.4 During planning identify biodiversity values listed in the Management Standards and Procedures prior to roading, harvesting, **tending** and

regeneration. Address risks to these values through management actions consistent with the Management Standards and Procedures such as appropriate location of **coupe infrastructure**, **buffers**, **exclusion areas**, modified harvest timing, modified silvicultural techniques or retention of specific structural attributes. **(The subject of Orders 3, 4 and 5)**

2.2.2.5 Protect areas excluded from harvesting from the impacts of timber harvesting operations.

2.2.2.6 Ensure chemical use is appropriate to the circumstances and provides for the maintenance of biodiversity.

2.2.2.7 Rainforest communities must not be harvested.

Perpetuating the biodiversity of harvested native forests

2.2.2.8 Long-term (strategic) **forest** management planning must incorporate **wildlife corridors**, comprising appropriate widths of retained forest, to facilitate animal movement between patches of forest of varying ages and stages of development, and contribute to a linked system of reserves.

2.2.2.9 Modify **coupe** size and **rotation** periods to maintain a diversity of forest structures throughout the landscape.

2.2.2.10 Retain and protect **habitat trees** or habitat patches and long-lived understorey species to provide for the continuity and replacement of old hollow-bearing trees and existing vegetation types within each coupe.

2.2.2.11 Use silvicultural systems that suit the ecological requirements of **the forest type**.

2.2.2.12 Regenerate harvested areas using seed from **overstorey** species with **provenances** native to the area.

Maintaining forest health

2.2.2.13 Implement appropriate vehicle and equipment hygiene precautions when moving from areas of known pest plant, pest animal and pathogen infestations.

2.2.2.14 Implement appropriate control actions where **timber harvesting operations** have introduced or exacerbated a pathogen or weed.

2.2.2.15 Report the suspected introduction of new or unknown **exotic** agents to DEPI's Biosecurity section.

2.2.2.16 Where Myrtle Wilt (Chalara australis), Cinnamon Fungus (Phytophthora cinnamomi) or Root Rot (Armillaria) is known to exist, apply appropriate measures to minimise the spread of these pathogens.

86 Clause 2.5.1 of the Code deals with "Coupe Management". It provides, relevantly:

2.5.1 Mandatory Actions

2.5.1.1 Planning and management of timber harvesting operations must comply with relevant **coupe** management measures specified in the

Management Standards and Procedures. (The subject of Order 6)

2.5.1.2 Timber harvesting operations must be conducted in accordance with the Forest Coupe Plan and all applicable Special Management Zone plans.

2.5.1.3 The location of coupe boundaries, Special Protection Zones, **buffers**, filters, **exclusion areas**, areas where special management applies and **habitat trees** must be easily distinguishable in the field.

2.5.1.4 Timber harvesting operations must only be undertaken within established **coupe** boundaries as indicated on the Forest Coupe Plan and where required marked in the field, unless the timber harvesting operation is specifically **sanctioned** or exempted in accordance with this Code.

The Management Standards and Procedures

87 The provisions of the Management Standards and Procedures relevant to the issues in these proceedings are set out below (emphasis in original).

1. Introduction

1.1 Scope

1.1.1.1 The Management Standards and Procedures apply to all commercial **timber harvesting operations** conducted in Victoria's **State forests** where the **Code** applies.

1.2 Role

1.2.1.1 This document provides standards and procedures to instruct managing authorities, harvesting entities **and operators** in interpreting the requirements of the Code.

1.2.1.2 These Management Standards and Procedures do not take the place of the mandatory actions in the Code.

1.2.1.3 Where there is a conflict between the Code and these Management Standards Procedures, the Code shall prevail.

1.3 Application

1.3.1.1 Notwithstanding clause 1.2.1.3, operations that comply with these Management Standards and Procedures are deemed to comply with the Code.

1.3.1.2 Requests for exemptions or temporary variations to these Management Standards and Procedures will demonstrate to the satisfaction of the **Minister** or **delegate** that they are consistent with the Operational Goals and Mandatory Actions of the Code.

88 Clause 2 is concerned with "Planning and Record Keeping". It provides, relevantly:

2.1 FMZ [forest management zone] **and planning information**

…

2.1.1.3 Where evidence of a value that requires protection via the establishment or amendment of an SPZ [special protection zone] or SMZ [special management zone] is found in the field application must be made to the Secretary or delegate prior to commencement of the timber harvesting operation to create or amend an SPZ or SMZ in accordance with Appendix 5 the Planning Standards. SMZ applications must be accompanied by and SMZ plan and must be complied with during timber harvesting operations. **(The subject of Orders 4 and 5)**

89 Clause 4 of the Management Standards and Procedures is concerned with "Biodiversity". Relevantly, cl 4.1.4 provides:

4.1.4 Central Highlands [Forest Management Areas] FMAs

4.1.4.1 When selecting habitat trees, prioritise hollow-bearing trees where they are present and trees more likely to develop hollows in the short term

4.1.4.2 Scatter habitat trees across the timber harvesting coup in mixed-species **forest**.

4.1.4.3 Where possible, retain potential hollow-bearing ash eucalyptus 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 150 m. **(The subject of Order 7)**

4.1.4.5 Retain habitat trees where they can be most easily protected from damage during harvesting and site preparation treatment.

90 The Management Standards and Procedures contain specific prescriptions for some threatened fauna species, but not all threatened fauna and flora species.

4.2 Fauna

4.2.1.1 Apply management actions for rare and threatened fauna identified within areas affected by timber harvesting operations as outlined in Appendix 3 Table 13 (Rare or threatened fauna prescriptions). **(The subject of Orders 4 and 5)**

4.3 Flora

4.3.1.1 Apply management actions for rare and threatened flora identified within areas affected by **timber harvesting operations** as outlined in Appendix 3 Table 14 (Rare or threatened flora prescriptions). **(The subject of Order 3)**

91 The specific prescriptions in Appendix 3 at Tables 13 and 14 relevant to the Forest Management Areas (**RMAs**) in the Central Highlands are:

Extract from Management Standards and Procedures Appendix 3, Table 13

FMA	Common name	Scientific name	Management

Central Highlands FMAs	Leadbeater's Possum **habitat**	*Gymnobelideus leadbeateri*	Exclude timber harvesting operations from areas of Zone 1B habitat where there are more than 12 hollow bearing trees per 3 ha in patches greater than 10 ha and wattle density exceeds 5 m2/ha. This prescription applies until either of the two Zone 1B attributes: 1. the presence of **dead mature** of **senescent** living trees; or 2. wattle understorey no longer exist. Where evidence of Zone 1A habitat is found in the field follow clause 2.1.1.3 of this document using table 4 in Appendix 5 the Planning Standards for information.
Central Highlands FMAs	Leadbeater's Possum **colony**	*Gymnobelideus leadbeateri*	Where evidence of this value is found in the field follow clause 2.1.1.3 of this document using table 4 in Appendix 5 the Planning Standards for information.

Extract from Management Standards and Procedures Appendix 3, Table 14

FMA	Common name	Scientific name	Management
Central Highlands FMAs	Tree Geebung	*Persoonia arborea*	Protect mature individuals from disturbance where possible.

92 The Management Standards and Procedures deal with "Other values" in cl 5. Relevantly, cl 5.3 provides:

> **5.3 Landscape**
>
> **5.3.1 Central Highlands FMAs**
>
> 5.3.1.1 Retain all **mature** trees within 20 m of the Monda Track.
>
> 5.3.1.2 Apply a 50 m **buffer** either side of La La Falls walking track.
>
> 5.3.1.3 Apply a 50 m buffer either side of Island Creek walking track and a 100 m buffer around the Ada Tree.
>
> *Foreground (0 – 500m)*
>
> 5.3.1.4 Within 500 m of the scenic drives and designated lookouts listed in table 9 in Appendix 5 the Planning Standards, manage **timber harvesting operations** to ensure landscape alterations are temporary, subtle and not evident to the casual observer.
>
> 5.3.1.5 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. **(The subject of Order 6)**
>
> …

GROUNDS OF APPEAL

93 By the time of the hearing of this appeal, VicForests pressed 23 of the grounds raised in its Amended Notice of Appeal, grouped into five categories the subject of challenge:

A. Loss of exemption from Pt 3 of the *EPBC Act*;

B. The precautionary principle;

C. Miscellaneous alleged breaches of the Code;

D. Significant impact; and

E. Relief (only pressed in the event that all of the grounds in sections A-D are rejected).

94 VicForests abandoned Grounds 12, 16, 17, 19, 22, 26, 27, and 28 of its appeal. This is also relevant to the issue of costs.

95 VicForests contends that Ground 1 is dispositive of the appeal and, if successful, must result in the appeal being allowed and orders made substantially in the form sought in its Amended Notice of Appeal. If Ground 1 succeeds, it necessarily follows that Ground 6 must also. VicForests contends that, in that event, it would be unnecessary for the Court to consider the remaining grounds.

96 The obligation of intermediate courts of appeal to consider whether to deal with all grounds of appeal has been explained recently by the High Court. In *Boensch v Pascoe* [2019] HCA 49; (2019) ALR 15 at [7]-[8] per Kiefel CJ, Gageler and Keane JJ; Bell, Gordon, Nettle and Edelman JJ agreeing at [101], it was said:

> [7] Though it would have been preferable for the primary judge to have made findings on all of the facts that were in contest before him, we would not criticise the Full Court for not addressing an issue raised before it which it did not consider to be dispositive. The principle that an appellate court should confine itself to determining only those issues which it considers to be dispositive of the justiciable controversy raised by the appeal before it is so much embedded in a common law system of adjudication that we have no name for it. In some other systems, it is known as "judicial economy". Judicial economy promotes judicial efficiency in a common law system not only by narrowing the scope of the issues that need to be determined in the individual case but also by ensuring that such pronouncements as are made by appellate courts on contested issues of law are limited to those that have the status of precedent.
>
> [8] Within the integrated Australian legal system, the mere potential for an appeal to be brought, by special leave, to the High Court provides no reason for an intermediate court of appeal to sacrifice those efficiencies. That is not to deny that there will be occasions when departure from judicial economy will

> enhance the overall efficiency of the system or that the prospect of an appeal being brought, by special leave, to this Court in a particular case can give rise to such an occasion. There is accordingly no reason to deny that, "although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal not just with what is identified as the decisive ground". But a non-universal rule making it important for intermediate courts of appeal to consider whether to deal with all grounds of appeal is quite different from a rule that always or even ordinarily requires those courts to deal with all grounds of appeal. It is important to the efficiency of the system as a whole that intermediate courts of appeal should not feel compelled to treat determination of non-dispositive issues in appeals before them as the norm.

97 For these reasons, and given our conclusion that Ground 1 of the appeal must be sustained, we consider the alternative grounds of appeal in a summary manner.

A. Ground 1 – Loss of exemption from Part 3 of the *EPBC Act*

98 ***Ground 1*** contends that the primary judge erred in holding that the actual conduct of forestry operations must be undertaken in accordance with the contents of the CH RFA – that is, in compliance with any restrictions, limits, prescriptions, and contents of the Code – in order to secure the benefit of the exemption in s 38(1) of the *EPBC Act*. VicForests contends that the primary judge ought to have held that, on the proper construction of s 38(1) of the *EPBC Act* and s 6(4) of the *RFA Act*, any forestry operations that:

> (a) are forestry operations as defined by an RFA as in force on 1 September 2001; and
>
> (b) are conducted in relation to land:
>
> (i) in a region covered by the RFA; and
>
> (ii) where those operations are not prohibited by the RFA
>
> are exempt from the operation of Part 3 of the *EPBC Act*.

99 Grounds 2 – 6 are advanced in the alternative to Ground 1 and will be discussed later.

100 The issue raised by Ground 1 is a question of statutory construction. The applicable principles, which require consideration of the text, context and purpose, are well established: see, in particular, s 15AA of the *Acts Interpretation Act 1901* (Cth); *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39]; *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [25]-[26]; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR

362 at [14]; *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2020] FCAFC 192; (2020) 384 ALR 668 at [4].

101 The primary judge dealt with how the exemption conferred by s 38(1) of the *EPBC Act* might be lost at [193]-[272] of the Separate Question reasons. The primary judge identified the key factors that led to her conclusion, at [193], as:

- textual considerations in s 38(1), especially the use of the phrase "in accordance with"; and the focus of the provision on forestry operations;
- context: in particular the place of Div 4 (Forestry operations) within Pt 4 of the *EPBC Act*;
- purpose: which construction best promotes the purpose and objects of the *EPBC Act*;
- the scheme of the *EPBC Act*;
- the consequences of the competing constructions;
- why cl 36 [the five yearly review provision] of the Central Highlands RFA is not a compliance provision;
- consistency of the chosen construction with *Brown Mountain*; and
- the fact that the text, context and purpose of the *RFA Act* is consistent with this construction.

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), that the phrase meant "consistently with", in "conformity with" or "in compliance with", being consistent with how the phrase was used elsewhere in the *EPBC Act*.

103 As was also observed by the primary judge, the current form of Div 4 and s 38 of the *EPBC Act* commenced on 3 May 2002 as a consequence of the passage of the *RFA Act* (Separate Question reasons at [103]). As noted above, s 38(1) of the *EPBC Act* and s 6(4) of the *RFA Act* are in identical terms. The language used in each of those sections does not accord precisely with that used in the other divisions of Pt 3 and so it might be thought that a deliberate choice was made by Parliament in enacting the amendment to s 38 to convey a meaning that does indeed differ from elsewhere in the *EPBC Act*.

104 VicForests contends that s 38(1) of the *EPBC Act* operates as a general exemption from the requirements otherwise imposed by Pt 3 of Ch 2 of the Act. The simplified outline of Ch 2, contained in s 11, suggests that such a construction is apposite. It provides:

> This Chapter provides a basis for the Minister to decide whether an action that has, will have or is likely to have a significant impact on certain aspects of the environment should proceed.
>
> It does so by prohibiting a person from taking an action without the Minister having given approval or decided that approval is not needed. (Part 9 deals with the giving of approval.)
>
> Approval is not needed to take an action if any of the following declare that the action does not need approval:
>
> (a) a bilateral agreement between the Commonwealth and the State or Territory in which the action is taken;
>
> (b) a declaration by the Minister.
>
> **Also, an action does not need approval if it is taken in accordance with Regional Forest Agreements** or it is for a purpose for which, under a zoning plan for a zone made under the *Great Barrier Reef Marine Park Act 1975*, the zone may be used or entered without permission.
>
> (emphasis added)

105 The primary judge noted that, "throughout Pt 4 of the *EPBC Act*, where the scheme uses the phrase, 'in accordance with', it does so as a method of picking up, by a cross-reference, the content of another document or agreement" (Separate Question reasons at [210]).

106 So much may be accepted. Persons are permitted to take an action described in a provision of Pt 3 without an approval under Pt 9 if: such action is approved or taken *in accordance with a management arrangement* or authorisation process that is a bilaterally accredited management arrangement (Div 1); the action is one of a class declared by the Minister not to require approval because the action is approved *in accordance with a management arrangement* or authorisation process (Div 2); the action is one declared by the Minister not to require approval because the action is taken *in accordance with a particular bioregional plan* (Div 3); the action is included in a class of actions declared in a conservation agreement *in accordance with s 306A*; or, the action is taken *in accordance with the conditions* (if any) specified in the declaration (Div 3A) (emphasis added).

107 Division 4, however, does not merely permit a person to take an action described in a provision of Pt 3 without an approval under Pt 9; Div 4 *excludes* the operation of Pt 3 altogether in respect of RFA forestry operations undertaken in accordance with an RFA. In other words, RFA forest

operations undertaken in accordance with an RFA cannot be an "action" for the purposes of Pt 3 of the *EPBC Act*. The primary judge drew attention to the different voice employed in the amended version of s 38, notably the use of the passive voice, but considered that this did not connote any intentional difference in meaning from other provisions of the *EPBC Act* which state that a "person may take an action".

108 Other provisions of the *EPBC Act* which permit a person to take action in certain circumstances use more prescriptive terms than those contained in s 38(1). For example, in Div 3A, s 37M permits a person to take an action without an approval under Pt 9 if, inter alia, "the action is taken in accordance with *the conditions (if any) specified in* the declaration" (emphasis added). Similarly, in Div 3, s 29 permits a person to take an action without an approval under Pt 9 if, inter alia, the action is one of a class of actions declared a bilateral agreement and, in the case of a bilaterally accredited authorisation process, amongst other matters, the action is taken in accordance with *the bilaterally accredited authorisation process* (emphasis added).

109 It would have been a simple matter for Parliament to exclude from the ambit of Pt 3 an RFA forestry operation that is undertaken "in accordance with any requirements imposed by or through an RFA". It did not to do so.

110 The primary judge considered that the original iteration of Div 4, and s 38 in particular, at the commencement of the *EPBC Act* in July 2000, was instructive in construing the current wording of s 38. As already set out above, the section originally provided:

> **Subdivision A - Regions covered by regional forest agreements**
>
> **38 Approval not needed for forestry operations permitted by regional forest agreements**
>
> (1) A person may undertake RFA forestry operations without approval under Part 9 for the purposes of provisions of Part 3 if they are undertaken in accordance with a regional forest agreement.

111 The primary judge said, at [99]-[100] of the Separate Question reasons:

> [99] It is worthwhile noting two matters about the original s 38. The first is that its form – "a person may undertake" is a formulation retained in many of the exception and exemption provisions in the EPBC Act. This form uses the active voice, and directs itself at the person undertaking the action.
>
> …
>
> [100] Aside from the change in formulation and voice, the substance of the exemption remains as it was enacted with the EPBC Act in 2000. The focus of the provision is on the undertaking of forestry operations: that focus is critical to the conclusion I have reached about the correct construction of s 38. It is of

> some weight that this has been the focus of s 38, in its context in Pt 4 of Ch 2, since the introduction of the legislative scheme of the EPBC Act.

112 The primary judge considered that the original form, reflecting the form otherwise used throughout Pt 4, confirmed her preferred construction and that "the change in language in 2002 is explained simply by the fact that it was drafted separately and introduced through another piece of amending legislation" (Separate Question reasons at [59]). Such a construction does not sit comfortably with the clear language of s 38(1) – "Part 3 does not apply…".

113 Of some note is the fact that the headings to Div 4 and to Div 4, Subdiv A remained unchanged despite the amendment to s 38 in 2002. The heading to Div 4 refers to "Forestry operation *in certain regions*" while the heading to Subdiv A refers to "Regions *covered by* regional forest agreements" (emphasis added). By contrast, the heading to s 38 itself was changed from "Approval not needed for forestry operations *permitted by* regional forest agreements" (emphasis added) to "Part 3 *not to apply to* certain forestry operations" (emphasis added). Consistently with the heading to s 38 and the structure of Div 4, Subdiv A, s 38(1) does not impose any legal obligations on a person conducting a forestry operation in an RFA region.

114 These textual and structural considerations suggest that the use of the words "in accordance with" in s 38(1) was intended to be descriptive of the forestry operation: that is, the operation is one covered by or permitted by the relevant RFA. 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.

115 Division 4 also draws a distinction between forestry operations undertaken in regions covered by an RFA (Subdiv A) and forestry operations undertaken in regions for which a process of developing and negotiating an RFA is being, or has been carried on (Subdiv B). The former are excluded from Pt 3 of the *EPBC Act* while the latter are expressed not to require approval under Pt 9 for the purposes of a provision of Pt 3. As submitted by VicForests, "it would be a curious outcome if forestry operations in an RFA region (but where no RFA was in force in that region, i.e. Subdiv B operations) had less stringent environmental controls than RFA forestry operations that are conducted in relation to a region covered by the RFA where those operations are not prohibited by an RFA". Such is the consequence of the construction given to s 38(1) by the primary judge and contended for by FLP. FLP argues that the focus of s 38(1) is on "the doing of things" (forestry operations) and not on the identification of the geographical region relevant to the particular RFA. 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.

116 The object of Subdiv B provided for in s 39, being "to ensure that approval under Pt 9 is *not required for forestry operations in a region* for which a process…of developing and negotiating a regional forest agreement is being, or has been carried on" (emphasis added), reinforces the contention that an RFA forestry operation is "undertaken in accordance with an RFA", if it is conducted in a *region* covered by an RFA, where those operations are not prohibited by the RFA.

117 FLP contends that the construction pressed by VicForests is tautologous because it mimics the definition of RFA forestry operation in s 4 of the *RFA Act*, thereby making the words "that is undertaken in accordance with an RFA" redundant. Such a contention cannot be accepted. If s 38(1) is read harmoniously with s 4 of the *RFA Act*, it provides:

> Part 3 does not apply to [forestry operations that are *conducted in relation to land in a region* covered by the RFA (*being land where those operations are not prohibited* by the RFA)] **undertaken in accordance with** [*an agreement that is in force between the Commonwealth and a State* in respect of *a region* that satisfies the following conditions:
>
> (a) the agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions;
>
> (i) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;
>
> (ii) indigenous heritage values;
>
> (iii) economic values of forested areas and forest industries;
>
> (iv) social values (including community needs);
>
> (v) principles of ecologically sustainable management;
>
> (b) the agreement provides for a comprehensive, adequate and representative reserve system;
>
> (c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions;
>
> (d) the agreement is expressed to be for the purpose of providing long-term stability of forests and forest industries;
>
> (e) the agreement is expressed to be a Regional Forest Agreement].
>
> (emphasis added).

118 The words "in accordance with an RFA" are not redundant; they are shorthand for the list of features required for an agreement to meet the definition of an RFA. In other words, and importantly, the words are descriptive of what is required for an agreement to be an RFA.

119 The view that we have reached in relation to the textual considerations of s 38(1) is reinforced by the explanatory materials to both the *EPBC Act* and the *RFA Act*. These unequivocally state that 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" (revised Explanatory Memorandum to *Regional Forest Agreements Bill 1998* cl 4; Commonwealth, *Parliamentary Debates*, Senate, Second Reading Speech, 12 November 1998, 211 (Rod Kemp)).

120 The Explanatory Memorandum accompanying the Bill that became the *EPBC Act* describes the object of Div 4, Subdiv B as follows (at p 38):

> The object of this subdivision recognises that in each RFA region a comprehensive assessment is being, or has been, undertaken to address the environmental, economic and social impacts of forestry operations. In particular, environmental assessments are being conducted in accordance with the Environment Protection (Impact of Proposals) Act 1974. In each region, interim arrangements for the protection and management of forests are in place pending finalisation of an RFA. The objectives of the RFA scheme as a whole include the establishment of a comprehensive, adequate and representative reserve system and the implementation of ecologically sustainable forest management. **These objectives are being pursued in relation to each region. The objects of this will be met through the RFA process for each region and, accordingly, the Act does not apply to forestry operations in RFA regions**.
>
> (emphasis added)

121 As was said by the Full Court in *Forestry Tasmania v Brown* [2007] FCAFC 186; (2007) 167 FCR 34 at [61], "the emphasised passage indicates that the Act does not apply to forestry operations in RFA regions, and the way in which the objects of the Act will be met in relation to those operations is to be ascertained by reference to the relevant RFA".

122 Similarly, the Revised Explanatory Memorandum accompanying the Bill that became the *RFA Act* reinforces the message that the *EPBC Act* does not apply to forestry operations in RFA regions, and that the regime applicable in those regions is found in the RFAs themselves. In relation to cl 6(4) of that Bill, it states (at p 7):

> This clause provides that forestry operations in regions subject to RFAs are excluded from certain Commonwealth legislation. This is because the environmental and heritage values of those regions have been comprehensively assessed under relevant legislation during the RFA process and the RFAs themselves contain an agreed framework on the ecologically sustainable development of these forest regions over

the next 20 years.

123 The broader purpose behind the exclusion of forestry operations undertaken in accordance with an RFA from the Commonwealth legislation can be gleaned from the Explanatory Memorandum to the Environment Protection and Biodiversity Conservation Bill 1998 (Cth) (**EM to EPBC Bill**), which identified the problem being addressed as the "division of responsibilities between the Commonwealth, State and Territories, together with a series of government environmental processes which were in need of reform ... to remove unnecessary impediments to business/industry and to improve the effectiveness of environmental protection measures" (EM to EPBC Bill p 6).

124 The EM to the EPBC Bill refers to the 1996 COAG Review of Commonwealth/State Roles and Responsibilities for the Environment and summarises the major outcomes of the Review as reflected in the Bill as being, relevantly (EM to EPBC Bill pp 8-9):

- the Commonwealth focussing on matters of national environmental significance;
- for activities or proposals involving both the Commonwealth and a State, the Commonwealth environmental assessment and approval process being triggered only by those actions which may have a significant impact on matters of national environmental significance;
- improving the efficiency and timeliness of environmental and development approval processes; and
- a reliance on State processes and management approaches which will, as appropriate, accommodate Commonwealth interests.

125 An important feature of the Bill was said to be (EM to EPBC Bill p 11):

> A transparent legislative mechanism for accreditation of State assessment processes and, in some cases, State decisions will be adopted. The goal will be to maximise reliance on State processes which meet appropriate standards. Bilateral agreements will provide for Commonwealth accreditation of State processes and, in appropriate cases, State decisions (for example, decisions under agreed management plans). Accordingly, bilateral agreements will allow the Commonwealth to accredit State systems which meet specified criteria. The Bill contains provisions to ensure that the level of protection afforded by State processes must be at least equivalent to the provided by Commonwealth processes.

126 These contextual considerations reinforce our preferred construction of s 38(1). Where an RFA is in force, that agreement will provide for Commonwealth accreditation of State processes. As has already been set out above, by cl 46 of the CH RFA, the Commonwealth and Victoria

agreed that Victoria's forest management system (including its legislation, policies, codes, plans and management practices) provided for continuous improvement in ESFM. By cl 47, the Commonwealth accredited Victoria's forest management system for the Central Highlands, including the systems and processes established by the Code. It is those systems and processes, together with the remedies available under Victorian law, in particular the offences created by the *SFT Act*, which govern forestry operations undertaken in the region covered by the CH RFA. 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.

127 Those systems and processes under Victoria's forest management system include those relating to endangered species, which might otherwise be subject to the Commonwealth's requirements in Div 1 ("Requirements relating to matters of national environmental significance") of Pt 3 of the *EPBC Act*. In particular, Attachment 2 to the CH RFA provides:

> **THREATENED FLORA, FAUNA AND COMMUNITIES**
>
> Both Parties recognise the range of mechanisms in place to conserve the habitat of rare and threatened flora and fauna in the Central Highlands. These include protection within the CAR Reserve System, protection of key habitats such as rainforest and rare or threatened Ecological Vegetation Classes (EVCs), and the development of Action Statements for species listed under the *Flora and Fauna Guarantee Act 1988* and Recovery Plans for species listed under the *Endangered Species Protection Act 1992*. Parties note that the Recovery Plan for Leadbeater's Possum has been approved under the *Endangered Species Protection Act 1992*.

128 It is through the interaction of the provisions of the *EPBC Act* and those of the various RFAs that the objects of the *EPBC Act* in s 3 are achieved. In particular: to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and, to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and to assist in the co-operative implementation of Australia's international environmental responsibilities. That co-operative implementation extends to an obligation on the part of Victoria to ensure that it complies with the expectations of the Commonwealth, as described in the "Purpose of Agreement" in Recital A of the CH RFA, being to ensure "the Agreement is durable and that the obligations and commitments that it contains are delivered to ensure effective conservation, forest management and forest industry outcomes". Should Victoria fail to do so, the Commonwealth can terminate the CH RFA in accordance with cl 92. In such event, all forestry

operations within the Central Highlands would cease to be undertaken "in accordance with an RFA" and all would require approval under Pt 9 of the *EPBC Act*.

129 The same conclusion must apply to the definition of RFA forestry operations in s 4 of the *RFA Act*. As specified in subsection (b) of the definition, such operations mean "forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Victoria) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA)". Consistent with the reasoning above, "land in a region covered by the RFA (being land where those operations are not prohibited by the RFA)" means land on which forestry operations are permitted by an RFA, even if the permission is conditional. That is to say, a contravention of a condition of permissibility of the conduct of the forestry operation does not mean that the operation is prohibited by the RFA. Again, the focus of the statutory text is on the geographical area on which the RFA permits forestry operations and not the restrictions, limits, prescriptions, or contents of the Code or an RFA.

130 In light of these reasons, the primary judge's finding (Separate Question reasons at [155]) that the actual conduct of forestry operations (being an action for the purposes of the *EPBC Act*) 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.

131 We now deal in a summary fashion with the other grounds of the appeal.

B. Grounds 2 to 6 – Alternative grounds to Ground 1

132 In the alternative to Ground 1, VicForests contends by:

- ***Ground 2*** – that the primary judge erred in holding that non-compliance with cl 2.2.2.2 of the Code (being a failure to apply the precautionary principle) will result in the loss of the s 38(1) exemption, and that Pt 3 of the *EPBC Act* is likely to be engaged.
- ***Ground 3*** – that the primary 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**); and, in holding that FLP's pleaded case picks up and relies on the statutory concept of a "forestry operation" at a coupe-by-coupe level, treating each timber harvesting operation (together with all its planning and preparatory phases) as a course of conduct,

and that FLP had alleged that in each, some or all of the Scheduled Coupes and the Logged Coupes, VicForests had conducted an RFA forestry operation covering all of VicForests' activities within that coupe before, during and after harvesting (including its planning for harvesting in that coupe and burning afterwards), as a single course of conduct and a single "RFA forestry operation" for the purposes of s 38(1).

- ***Ground 4*** – that the primary judge erred in holding that if the forestry operation, as pleaded, is not undertaken "in accordance with" the Code as it applies in one respect, then Pt 3 of the *EPBC Act* applies to that forestry operation as an "action" and the exemption under s 38(1) of the *EPBC Act* is lost for every aspect of that forestry operation.
- ***Ground 5*** – that, in circumstances where there was no allegation that VicForests' forestry operations in the Scheduled Coupes would breach the Code insofar as the Leadbeater's Possum is concerned, and having found that VicForests is not likely to apply the precautionary principle to the conservation of the Greater Glider in the Schedules Coupes, the primary judge erred: in holding that the exemption under s 38(1) of the *EPBC Act* is lost not only in respect of forestry operations in the Scheduled Coupes insofar as they may impact on the Greater Glider, but also insofar as those operations may impact upon the Leadbeater's Possum; and in finding that VicForests' forestry operations in the Scheduled Coupes are likely to have a significant impact on the Leadbeater's Possum.
- ***Ground 6*** – that the primary judge erred in holding that none of the 66 impugned coupes are subject to the s 38(1) exemption.

133 Assuming that the primary judge's construction of s 38(1) is correct, the alternative submissions on behalf of VicForests focus on whether various findings by the primary judge that VicForests did or would breach the Code, and her findings as to the scope of the definition of "forestry operations", mean that the exemption under s 38(1) is lost for every aspect of that forestry operation and in respect of every one of the 66 impugned coupes.

134 As to the circumstances raised by ***Ground 2***, the primary judge held (Principal reasons at [833]):

> At [790] to [799] above, I have rejected VicForests' argument that cl 2.2.2.2 of the Code concerns matters of degree and judgment in a way that renders it not susceptible to clear application in a given factual situation, and I have rejected the purported conclusion that non-compliance with cl 2.2.2.2 cannot result in the loss of the s 38(1)

> exemption. Clause 2.2.2.2 is a mandatory action under the Code. Section 46 of the SFT Act imposes a mandatory obligation on VicForests to comply with the Code. The substitute regulatory regime, which was accredited by the CH RFA, could not be clearer about VicForests' legal obligation to apply the precautionary principle to the conservation of biodiversity values, including doing so in the conduct of its RFA forestry operations in native forest in Victoria, and, relevantly here, in the CH RFA region. Non-compliance with this obligation will result in the s 38(1) exemption not being applicable, and Pt 3 of the EPBC Act is likely to be engaged.

135 VicForests submits that non-compliance with cl 2.2.2.2 ought not lead to a loss of exemption under s 38(1). It is argued that the primary judge ought to have held, consistent with [49]-[51], [175], [186], [196], [208]-[209] and [243] of the Separate Question reasons, that cl 2.2.2.2 of the Code concerns matters of degree and subjective judgment which are not sufficiently clear and capable of practical implementation in a given factual situation, such that non-compliance with cl 2.2.2.2 will not result in the loss of the s 38(1) exemption.

136 In particular, VicForests points to the Separate Question reasons at [49] where the primary judge said:

> Pt 3 creates criminal offences and imposes civil penalties for contraventions of the prohibitions. The target of these offences and civil penalty provisions are those people or entities who take an "action". A construction which promotes clarity and an understanding of what, practically, is required to comply with the law will generally be preferred over one which creates, or is likely to create, ambiguity or uncertainty for those whose conduct is being regulated.

137 VicForests submits that, on its own terms (and having regard to the definition of "precautionary principle" in the Code's Glossary), cl 2.2.2.2 does not direct any particular outcome in any given scenario. Thus, it is argued, the precautionary principle is in a different category to those prescriptions capable of clear and objective practical application. It does not provide an actor, prior to taking an "action" in a given coupe, with a clear understanding of what, practically, is required to comply with the law and avoid exposure to potential criminal consequences under the *EPBC Act*.

138 FLP contends that there is no substance to the characterisation of cl 2.2.2.2 as merely exhortatory and adopts the primary judge's observation (Principal reasons at [795]) that, "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'".

139 FLP's submissions must be accepted. The primary judge did not err as proposed in Ground 2.

140 Under the CH RFA, and in particular cll 47 and 67, Victoria's forest management system includes, and requires compliance with, amongst other things, the Code (which, as VicForests accepted in the appeal, means the Code as made in 2014 in accordance with cll 3(c) and/or (d) of the CH RFA). This obligation is reflected in s 46 of the *SFT Act* which provides specifically that VicForests must comply with any relevant Code of Practice relating to timber harvesting. By s 3 of the *SFT Act,* a Code of Practice has the same meaning as in s 3 of the *CFL Act*. As noted, the Code was made under s 31(1) of the *CFL Act* and is a Code of Practice within the meaning of that Act.

141 VicForests' submissions are inconsistent with the terms of the Code. The Code identifies the application of the precautionary principle as a mandatory action. By cl 1.2.8 of the Code, a failure to apply the precautionary principle leads to non-compliance with the Code. In other words, the terms of the Code do not enable any argument to be put that cl 2.2.2.2 involves matters of subjective evaluation incapable of constituting a breach of the Code with legal consequences.

142 VicForests' argument relating to Ground 2 is also logically incoherent. VicForests' contention in Ground 1 is that the State's forest management system as accredited by the Commonwealth exclusively regulates the conduct of VicForests in respect of an RFA forestry operation. By s 46 of the *SFT Act*, VicForests is bound to comply with the Code, including cl 2.2.2.2. VicForests accepts that threatened or actual contraventions of s 46 of the *SFT Act* by non-compliance with cl 2.2.2.2 of the Code may result in injunctive relief against it, consistent with the reasoning in *Brown Mountain* and *MyEnvironment*. If cl 2.2.2.2 is capable of founding injunctive relief by a State court, it is equally capable of founding such relief, and civil and criminal penalties, by this Court under the *EPBC Act* (assuming, contrary to our conclusion under Ground 1, it applies). VicForests has not confronted this incoherence in its written or oral submissions in support of the appeal.

143 Further, as FLP submitted, the fact that a statutory requirement may be difficult to apply does not render it incapable of application: *Monis v The Queen* [2013] HCA 4; (2013) 249 CLR 92 at [338]. Where Parliament intends that a court should apply a value judgment, even if the value judgment concerns criminal liability, the court must give effect to the will of Parliament: *Taikato v The Queen* [1996] HCA 28; (1996) 186 CLR 454 at 466. Here, the inclusion of cl 2.2.2.2 in the Code and the relevance of the Code to the application of both the Commonwealth (if we are wrong about Ground 1) and State statutory regimes indicates that it

is the will of both Parliaments (Victorian and Commonwealth) that courts give meaning and effect to the obligation in cl 2.2.2.2 of the Code. In any event, vagueness or uncertainty of the law does not render it incapable of application: *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 at [149], [306], [448]-[456], and [506]-[508].

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. At [792] of the Principal reasons, the primary judge clearly explained that making findings which involve a qualitative or evaluative aspect are familiar to the Court. For these reasons Ground 2 of the appeal must be rejected.

145 As to the circumstances raised by ***Ground 3***, VicForests contends that the primary 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 TRP. VicForests contends that the preparation of the TRP should fall within the definition in paragraph (b), being management of trees before they are harvested.

146 VicForests argues that, in making this finding, the primary judge ignored the fact that the preparation of the TRP is governed by provisions contained in Pt 5 of the *SFT Act* entitled "Management of timber resources by VicForests". Part 5 of the *SFT Act* relates to timber resources which have vested in VicForests on gazettal of the relevant allocation order in accordance with s 13 of the *SFT Act*. VicForests draws attention to the distinction in Pt 5, which specifies how timber resources are to be managed from the point of vesting through to the conduct of operations, and Pt 6, which is entitled "Management of timber harvesting", which mandates compliance with the Codes of Practice and Pt 7 which is entitled "Conduct of timber harvesting operations".

147 VicForests argues that it is clear that the preparation and promulgation of the TRP falls within para (b) of the definition of 'forestry operations' in the CH RFA but not within para (c).

148 Ground 3 is misconceived. There is no inconsistency in her Honour's reasoning, nor any denial of procedural fairness by her Honour. The primary judge recognised that FLP had not pleaded that the preparation and promulgation of the TRP was a forestry operation that must comply with cl 2.2.2.2 of the Code (Principal reasons at [418] and [716]). The pleaded issue 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" (Principal reasons at [718]). The primary judge considered that the TRP was relevant to that issue (Principal reasons at [415] and [730]). This is because the TRP specified what was planned or required to occur in terms of harvesting timber (Principal reasons at [731]). The fact that the TRP is made under the *SFT Act* does not mean that the primary judge erred in deciding that the TRP was within the scope of para (c) of the definition of "Forestry Operations" in the CH RFA. The primary judge did not misunderstand VicForests' case. She simply rejected that argument. VicForests does not explain why the primary judge was wrong to conclude that the TRP is relevant to the harvesting of timber (Principal reasons at [718]-[722], [728]-[731]).

149 Nor does anything in her Honour's reasons involve any procedural unfairness to VicForests. The TRP was obviously relevant to the pleaded issue of VicForests' compliance with the Code. Even if VicForests did not anticipate that her Honour would accept this argument by FLP, VicForests has not identified any material effect on it as a result. The mere speculation that it might have run its case differently before the primary judge does not established any practical injustice to it.

150 For these reasons Ground 3 of the appeal must be rejected.

151 As to ***Grounds 4-6***, VicForests contends that the primary judge ought to have held that:

(a) as the only alleged non-compliance with the CH RFA in respect of the Scheduled Coupes and the Logged Coupes (other than the alleged miscellaneous breaches) related to allegations of non-compliance with cl 2.2.2.2 of the Code in respect of the Greater Glider, any loss of the exemption under s 38(1) of the *EPBC Act* in respect of those coupes was limited to forestry operations insofar as they affect the Greater Glider, and questions of significant impact in respect of other values (such as Leadbeater's Possum) do not arise.

(b) in the absence of any pleaded case against it that its forestry operations in the Scheduled Coupes would not comply with the Code insofar as the Leadbeater's Possum is concerned, the s 38 exemption was not lost in any of the Scheduled Coupes insofar as those operations may impact upon the Leadbeater's Possum.

(c) each of the 66 impugned coupes was subject to the s 38(1) exemption.

152 VicForests argues that the use of the singular term "an RFA operation" in s 38 focuses attention on a particular forestry operation that is conducted in relation to land (coupes) in the CH RFA

area. It says that forestry operations are the actions that the *EPBC Act* seeks to regulate so as to avoid significant impact on a listed threatened species and that it is the taking of the action, that is, the actual conduct of a forestry operation which must be taken "in accordance with" the RFA.

153 VicForests contends that as the only alleged breach said to arise in respect of the forestry operations in the Scheduled Coupes is the alleged failure by it to comply with cl 2.2.2.2 of the Code in respect of the Greater Glider, this is the only respect in which it is alleged that the RFA forestry operation is not being undertaken in accordance with an RFA. Consequently, any loss of exemption under s 38 in respect of the Scheduled Coupes is limited to proposed forestry operations insofar as they affect the Greater Glider, and questions of significant impact to other values (such as Leadbeater's Possum) do not arise.

154 Likewise, it is contended, the alleged breach said to arise in respect of the forestry operations in the Logged Glider Coupes is the failure to comply with cl 2.2.2.2 of the Code in respect of the Greater Glider. If the exemption in s 38(1) were lost in respect of the Logged Glider Coupes, it would be because the conduct of the forestry operation did not comply with cl 2.2.2.2 of the Code in respect of the Greater Glider. The exemption would continue to apply to other forestry operations insofar as they are undertaken in accordance with the RFA and questions of significant impact are limited to the Greater Glider only.

155 VicForests submits that the construction of s 38(1) accepted by the primary judge, where a breach of the Code concerning a Tree Geebung would expose the entirety of the forestry operations to the *EPBC Act*, would render the substitute regimes established by the RFAs otiose once the exemption in s 38(1) no longer applies, and open up questions of significant impact on every matter of environmental significance. It ignores the substitute regime envisaged by Pt 4, Div 4 of the *EPBC Act*.

156 FLP counters that the primary judge's construction and application of s 38 was orthodox and her Honour correctly found that: s 38(1) operates on a "forestry operation"; 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"; 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 operations as an "action" (Pt 3 does not apply to any particular "value").

157 As submitted by VicForests, the construction arrived at by the primary judge means that any breach of the Code would lead to a complete loss of exemption in respect of the entire forestry operations within a coupe. Non-compliance with a prescription concerning one value (eg. to protect mature individuals of Tree Geebung from disturbance where possible) would require the Minister to consider all aspects of the entire forestry operation, including, for example, Leadbeater's Possum even where there has been no non-compliance with prescriptions relating to Leadbeater's Possum in the Code. VicForests argues that such an interpretation of s 38(1) produces an unreasonable and absurd consequence and this indicates that this construction is not one intended by Parliament.

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. As her Honour found: s 38(1) of the *EPBC Act* concerns an "RFA forestry operation" (Principal reasons at [787]); and, nothing in the text, context or purpose of s 38(1) suggests that the provision may be engaged or disengaged in part by reference to any particular environmental value (Principal reasons at [789]). It necessarily follows that VicForests' submission that if the s 38(1) exemption is lost because of a failure to comply with cl 2.2.2.2 of the Code in respect of the Greater Glider, then the extent of the lost exemption is confined to any action for the purposes of Pt 3 of the *EPBC Act* which may impact on the Greater Glider is irreconcilable with the terms of s 38(1) and its function in regulating the application of Pt 3.

159 In reality, VicForests' arguments in this regard are relevant to its case under Ground 1 concerning the proper construction of s 38(1). It is necessary to assess the arguments assuming that Ground 1 is decided against VicForests. Once that assumption is made, the illogicality and incoherence of these grounds of appeal is clear. Section 38(1) either does or does not apply to an RFA forestry operation. If it applies, Pt 3 of the *EPBC Act* does not apply to the RFA forestry operation. If it does not apply, Pt 3 of the *EPBC Act* may apply to the RFA forestry operation (depending on one or other of the Pt 3, Div 1 triggers being engaged or not). The required level of focus is always on the RFA forestry operation. An RFA forestry operation cannot be characterised as an operation in part and only to the extent the operation effects some or other environmental value. VicForests' submissions to the contrary are divorced from the statutory provisions, assuming (contrary to our conclusion) that Ground 1 is decided against VicForests.

160 For these reasons Grounds 4 to 6 of the appeal must be dismissed.

C. Grounds 7 to 15 – The precautionary principle

161 Grounds 7 – 15 challenge the primary judge's findings in relation to the application of the precautionary principle and the evidential basis for those findings.

162 VicForests contends by:

- ***Ground 7*** – that the primary judge erred in holding that the precautionary principle in cl 2.2.2.2 of the Code is not subject to two conditions precedent, namely a threat of serious or irreversible environmental damage, and scientific uncertainty as to the environmental damage.
- ***Ground 8*** – that the primary judge erred in construing the precautionary principle in cl 2.2.2.2 of the Code as requiring that measures be taken that assist in arresting and reversing the decline, and therefore facilitating the recovery, of the relevant threatened species.
- ***Ground 9*** – that the primary judge erred in holding that: cl 2.2.2.2 of the Code 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, as a consequence, much of Dr Davey's opinions were of marginal relevance because his analysis assumed that the relevant question was *whether forestry operations in the Logged Coupes* posed a serious or irreversible threat to the Greater Glider (emphasis added).
- ***Ground 10*** – that the primary judge erred in finding that, in undertaking forestry operations in the Scheduled Coupes, VicForests is not likely to apply the precautionary principle to the conservation of biodiversity values in those coupes, as required by cl 2.2.2.2 of the Code.
- ***Ground 11*** – alternatively to Ground 10, that the primary judge erred in finding that VicForests will not use less intensive silvicultural methods in the Scheduled Coupes than has been its historical practice; and that even if VicForests were to conduct its forestry operations in the Scheduled Coupes using less intensive silvicultural methods, this would not lead to any different or better compliance with cl 2.2.2.2 of the Code.
- ***Ground 12*** – that the primary judge erred in ruling on 7 June 2019 that the additional coupes evidence was admissible evidence (VicForests did not press this ground).

- ***Ground 13*** – that, having admitted the additional coupes evidence, the primary judge erred in finding that that evidence confirmed the primary judge's view that VicForests is unlikely to comply with cl 2.2.2.2 of the Code in the Scheduled Coupes in the foreseeable future.
- ***Ground 14*** – that, in circumstances where it was not part of FLP's pleaded case, the primary judge erred in holding 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 Timber Harvesting Exclusion Zones (**THEZs**) highlighted in Professor Woinarski's report.
- ***Ground 15*** – that, in respect of the evidence of Professor Baker, the primary judge erred in finding that Professor Baker was not an independent expert and that Professor Baker's evidence contained "serious flaws" and should be rejected.

163 As to ***Ground 7***, VicForests contends that the primary judge ought to have held that the application of the precautionary principle in cl 2.2.2.2 of the Code and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent: first, a threat of serious or irreversible environmental damage; and second, scientific uncertainty as to the environmental damage, in accordance with the approach taken by Osborn J in *Brown Mountain* at [187]-[188]. Although *Brown Mountain* considered the 2007 Code, there is no material difference between that version and the current version for the purposes of this proceeding.

164 Clause 2.2.2.2 has been set out earlier, but it is convenient to restate it here:

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

165 The definition of 'precautionary principle' in the Glossary to the Code has also been set out earlier but we repeat it here, as well as the definition of 'biodiversity', for convenience:

> **'biodiversity'** means the natural diversity of all life: the sum of all our native species of flora and fauna, the genetic variation within them, their habitats, and the ecosystems of which they are an integral part.
>
> '**precautionary principle**' means when contemplating decisions that will affect the environment, careful evaluation of management options be undertaken to wherever practical avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various options. When dealing with threats of serious or irreversible environmental damage, lack of full scientific certainty should

not be used as a reason for postponing measures to prevent environmental degradation.

166 The primary judge held, at [843]-[844] of the Principal reasons, that the precautionary approach required by the Code, which must be undertaken, as cl 2.2.2.3 makes clear, in accordance with advice from relevant experts and relevant research in conservation biology and flora and fauna management, and with which VicForests must comply, is:

> [i]n its timber harvesting operations (an in planning for them) VicForests must:
>
> (a) carefully evaluate its own management option to wherever practical avoid serious or irreversible damage to the environment (here, relevantly, to the Greater Glider); and
>
> (b) properly assess the risk-weighted consequences of various options.

167 The primary judge held that the second sentence within the definition of the precautionary principle is a secondary or consequential aspect of the obligation under cl 2.2.2.2 which means, that if the circumstances of a person's forestry operations "mean it is 'dealing', objectively, with circumstances where there are likely to be threats of serious environmental damage or threats of irreversible environmental damage, then in undertaking its evaluation and assessment of how (and if) those forestry operations should be conducted, [the person] cannot justify its lack of measures to prevent environmental degradation by relying on a lack of scientific certainty about what it needs to do" (Principal reasons at [845]).

168 This is the essence of the difference of approach between the primary judge and Osborn J: the former interpreting the second sentence as a secondary or consequential obligation; the latter held that it imposes two conditions precedent or thresholds.

169 The statutory expression of the precautionary principle in s 391 of the *EPBC Act* is as follows:

> The *precautionary principle* is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

170 Similarly worded provisions articulating the principles of ecologically sustainable development have been described as statutory expressions of the precautionary principle: see *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042; (2016) 251 FCR 308 at [12]. Section 3A(b) of the *EPBC Act* provides:

> … if there are 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.

171 These statutory provisions reflect cl 3.5.1 of the Australian *Intergovernmental Agreement on the Environment*, 1 May 1992 (***Intergovernmental Agreement***), contained in the Schedule to the *National Environment Protection Council Act 1994* (Cth) which provides:

> 3.5.1 precautionary principle –
>
> Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measure to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:
>
> i. careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
>
> ii. an assessment of the risk-weighted consequences of various options.

172 Further, Principle 15 of the *Rio Declaration on Environment and Development 1992* (Report of the United Nations Conference on Environment and Development, 3-14 June 1992, Annex 1) states:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

173 Both of these intergovernmental agreements articulate the precautionary principle in terms that place primacy on the existence of the threshold issues of a threat of serious or irreversible environmental damage and a lack of full scientific certainty. The *Intergovernmental Agreement* is explicit that these two issues are threshold issues or conditions precedent before proceeding to describe the appropriate approach to decision-making.

174 Section 5(4)(b) of the *SFT Act*, the statute which requires VicForests to comply with the Code (s 49), uses similar language.

175 These statutory expressions of the precautionary principle encapsulate the two matters that Osborn J draws from the definition in the Code as threshold issues.

176 The text of the Code inverts the statement of the precautionary principle itself with the statement of the actions to be taken when contemplating a decision.

177 The primary judge reasoned (Principal reasons at [836]) that there were two relevant Operational Goals (where an 'Operational Goal' is defined in the Code as "the desired outcome or goal for each of the specific areas of timber harvesting operations to meet the Code Principles") for cl 2.2.2. These Operational Goals are:

…

Timber operations in **State forests** specifically address **biodiversity** conservation risks and consider relevant scientific knowledge at all stages of planning and management.

Harvested State forest is managed to ensure that the **forest** is regenerated and the biodiversity of the **native forest** is perpetuated.

178 The primary judge continued:

> 838 Seven mandatory actions are stipulated to achieve [the] first Operational Goal. One is cl 2.2.2.2. A mandatory action is defined in the Code [as] an action "to be conducted in order to achieve each operational goal". Clause 1.2.8 states:
>
> > Timber harvesting managers, harvesting entities and operators **must** undertake **all relevant mandatory actions** to meet the objectives of the Code. Mandatory Actions are **focussed on practices or activities**. Failure to undertake a relevant Mandatory Action would result in non-compliance with this Code.
> >
> > (Emphasis added.)
>
> 839 There is nothing equivocal or optional about these provisions. They are not conditioned on VicForests' satisfaction, or any other person's satisfaction, that the mandatory actions are appropriate or justified. They are consistent with the obligatory language in s 46 of the SFT Act.
>
> 840 The applicant's submissions paid attention to cl 2.2.2.2 itself, but VicForests' did not. The first sentence of cl 2.2.2.2 of the Code provides:
>
> > The precautionary principle **must be applied** to the conservation of biodiversity values.
> >
> > (Emphasis added.)
>
> 841 There is no equivocation in this statement. To comply with the Code, in its timber harvesting, VicForests must apply the precautionary principle to the conservation of biodiversity values. And how must it do so? It is clear from the definition of the precautionary principle, that VicForests is to do so by:
>
> > when contemplating decisions that will affect the environment, [engaging in] careful evaluation of management options be undertaken to wherever practical avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various option.

179 The primary judge was not persuaded that she should adopt the approach taken by Osborn J to the operation of the precautionary principle in *Brown Mountain*, essentially on the basis that Osborn J had accepted the analysis of the principle as it had been stated by Preston CJ in ***Telstra*** *Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 67 NSWLR 256. The primary judge observed that *Telstra* was concerned with a different text and an entirely different statutory scheme (Principal reasons at [827]), and that statutory context is important,

as is the particular textual expression of the precautionary principle, in its particular context (Principal reasons at [819]).

180 Despite Osborn J's acceptance of the principle as stated by Preston CJ, albeit having arisen in a different statutory context, *Brown Mountain* itself *was* concerned with cl 2.2.2.2 of the Code. Osborn J articulated the principles relevant to that provision:

- if the conditions precedent are satisfied (a threat of serious or irreversible environmental damage and a lack of full scientific certainty), the burden of showing the threat of serious or irreversible environmental damage will not occur shifts to the proponent of the relevant action (*Brown Mountain* at [199]);
- the precautionary principle permits the taking of preventative measures without having to wait until the reality and seriousness of the threat have been fully known (*Brown Mountain* at [201]);
- the precautionary principle is not however directed to the avoidance of all risks (*Brown Mountain* at [203]);
- the degree of precaution appropriate will depend on the combined effect of the seriousness of the threat and the degree of uncertainty (*Brown Mountain* at [204]);
- the margin for error in respect of a particular proposal may be controlled by an adaptive management approach (*Brown Mountain* at [205]);
- the precautionary principle requires a proportionate response. Measures should not go beyond what is appropriate and necessary in order to achieve the objective in question. The principle requires the avoidance of serious or irreversible damage to the environment 'wherever practical'. It also requires the assessment of the risk-weighted consequences of optional courses of action (*Brown Mountain* at [207];
- a reasonable balance must be struck between the cost burden of the measures and the benefit derived from them (*Brown Mountain* at [208]);
- the relevant notion of proportionality is however not readily captured by traditional cost benefit analysis (*Brown Mountain* at [209]);
- the triggering of the precautionary principle does not necessarily preclude the carrying out of a particular land use or development proposal (*Brown Mountain* at [210]); and
- the precautionary principle may also require consideration in the context of other principles of environmentally sustainable development (*Brown Mountain* at [211]).

181 The primary judge observed that it was not clear whether VicForests embraced the aspect of Osborn J's reasoning whereby, once the two conditions precedent have been established, there is a shifting of the evidential burden of proof to show that the threat does not in fact exist, or is negligible (Principal reasons at [817]).

182 The primary judge considered it unnecessary to grapple with the shifting of the burden of proof to VicForests about the non-existence of a threat to the threatened species if Osborn J's reasoning were adopted because the argument put by FLP in these proceedings was not put to Osborn J and so his approach could be distinguished (Principal reasons at [818]).

183 It is not necessary to resolve this aspect of the appeal. In short, to the extent that the primary judge may have erred in departing from *Brown Mountain* without finding that it was plainly wrong, the error is immaterial. 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 (Principal reasons at [829]).

184 Accordingly, Ground 7 cannot succeed.

185 As to ***Ground 8***, VicForests contends that the primary judge ought to have held that, properly construed, the precautionary principle in cl 2.2.2.2 of the Code is not directed to the avoidance of all risks. It is said that it is at least implicit in the Principal reasons that the primary judge did not consider the principles identified by Osborn J as encompassed in the preferred construction of the precautionary principle in the Code and that a departure from Osborn J's construction required a finding that his Honour was plainly wrong; no such finding was made.

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, VicForests' contention cannot succeed.

187 VicForests contends further that, to the extent that the primary judge construed the precautionary principle as requiring that measures be taken to arrest and reverse a decline in threatened species at [630] of the Principal reasons, that elevates a purpose of environmental protection above timber production and should not be preferred. FLP argues that the conclusion that the Code, including cl 2.2.2.2, contemplates that species be assisted to recover was arrived at on the basis of an orthodox process of statutory construction.

188 The primary judge's analysis of this point commenced with s 3(2)(e)(i) of the *EPBC Act* (Principal reasons at [626]), which provides that, in order to achieve its objects, the Act:

> (e) enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions to:
>
> (i) protect native species (and in particular prevent the extinction, and **promote the recovery, of threatened species**) and ensure the conservation of migratory species;
>
> …
>
> (emphasis added)

189 The primary judge then referred to s 270(1) of the *EPBC Act* which describes the content and purpose of Recovery Plans: "to stop the decline of, and support the recovery of, the listed threatened species … so that its chances of long-term survival are maximised" (Principal reasons at [627]). Her Honour considered that recovery forms part of the objective present in the Code, expressed at cl 1.3, "biological diversity and the ecological characteristics of native flora and fauna within forests are maintained" (Principal reasons at [629]). The primary judge continued (at [630]):

> To similar effect are the operational goals in cl 2.2.2 of the Code (see [137] above). In order for a threatened species to be "maintained" as part of the maintenance of biodiversity, its decline must be arrested and reversed.

190 The primary judge's conclusions reflect the provisions of the *EPBC Act* and the Code. In particular, in specifying the relationship between the Code principle that biological diversity and ecological characteristics of native flora and fauna within forests is maintained, the operational goals in Table 1 of the Code require that harvested native forest is managed to ensure the forest is regenerated and the biodiversity of the native forest is perpetuated. 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.

191 Ground 8 of the appeal must be rejected.

192 As to ***Ground 9***, VicForests contends that the primary judge ought to have held that cl 2.2.2.2 of the Code requires the relevant forestry operation to pose a threat of serious or irreversible environmental damage before the precautionary principle is engaged and Dr Davey's opinion that forestry operations undertaken in the Logged Coupes did not pose a threat of serious or irreversible damage to the Greater Glider should have been taken into account.

193 It is argued that, when construing the text of cl 2.2.2.2, the 'threats' referred to in the second sentence of the precautionary principle are threats from decisions that will affect the environment within the meaning of the first sentence. In the context of this proceeding, the relevant decisions are to conduct timber harvesting (or forestry) operations in a particular manner; those operations are therefore the subject of the analysis as to whether they constitute "threats of serious or irreversible environmental damage" within the meaning of the second sentence and the conditions precedent. It is said that this is consistent with FLP's pleaded case as opened.

194 VicForests argues that the primary judge's conclusion (Principal reasons at [847] and [850]) that the 'threats' do not need to be only from forestry operations, in the absence of conducting an analysis as to whether Osborn J was plainly wrong in that regard, was erroneous. There is, however, nothing in the reasons of Osborn J in *Brown Mountain* that compels such a narrow construction of the precautionary principle. To the contrary, Osborn J drew attention specifically to the factors identified by Preston CJ in *Telstra* that may be relevant when assessing whether the proposed activities constitute a threat (*Brown Mountain* at [190]). Those factors included:

(a) the spatial scale of the threat (for example, local, regional, statewide, national, international);

(b) the magnitude of possible impacts on both natural and human systems;

(c) the perceived value of the threatened environment;

(d) the temporal scale of possible impacts, in terms of both the timing and the longevity (or persistence) of the impacts;

(e) the complexity and connectivity of the possible impacts;

(f) the manageability of possible impacts having regard to the availability of means and the acceptability of means;

(g) the level of public concern, and the rationality of and scientific or other evidentiary basis for the public concern; and

(h) the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts and the difficulty and expense of reversing the impacts.

195 It is said then that, on the correct construction of the precautionary principle, Dr Davey's opinion was directly relevant to an analysis of whether the conditions precedent for the

engagement of the precautionary principle were met and the primary judge erred in finding that his opinions were of "marginal relevance" (Principal reasons at [848]).

196 FLP argues that this constitutes an overly narrow view of the obligation imposed by cl 2.2.2.2 and mischaracterises the primary judge's reasons. FLP points out that the primary judge:

- considered the operational goals of cl 2.2.2 – 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" (Principal reasons at [836]-[837]);
- recognised that the Code stipulates mandatory actions which must be conducted in order to achieve the operational goal, where, according to cl 1.2.8, "[f]ailure to undertake a relevant Mandatory Action would result in non-compliance with the Code" (Principal reasons at [838]);
- said that one such mandatory action is that set out in cl 2.2.2.2, and based on the first sentence of the definition of the precautionary principle, 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 (Principal reasons at [842]). This required VicForests to "carefully evaluate its management options to wherever practical avoid serious or irreversible damage to the environment" (here, the Great Glider), and "properly assess the risk weighted consequences of various options" (Principal reasons at [843] and [849]);
- as to the second sentence of the precautionary principle, her Honour stated at para [845] of the Principal reasons that it means

> … if 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…;

and

- it was in that context that the primary judge said that when VicForests is conducting timber harvesting operations in native forests where the Great Glider is likely to be present, VicForests is 'dealing' with that threat of serious damage.

197 We accept FLP's submission that there was no error in the primary judge's reasons relating to this issue. As explained above, her Honour's analysis properly took into account the text and context of cl 2.2.2.2. Further, VicForests' construction would fail to achieve the operational goals of cl 2.2.2. Ground 9 cannot succeed.

198 As to ***Ground 10***, VicForests contends that the primary judge ought to have found that:

- there were no sufficiently advanced proposals to conduct timber harvesting operations in any of the Scheduled Coupes to enable any 'threat' to be properly identified and analysed, and therefore, no engagement of the conditions precedent to the precautionary principle in cl 2.2.2.2 of the Code; and
- alternatively, the evidence, when considered as a whole, does not establish a threat of serious or irreversible damage to the Greater Glider by reason of VicForests' proposed forestry operations in the Scheduled Coupes.

199 VicForests contends that the evidence before the primary judge revealed that the manner in which the Scheduled Coupes might be harvested was uncertain. Any coupe plans that had in fact been prepared in respect of those coupes were stale and out of date. According to VicForests, relevant uncertainties that could impact on the configurations of the coupes to be harvested include all the matters in subpara 6.3(c)(v) of VicForests' Defence filed in the proceedings before the primary judge. Similarly to its position in *MyEnvironment*, VicForests argues that the primary judge was not in a position to identify any 'threat' with respect to the Scheduled Coupes since the extent to which VicForests will seek to log these coupes, by what means, and in what configuration, is uncertain. Further, even if it be accepted that Greater Gliders have been detected in the Scheduled Coupes, it is unclear whether any actual timber harvesting operations will constitute the necessary threat to satisfy one of the conditions precedent to the engagement of the precautionary principle.

200 In the further alternative, VicForests contends that, if the precautionary principle is engaged and the threat in the Scheduled Coupes is not negligible, VicForests will carefully evaluate management options in response to the threat such that it will comply with cl 2.2.2.2 of the Code in respect of the Scheduled Coupes. In other words, the threat posed by prospective forestry operations in the Scheduled Coupes will be addressed by adaptive management and the measures alleged to be required are not proportionate to the threat in issue.

201 VicForests argues that there is nothing in the formulation of the precautionary principle which requires decision-makers to give the 'serious or irreversible damage' factor overriding weight compared to other factors required to be considered, such as social and economic factors, when deciding how to proceed. Properly construed, the precautionary principle requires caution, but it does not mandate inaction, and it will not generally dictate one specific course of action to the exclusion of others. According to VicForests, it should not be used to avoid all risks.

202 VicForests also argues that the primary judge ought to have found, on the whole of the evidence and on the proper construction of the precautionary principle, that whatever may have been the historical position, the development and implementation of more adaptive silvicultural practices, together with more widespread, pre-harvest surveys, constitutes a sufficient degree of cautiousness in the circumstances such that, assuming the precautionary principle was engaged, it had not been breached.

203 FLP challenges this ground on the basis that it is a challenge to a finding of a future fact by the primary judge in circumstances where VicForests does not point to any specific error in the reasoning.

204 Our appellate function is confined to correcting error: see *Branir Pty Ltd v Owston Nominees Pty Ltd (No 2)* [2001] FCA 1833; (2001) 117 FCR 424 at [20]-[22]. To establish error, VicForests must persuade us that the primary judge's factual findings were "glaringly improbable", were contrary to "incontrovertible facts or uncontested testimony", or were "contrary to compelling inferences": *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [28]-[29]; see also *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301 at [2]-[10], [45]-[54] and [169] and *Queensland v Masson* [2020] HCA 28; (2020) 381 ALR 560 at [119]. VicForests has not come close to satisfying the requisite standard for appellate correction of any fact finding error by the primary judge. VicForests' submissions do no more than argue for a different result based on the same evidence which the primary judge carefully evaluated with the benefit of a lengthy hearing, during which her Honour was able to form an impression of each witness as they gave evidence, and a view. Her Honour's careful evaluation culminated in the Principal reasons containing 1464 closely considered paragraphs.

205 VicForests relied on evidence from Mr Paul to support its case that there were no sufficiently advanced plans in place to determine if there was a 'threat' to the Greater Glider in the relevant area. The primary judge's reservations about Mr Paul's evidence are relevant and cannot be disregarded as VicForests' assumes is permissible (see the Principal reasons at [256]-[263],

[446]-[448], [954], [992(g)], [1009], [1012]-[1015], [1027], [1052]-[1054], [1142]-[1144], and [1201]-[1202]. In summary:

- Mr Paul was not the appropriate person within VicForests to be giving evidence to the Court about the certainty attaching to VicForests' policy changes and the difference it was likely to make on the ground to its forestry operations;
- Mr Paul's evidence was not persuasive about key issues, involved overreach, demonstrated his resistance to obvious propositions and itself was consistent with the view that "the attitude within VicForests to conservation of threatened species, including the Greater Glider: that it is an inconvenience, an interruption to its timber harvesting programs, not a topic it wishes to be proactive about and something about which it has a defensive and negative approach";
- Mr Paul's evidence showed "no awareness at all about the complex habitat requirements of the Greater Glider (or any other hollow-dependent species), and involves a denial of the effects of forestry operations"; and
- other evidence showed how unreliable Mr Paul's generalisations were.

206 The Principal reasons at [1118]-[1178] disclose no error, yet that fact has not been confronted by VicForests. It merely asserts that the primary judge erred and should have reached a different conclusion based on evidence identified by VicForests which the primary judge evaluated but was not persuaded should lead to the conclusion proposed by VicForests that its plans were insufficiently certain to enable any findings to be made.

207 In the course of her Honour's reasoning, the primary judge:

- explained why her conclusion based on the evidence in this case was different from that reached by Osborn JA (as his Honour then was) in *MyEnvironment* which related to different facts and different evidence (Principal reasons at [1118], [1123]-[1127]);
- considered the evidence of witnesses other than, and as well as, Mr Paul (Principal reasons at [1128]-[1156]);
- analysed the TRP (Principal reasons at [1159]-[1161]);
- evaluated VicForests' practices (Principal reasons at [1162]-[1165]);
- explained why VicForests' allegedly new silvicultural methods were no answer to FLP's case (Principal reasons at [1165]); and

- explained why the pre-harvest survey program did not lead to any different view (Principal reasons at [1166]-[1174]).

208 The fact that the primary judge reached a different conclusion on the evidence before her than that reached by Osborn JA on the evidence before him in *MyEnvironment* is incapable of establishing error.

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 for the reasons given by FLP. It is sufficient to record FLP's submission in response to demonstrate why VicForests' argument cannot sustain any appellate interference with the primary judge's factual conclusion. There was cogent competing evidence which the primary judge preferred. As such, it could never be said that her Honour's factual findings were "glaringly improbable", contrary to "incontrovertible facts or uncontested testimony", or "contrary to compelling inferences". As FLP submits:

> 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].

210 VicForests' alternative argument in relation to Ground 10 is that if the precautionary principle is engaged and the threat is not negligible, the primary judge should have found that it will apply a sufficiently cautious approach by reason of its new silvicultural systems and the pre-harvest surveys which will result in it complying with cl 2.2.2.2 of the Code. This argument was evaluated and rejected by the primary judge at [1157]-[1174] of the Principal reasons. 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.

211 VicForests' additional oral arguments are equally unpersuasive. It is apparent that the primary judge considered the geographic range of the Greater Glider at [425]-[430] of the Principal reasons. Her Honour explained why the habitat mapping was unreliable (Principal reasons at [432]). She explained why the alleged "abundance" of Greater Gliders in reserves and national

parks was not proven (Principal reasons at [974]-[977]). VicForests' contrary submissions are rejected.

212 The primary judge, having heard the evidence, concluded that "there is ample probative basis for the Court to find that forestry operations in the Scheduled Coupes are likely to occur in the foreseeable future, and, further, are likely to be carried out in a way which will not be compatible with VicForests' obligations under cl 2.2.2.2, in relation to the Greater Glider" (Principal reasons at [1123]). The primary judge rejected VicForests' contentions about its proposed changes to its silvicultural practices (Principal reasons at [1164]) and was "not persuaded that in terms of what occurs on the forest, VicForests is likely to change its practices to any meaningful degree" (Principal reasons at [1165]).

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 (Principal reasons at [1178]). Ground 10 cannot succeed.

214 In the alternative, by ***Ground 11***, VicForests submits, that the primary judge ought to have found that, as foreshadowed in the May 2019 Harvesting and Regeneration Systems document, VicForests will, in some or all of the Scheduled Coupes, use less intensive silvicultural methods than it has historically used, and this will reduce or negate any threat of serious or irreversible damage to the environment and, in any event, constitute a careful evaluation of management options in response to any threat to the environment.

215 FLP argues that, in substance, this too is an allegation of error going to a finding of a future fact and that no error in the primary judge's reasons has been established.

216 Ground 11 is another challenge to the rationality of the primary judge's process of fact finding founded on the proposition that certain evidence which the primary judge admitted (in respect of which there is no challenge as Ground 12 of the appeal is not pressed) could not "rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue" as required by s 55 of the ***Evidence Act*** *1995* (Cth).

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. The assessment of the capacity of the evidence to affect the probability of the fact in issue is to be made in the context of the evidence as a whole: see *Evans v The Queen* [2007] HCA 59; (2007)

235 CLR 521 at [177]. Relevance requires only a logical connection between the evidence and the fact in issue: see *Papakosmas v The Queen* [1999] HCA 37; (1999) 196 CLR 297 at [81].

218 Once these principles are understood it is obvious that VicForests' submissions in respect of Ground 11 are untenable.

219 It cannot be the case that the evidence of VicForests' past timber harvesting activities has no logical connection to the primary judge's findings about VicForests' likely future timber harvesting activities. The fact (if it be the fact) that (a) only a small portion of the coupes was harvested; and (b) there was no expert evidence that harvesting in those particular configurations, or within the coupes themselves, posed a threat of serious or irreversible damage to Greater Glider, is immaterial. It was rational for the primary judge to use evidence of VicForests' past conduct in assessing probabilities relating to its future conduct.

220 Nor was the primary judge bound to accept VicForests' proposition that as it was in the process of changing its silvicultural methods, a contrary conclusion should be reached, or that, as posited in Ground 10, no conclusion about its likely future conduct could be reached at all. For one thing, there is no challenge by VicForests to the finding of the primary judge at [992] of the Principal reasons that VicForests would not implement any new or different silvicultural methods in the Scheduled Coupes. This finding was made on the basis of the reasoning at [993]-[1037] of the Principal reasons. For another, the primary judge explained why she was not satisfied that, if implemented, VicForests' purportedly new silvicultural methods were likely to comply with cl 2.2.2.2 of the Code in conducting forestry operations in the Scheduled Coupes at [1038]-[1076] of the Principal reasons. 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.

221 VicForests' submission that the fact that it did not change its silvicultural methods when the TRP was reissued in 2019 is not rationally capable of proving anything because: (a) the TRP only identifies the most intensive silvicultural method that may be used in a coupe but does not designate the silvicultural method that will be used in a coupe; and (b) the TRP does not detail how operations are to be carried out, is unsustainable. Rather, it discloses the lack of merit of Ground 11. The fact that VicForests had identified the most intensive silvicultural method that may be used in a coupe is logically connected to the conclusion that its future silvicultural methods were likely to be no different. The primary judge, in effect, rejected the same argument

at [994] of the Principal reasons when observing after a detailed explanation of the status and function of the TRP that:

> 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.

222 The same conclusion applies to VicForests' objection to the primary judge taking into account "structural and organisational features of VicForests, and of its conduct in this proceeding" (Principal reasons at [992(d)], [1007] and [1009]). The primary judge explained in detail why she had reached the conclusions she did in this regard. Her Honour's process of reasoning consistently exposes the logical connection between the evidence and her findings: see, for example, the detailed process of reasoning in the Principal reasons at [1007]-[1015]. For example, the contention of VicForests that its refusal to admit certain facts in response to a notice to admit proved nothing (because its position may have been the result of legal or expert advice or any number of matters) is misconceived in the face of the primary judge's actual process of reasoning. The primary judge identified in the Principal reasons at [1011] that VicForests failed to admit obvious facts that were the very basis for the listing of the Greater Glider under the *EPBC Act*. But the listing of the Greater Glider under the *EPBC Act* was an essential foundation for the proceeding. As the primary judge explained in the Principal reasons at [1012]:

> If VicForests, as a statutory agency charged with the conservation of biodiversity values based on relevant monitoring and research, cannot accept the very factual basis for the listing of the species, then this Court can have no confidence that VicForests is likely in the foreseeable future to modify its forestry operations in the CH RFA region in a way which is intended to be more protective of hollow-dependent species such as the Greater Glider (and the Leadbeater's Possum for that matter) from the adverse impacts of its forestry operations.

223 VicForests also objected to the primary judge's description of it as a statutory agency charged with the conservation of biodiversity values based on relevant monitoring and research. VicForests was established by the Governor making an Order in Council under s 14 of the *State Owned Enterprises Act 1992* (Vic). It is true that the Order identifies the purpose of VicForests as creating a statutory body to undertake the management and sale of timber resources in Victorian State forests on a commercial basis. However, in so doing, VicForests is bound by the Code which expressly provides in cl 2.2.2.2 that the precautionary principle must be applied "consistent with relevant monitoring and research". The primary judge's description of VicForests is not 'telling' of error at all. Rather, VicForests' submission is consistent with the

primary judge's view that VicForests' conduct makes it appear unlikely that it will change its silvicultural methods in practice (as opposed to mere theory).

224 Otherwise, the primary judge did not misapply the precautionary principle by requiring that VicForests' silvicultural methods involve no risk to the threatened species. So much is apparent from the focus of the primary judge's findings that:

- VicForests did not have a long term commitment to "changes in timber harvesting methods that would **better** advance the protection and conservation of threatened species which depend on the native forest it is currently permitted to log" (Principal reasons at [1007]);
- it is not likely that "VicForests will in fact change the way it carries out its forestry operations so that the Greater Glider **secures improved protection** from forestry operations and its population decline is not only arrested but begins to be reversed (Principal reasons" at [1015]); and
- "VicForests presently is reluctant to accept the need to modify, and to plan to modify, its forestry operations to **avoid, wherever practical, further serious damage** to hollow-dependent species, including, and in particular, the Greater Glider" (Principal reasons at [1036]).

  (emphasis added).

225 Finally with respect to Ground 11, VicForests' argues that the evidence established that it was complying with the precautionary principle as set out in cl 2.2.2.2 of the Code. Again, however, the fact that the primary judge rejected VicForests' submissions below to the same effect does not establish error.

226 No error on the part of the primary judge has been established in relation to Ground 11.

227 As to ***Ground 13***, VicForests contends that the primary judge ought to have held, in circumstances where there were no sufficiently advanced proposals to conduct timber harvesting operations in any of the Scheduled Coupes to enable any 'threat' to be properly identified and analysed with respect to those coupes, that the 'additional coupes evidence' was not rationally capable of affecting the issue of whether VicForests is unlikely to comply with cl 2.2.2.2 of the Code in the foreseeable future. The 'additional coupes evidence' was evidence of the conduct by VicForests of forestry operations in 18 coupes, outside the Logged Coupes and the Scheduled Coupes (Principal reasons at [1077]).

228 FLP relies on its submissions made under Grounds 10 and 11 – namely, that findings of future facts should not be lightly overturned.

229 The primary judge's conclusion in relation to the evidence about the additional coupes is at [1117] of the Principal reasons:

> For these reasons, I find that the evidence about the additional coupes confirms the views I have formed on the remainder of the evidence about VicForests' past non-compliance with cl 2.2.2.2 and the view that VicForests is unlikely to comply with cl 2.2.2.2 in the foreseeable future. It has been told since 2014 that it needs to take a more precautionary approach: it not only has not does so; it actively resists doing so and contests the application of the precautionary principle in its forestry operations where taking a precautionary approach requires different conduct on the ground.

230 The first point to be made about Ground 13 is that even if the ground is correct as articulated, the primary judge said this at [1078] of the Principal reasons:

> At the outset, I should make it clear that even without this evidence, I would have reached the same conclusions that I have: namely, that VicForests is 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. The evidence about the additional coupes confirms my conclusions, but is not necessary to them.

231 In other words, any alleged error by the primary judge about the evidence of the additional coupes is immaterial.

232 The second point is that VicForests has again failed to grapple with the requirements of s 55 of the *Evidence Act* discussed above.

233 The third point is that our rejection of Grounds 10 and 11 above necessarily involves the rejection of Ground 13. 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.

234 For these reasons Ground 13 must be dismissed.

235 As to ***Ground 14***, VicForests contends that the primary judge ought not to have had regard to the aspect of Professor Woinarski's report relating to the Timber Harvesting Exclusion Zone (**THEZ**) in considering whether VicForests had failed to comply with cl 2.2.2.2 of the Code in

the conduct of its forestry operations. As was said by the primary judge, it was not part of FLP's pleaded case that the THEZs were ineffective. Nevertheless, the primary judge pointed to difficulties with THEZs highlighted in Professor Woinarski's report as "another specific example of VicForests' failure to comply with cl 2.2.2.2 of the Code in the conduct of its forestry operations. While it is not part of the pleaded case, it is an example which confirms my satisfaction about the findings I have [made] on the applicant's pleaded case" (Principal reasons at [1369]).

236 VicForests argues that, given the absence of any plea on this issue, it did not adduce any evidence about the effectiveness or otherwise of THEZs, nor did it cross-examine Professor Woinarski on this issue. To make a finding in those circumstances, it argues, was a denial of procedural fairness.

237 FLP argues that the effectiveness of THEZs was contested and addressed by both parties. It says also that, in any event, the finding made by the primary judge confirmed a state of satisfaction already reached.

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. The evidence about the THEZs was relevant to the significance of the impact of VicForests' conduct on the Leadbeater's Possum. It was part of one of the central issues for resolution as identified in the Principal reasons at [242(d)]. Contrary to VicForests' arguments, both parties led evidence about the effectiveness of THEZs to ameliorate potential significant impacts on the Leadbeater's Possum. VicForests relied in this regard on evidence from Dr Davey and Mr Paul. FLP relied on the evidence of Professor Woinarski. On the evidence, the issue of the effectiveness of THEZs as an ameliorating measure was raised. FLP cross-examined Dr Davey about his evidence. VicForests chose not to cross-examine Professor Woinarski on this issue. The primary judge assessed the evidence at [1354]-[1369] of the Principal reasons, including recording at [1363] part of the hearing during which the primary judge put to Professor Woinarski aspects of the evidence of Dr Davey in order to obtain Professor Woinarski's response.

239 Further, as the Principal reasons at [1369] disclose, the evidence about the THEZs merely confirmed the primary judge's satisfaction, reached on the basis of other evidence, that VicForests' conduct involved a significant impact on the Leadbeater's Possum. 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.

240 Accordingly, Ground 14 must be dismissed.

241 As to ***Ground 15***, VicForests contends that the primary judge ought to have found that Professor Baker was an independent expert and accepted Professor Baker's evidence that modelling showed that any timber harvesting operations in the Scheduled Coupes would have no discernible impact on total habitat hectares for most coupes, and where it did have an impact, it was typically minor and transitory.

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 findings 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.

243 Ground 15 cannot be sustained.

D. Grounds 18, 20 and 21 – Miscellaneous breaches of the Code

244 Grounds 18 – 22 concern assertions of error on the part of the primary judge with respect to various findings relating to VicForests' non-compliance with the Code and the Management Standards and Procedures. Grounds 17, 19 and 22 were not pressed.

245 VicForests contends by:

- ***Ground 18*** – that the primary judge erred in finding that it 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 within the Blue Vein coupe.
- ***Ground 20*** – that the primary judge erred in holding that cl 5.3.1.5 of the Management Standards and Procedures applied to all timber harvesting operations (and new road alignments) in the Central Highlands Forest Management Areas as defined in the Management Standards and Procedures (**CH FMAs**).

- ***Ground 21*** – that the primary judge erred in finding that VicForests had not complied with cl 2.5.1.1 of the Code and cl 5.3.1.5 of the Management Standards and Procedures in all of the Logged Coupes except Blue Vein, Hairy Hyde, Tarzan, Rowles, Bromance, Lovers Lane, Swing High, Golden Snitch, Hogsmeade, Houston and Rocketman coupes.

246 ***Ground 18*** relates to the primary judge's findings at [1247]-[1249] of the Principal reasons that the forestry operations in Blue Vein coupe were not conducted in accordance with the CH RFA and consequently the exemption in s 38 did not apply. Her Honour's reasoning on this subject is at [1214]-[1249] of the Principal reasons.

247 Table 4 in the Planning Standards (which are in the Management Standards and Procedures) required a SPZ to be established over areas of Zone 1A habitat where there are more than ten hollow-bearing trees per 3 hectares in patches greater than 3 hectares. Her Honour noted that the term 'hollow-bearing trees' and other relevant terms were defined in the Management Standards and Procedures. In preparing to conduct forestry operations in a coupe, VicForests' practice was to inspect the coupe to see if there was any Zone 1A habitat present.

248 Her Honour referred at [1223] to a Departmental policy document entitled "Threatened Species Survey Standard: Leadbeater's Possum" produced by the Department of Environment, Land, Water and Planning (**DELWP**) in April 2015. The purpose of the policy document was to outline requirements for the surveying of threatened species subject to protective prescriptions under the Code and the associated timber harvesting regulatory framework. The policy document covered what DELWP regarded to be 'acceptable' survey methods and 'acceptable' levels of survey effort to identify the presence or absence of the Leadbeater's Possum or its habitat.

249 The policy document said that, in identifying Zone 1A habitat for Leadbeater's Possum, a tree map should be created which showed 'patches' of hollow-bearing trees. Separate patches were required if there was a gap of more than 100 m between hollow-bearing trees. There was no such 100 m requirement in the Code, Management Standards and Procedures or the Planning Standards.

250 In the Court below, in response to FLP's claim that there was a breach of cl 2.2.2.4 of the Code because VicForests should have identified Zone 1A Leadbeater's Possum habitat in Blue Vein coupe prior to conducting forestry operations there, VicForests relied on an investigation

undertaken by DELWP which had found that VicForests had not breached the Code. DELWP had informed VicForests that it had found no breach of the Code in Blue Vein coupe because DELWP had determined that there was no Zone 1A habitat there.

251 VicForests' basic contention under Ground 18 in the appeal is that the primary judge erred in holding that VicForests had failed to comply with cl 2.2.2.4 of the Code in conducting forestry operations in Blue Vein coupe, which was inconsistent with DELWP's view that there was no breach because, consistently with the policy document, DELWP had found that there was no Zone 1A habitat in that coupe, applying its policy document.

252 The primary judge said at [1247] that the Code and Management Standards and Procedures were the key relevant documents. They contain clear prescriptions relating to Zone 1A habitat. In contrast with the policy document, they say nothing about a 100 m gap between hollow-bearing trees in identifying patches of hollow-bearing trees.

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. Having regard to the relevant parts of the Code and the Management Standards and Procedures and the evidence below, it was well open to the primary judge to find that there was a breach of cl 2.2.2.4 by VicForests.

254 Ground 18 is rejected.

255 ***Ground 20*** relates to the primary judge's finding at [1270] that cl 5.3.1.5 of the Code was an absolute prohibition and applied to all timber harvesting operations and new road alignments in the CH FMAs. VicForests contends that the primary judge erred because, on its proper construction, cl 5.3.1.5 only required a minimum 20 m vegetation buffer where a new coupe or road is within the foreground (0-500 m) of, and may be visible from, a landscape feature listed in Table 9 in Appendix 5 to the Planning Standards, with particular emphasis on the landscape features in Table 9. It contends that this construction is consistent with relevant surrounding context, particularly cl 5.3.1.6 relating to the middle ground (500 m - 6.5 km), which makes plain that the clause is concerned with operations as seen from the features listed in Table 9. VicForests contends that the primary judge's construction was wrong because it construed the phrase "[u]se a minimum 20 m vegetation buffer" in cl 5.3.1.5 in isolation from its surrounding text, notably "[s]creen timber harvesting operations… and new alignments from view".

256 Persons conducting commercial timber harvesting operations in State forests where the Code applied were required to comply with the Management Standards and Procedures. Although the Code prevailed where there was a conflict between the Code and the Management Standards and Procedures, operations which complied with the Management Standards and Procedures were deemed to comply with the Code. The relevant provisions of the Management Standards and Procedures are in the part of that document under the heading "Landscape".

257 It is convenient to again set out cl 5.3.1 (emphasis in original):

> 5.3 Landscape
>
> 5.3.1 Central Highlands FMAs
>
> 5.3.1.1 Retain all **mature** trees within 20 m of the Monda Track.
>
> 5.3.1.2 Apply a 50 m **buffer** either side of La La Falls walking track.
>
> 5.3.1.3 Apply a 50 m buffer either side of Island Creek walking track and a 100 m buffer around the Ada Tree.
>
> *Foreground (0 – 500 m)*
>
> 5.3.1.4 Within 500 m of the scenic drives and designated lookouts listed in table 9 in Appendix 5 the Planning Standards, manage **timber harvesting operations** to ensure landscape alterations are temporary, subtle and not evident to the casual observer.
>
> 5.3.1.5 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.
>
> *Middleground (500 m – 6.5 km)*
>
> 5.3.1.6 In the middle ground, between 500 m and 6.5 km, seen from the features listed in table 9 in Appendix 5 the Planning Standards:
>
> (a) manage timber harvesting operations to ensure landscape alterations are only subtly apparent within 5 years of the operation; and
>
> (b) shape, position and time timber harvesting operations and new roads to minimise their visual impact.

258 The primary judge's reasons for rejecting VicForests' proposed construction of cl 5.3.1.5 are set out at [1270] of the Principal reasons:

> As VicForests submits, cl 5.3.1.5 must be read in context. 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.

259 The parties agree that general principles of legislative construction apply to the proper construction of cl 5.3.1.5. For the following reasons, no appealable error has been established in relation to the primary judge's construction. That construction is consistent with the text and context of the provision. Clauses 5.3.1.4 and 5.3.1.6 both contain express references to particular features of Table 9 in the Planning Standards, whereas cl 5.3.1.5 does not. Although cl 5.3.1.5 appears as the second sub-clause under a heading "*Foreground (0 – 500 m)*", it is evident from its clear terms that it has a wider operation than that geographic range.

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. The unqualified language of cl 5.3.1.5 should not be varied by reference to the heading of which appears above both it and cl 5.3.1.4.

261 A contrast is to be drawn with provisions such as cll 5.3.1.4 and 5.1.3.6, which contain explicit references to geographic ranges. It is appropriate to have regard to the terms of those other provisions as part of the context in which cl 5.3.1.5 appears.

262 ***Ground 21*** turns on the proper construction of cl 5.3.1.5. Accordingly, having regard to the rejection of VicForests' claim that the primary judge erred in her construction of cl 5.3.1.5, Ground 21 must also be rejected.

E. Grounds 23-25 and 29 – Significant impact

263 Grounds 23 – 29 concern assertions of error in relation to the primary judge's findings about the impact of VicForests' forestry operations on both the Leadbeater's Possum and the Greater Glider. Grounds 26 – 28 were not pressed.

264 VicForests contends by:

- ***Ground 23*** – that the primary judge erred in finding that there was a sufficient evidentiary foundation in respect of forestry operations in the Scheduled Coupes to make findings of fact about significant impact on both the Leadbeater's Possum and the Greater Glider.
- ***Ground 24*** – that the primary judge erred in finding that the forestry operations in the Scheduled Coupes, Logged Leadbeater's Possum Coupes and Logged Glider Coupes are likely to have had, or are likely to have, a significant impact on the Greater Glider species as a whole and the Leadbeater's Possum species as a whole.
- ***Ground 25*** – that the primary judge erred in finding that VicForests' operations at an individual coupe level, at a geographic coupe group level and/or at the level of the totality of the Logged Coupes or Schedules Coupes, are likely to have had, and are likely to have, a significant impact on both the Greater Glider and the Leadbeater's Possum.
- ***Ground 29*** – alternatively, that the primary judge erred in adopting findings to the effect that VicForests will not use less intensive silvicultural methods in the Scheduled Coupes that has been its historical practice and that, even if VicForests were to conduct its forestry operation in the Scheduled Coupes using less intensive silvicultural methods, this will not make any substantive difference on the ground to threats posed to the Greater Glider from timber harvesting.

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. Accordingly, Ground 23 must also be dismissed.

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. VicForests' additional arguments in support of Grounds 24 and 25 must also be rejected.

267 As FLP submits, the primary judge recognised that the relevant issue in this regard was "impact on two threatened species, at the species level, and not at the individual member of the species level" (Principal reasons at [1307]). The primary judge never departed from that focus. Her Honour's observations and findings about impacts on individuals and specific colonies of the threatened species are directed towards evaluating the impact of VicForests' conduct at a species level. VicForests' contentions of error in this regard wrongly assume that impacts on individuals and specific colonies of the threatened species are incapable of being relevant to

the issue of the threat of significant impact at a species level. But as the primary judge explained, in rejecting VicForests' apparent argument that "there must be some arithmetical, or quantifiable, consequence measuring the scale of the impact against the entirety of the population of a listed threatened species" (Principal reasons at [1301]), an argument which also underlies Grounds 24 and 25 of the appeal:

- "the whole context of the prohibitions – the taking of an action – is very likely to involve consideration of the effects of actions on flora or fauna species in identified and localised locations" (Principal reason at [1304]);
- the Leadbeater's Possum has a limited range and the CH RFA region is its stronghold (Principal reasons at [1306]);
- "Dr Davey also had no difficulty in identifying the Greater Glider population in the CH RFA region as an important local population. 'Important' indicates its value to the survival and recovery of the species across its natural range. Especially so where, as the experts all agreed, this is the southernmost population of Greater Glider" (Principal reasons at [1307]);
- "evidence about detections of individuals, and about the effects of forestry operations on individual members of both species which are occupying or using the native forest where the forestry operations were conducted … is capable of being probative of impact on the species as a whole. Assessing such an impact is not a mathematical exercise, but rather a matter of considering the evidence as a whole" (Principal reasons at [1308]);
- given the status of Leadbeater's Possum as critically endangered "impacts on distinct Leadbeater's Possum colonies in and around the coupes affected by VicForests' forestry operations were capable of being characterised as significant impacts on the Leadbeater's Possum species as a whole. That is because it is "facing an extremely high risk of extinction in the wild in the immediate future", and current measures for its protection from the effects of forestry operations have not resulted in any measurable stemming of that risk" (Principal reasons at [1309]);
- the whole future of Leadbeater's Possum depends on retaining its habitat (Principal reasons at [1386]);
- "[t]he destruction of any habitat occupied and used, or likely to be occupied and used, by Leadbeater's Possum will have an impact on the Leadbeater's Possum as a species that can be described as significant" (Principal reasons at [1430]);

- the population of the Greater Glider in the CH RFA region is important to the survival of the species as a whole and in particular, the maintenance of genetic diversity (Principal reasons at [1435]);
- losses of Greater Gliders resulting from VicForests' actions are material "not so much as individual members of the species, but because losses of that number of individuals is capable of affecting genetic diversity, the density levels of the Greater Glider in particular areas of forest and what might then occur as they come together from their otherwise rather isolated existence to breed. Effects on this number of individual animals is capable of further weakening the Central Highlands population as a whole" (Principal reasons at [1442]); and
- "the premise of the contention (that there are stable and robust populations [of Greater Gliders] in the reserve system) is not made out on the evidence" (Principal reasons at [1447]).

268 Contrary to VicForests' contentions, there was no evidence that there were substantial numbers of Greater Gliders in the east coast region of Australia (Principal reasons at [44]-[53]). Further, the primary judge considered the evidence about the population of Greater Gliders in the East Gippsland region (Principal reasons at [51(n)] and [611]). The primary judge explained why the location and size of localised populations of Greater Gliders was important, in contrast to their absolute population total (Principal reasons at [604]-[616]). Where habitat is fragmented, local populations are vulnerable to extinction. Dr Smith explained why the total population of Greater Gliders is not the relevant focus given the importance of the population local to the region of the CH RFA. That evidence was more than sufficient to support the primary judge's findings. 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 or 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:

> I accept that the maintenance of genetic diversity plays a critical role in the protection and conservation of a threatened species such as the Greater Glider (or the Leadbeater's Possum, for that matter). I accept the reasons why this is so are explained by Dr Smith in the passages I have extracted. Key to the maintenance of genetic diversity is the maintenance of viable, separate populations of the species, across their geographic

> range, and in locations which are sufficiently widely distributed that events such as wildfire are less likely to destroy all or most populations in the area.

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.

270 ***Ground 29*** is said to be in the alternative to Grounds 23 – 25. The primary judge is said to have erred at [1436] of the Principal reasons in adopting findings she made at [987]-[1076], which concern whether VicForests would use less intensive silvicultural methods in the Scheduled Coupes.

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.

RELIEF

272 Grounds 30 and 31 are pressed only in the event that all the grounds in Sections A – E are rejected. In the circumstances, there is no need to consider these grounds.

CONCLUSION

273 For the reasons given above, the appeal must be allowed and the primary judge's final orders set aside excluding order 20 (that each party pay its own costs of the separate question hearing).

COSTS

274 VicForests abandoned numerous grounds of appeal and at least one argument (in support of Ground 2, as set out in its reply submissions). It has also failed in respect of all grounds of appeal other than Ground 1, but, as we have said, the submissions it made on the issue of statutory construction remained opaque until clarified on questioning and prompting by the Bench late in the hearing of the appeal. In these circumstances, we propose to enable both parties to provide brief written submissions in relation to costs (other than the costs of the separate question hearing the subject of order 20 made by the primary judge) and have made orders accordingly.

I certify that the preceding two hundred and seventy-four (274) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Jagot, Griffiths and SC Derrington.

Associate: 

Dated: 10 May 2021