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IN THE SUPREME COURT OF VICTORIA AT SALE
COMMON LAW DIVISION

No. 8547 of 2009

BETWEEN:

ENVIRONMENT EAST GIPPSLAND INC

Plaintiff

AND

VICFORESTS

Defendant

CLOSING SUBMISSIONS ON BEHALF OF THE DEFENDANT

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A. THE NATURE OF THE RELIEF SOUGHT

1. The plaintiff seeks:

   (a) a permanent injunction restraining the defendant from harvesting timber in the Brown Mountain Forestry Coupes; and 15, 19, 26 + 27

   (b) a declaration that any timber harvesting operations in the Brown Mountain Forestry Coupes are unlawful.

A.1. Injunctive relief

2. The remedy of injunction is equitable in origin, although the jurisdictional source of the power is now expressed in s 37 of the *Supreme Court Act 1958* (Vic). Relevantly, s 37 reads:

> (1) The Court may by order, whether interlocutory or final, grant an injunction or appoint a receiver if it is just and convenient to do so.
>
> (2) An order made under subsection (1) may be made either unconditionally or on such terms and conditions as the Court thinks just.

3. Equitable remedies are discretionary. The equitable origins of the injunction inform the circumstances in which it is appropriate to grant it.

4. Courts of equity operate primarily *in personam* and not *in rem,* and in doing so they are, and have always been, courts of conscience.[1] Brown-Wilkinson J explained in *Swiss Bank Corporation v Lloyds Bank* [1979] Ch 548 at 565:

> Historically the courts of equity acted in personam. Whether equity was supplementing the common law by giving additional remedies or correcting the common law by imposing a different legal result, the courts of equity intervened by directing the defendant personally to do, or refrain from doing, a specific act. *In deciding whether or not to intervene, the court of equity required first, that the plaintiff should have some enforceable right, and secondly, that the conscience of the defendant was affected in some way* so as to make the failure of the defendant to give effect to the plaintiff's rights contrary to justice. [Emphasis added].

5. French J (as his Honour then was) said in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd [No 2]* (2000) 96

[1] *Ewing v Orr Ewing (No 1)* (1883) 9 App Cas 34 at 40.

FCR 491 at 498 that 'it can be said that the overriding aim of all equitable principle is the prevention of unconscionable behaviour'.[2]

6. It is necessary to identify the legal or equitable rights which are to be determined at trial and in respect of which there is sought the permanent injunction: *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 241.

7. In this matter the plaintiff seeks an injunction to ensure the observance of public law. Ordinarily a proceeding of this nature is at the suit of the Attorney-General, with or without a relator, or at the suit of a person with sufficient interest: *ABC v Lenah Game Meats Pty Ltd* (2010) 208 CLR 199 at 240. This aspect is discussed further in the section on standing below.

8. As the authors of the fourth edition of *Equity: Doctrines and Remedies* comment, 'there has been strong judicial emphasis on the discretionary power of the courts to decline an injunction sought by the Attorney-General, even in circumstances where they have jurisdiction to grant it.'[3]

9. So it was in *Attorney-General v British Petroleum (Australia) Ltd* [1964-5] NSWLR 2055[4] that Jacobs J refused an injunction at the suit of the Attorney-General in circumstances where the defendant had complied with the requirements of the law.

10. In *Attorney-General v Greenfield* [1962] SR (NSW) 393[5] the Full Court of the New South Wales Supreme Court upheld the trial judge's decision to refuse an injunction in circumstances where the defendants had 'acted perfectly innocently and without any intention to violate the law.' (At p 396).

11. What follows from this is the need for the plaintiff to establish some relevant wrongful conduct of VicForests so that, in the discretionary exercise of the Court's equitable jurisdiction, an injunction lies against VicForests as opposed to some other person. Put another way, there must be some action or inaction on VicForests' behalf that binds its conscience so that equity will intervene against it.

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[2] Cited with approval by Gummow and Hayne JJ in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 245.

[3] *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, Fourth Edition, p 741.

[4] Also reported at (1964) 83 WN (Pt 1) (NSW) 80.

[5] Also reported at [1961] NSWR 824.

12. Of relevance to that inquiry is that:

(a) it is the DSE (and not VicForests) that has the exclusive power to create an amendment to the zoning scheme by creating either a Special Management Zone (**SMZ**), or a Special Protection Zone (**SPZ**);[6]

(b) if the presence of a threatened species is detected (either by VicForests during operations or by another person prior to operations) that finding would need to be reported to the DSE so they could determine whether a SPZ was necessary;[7]

(c) the DSE (and not VicFo

(i) a SPZ on the bas
detected;[8]

(ii) an SMZ and Re
meaning of the
2:0542 at 554];[9]

(d) VicForests has mainta
boundaries in accordan
DSE;[10] and

(e) with the exception of the Long-footed Potoroo there have not been any detections of a threatened species within the Brown Mountain coupes that trigger any action under an applicable action statement.

13. To the extent that decisions have been made that are alleged to be improper or unlawful, they are not the VicForest's decisions, but decisions of the DSE. In this respect the plaintiff should have named the DSE as a defendant as it is desirable that the DSE should be made a party to a proceeding in which its decisions are being impugned: *Cambridge Credit Corporation v Parkes*

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[6] See the *Management Procedures for Timber Harvesting Operations and Associated Activities in Victoria's State Forests* for 2007 [**AB 2:0274**] and 2009 [**AB 2:0842**] in sections 3.2.3 and 3.2.4 respectively. See also exhibit LAM 30 to Mr Miezis' witness statement (**Exhibit N**) and the evidence of Lee Miezis to this effect at [**T 984:20**]; [**T 994:7**]; [**T 1010:27**].

[7] [**T 1010:27**].

[8] For the reasons expressed in exhibit LAM 30 to Mr Miezis' witness statement (**Exhibit N**).

[9] See paragraph 91 of Mr Miezis' statement (**Exhibit N**).

[10] See paragraph 94 of Mr MacDonald's fourth affidavit (**Exhibit M**).

Developments Pty Ltd [1974] 2 NSWLR 590 at 605 (per Hope JA) and 616 (per Glass JA).

14. Whether the DSE's decisions concerning the elevated level of arboreal mammals and the detection of the Long-footed Potoroo were correct or not, what is clear is that they are not decisions capable of being made by VicForests, and their correctness or otherwise does not legally affect the proper exercise of the Court's discretion in determining whether an injunction should be granted against VicForests.

15. On this analysis, the existence of a necessary equity to attract relief has not been established: see *Bridgewater v Leahy* (1998) 194 CLR 457 at 494 where Gaudron, Gummow and Kirby JJ said:

> Once a court has determined upon the existence of a necessary equity to attract relief, the framing, or, as it is often expressed, the moulding, of relief may produce a final result not exactly representing what either side would have wished. However, that is a consequence of the balancing of competing interests to which, in the particular circumstances, weight is to be given.

A.2. Declaratory Relief

16. The plaintiff seeks a declaration that any timber harvesting operations in the Brown Mountain Forestry Coupes are unlawful.

17. The nature and scope of declaratory relief was recently reviewed by Vickery J in *Ambridge Investments Pty Ltd v Baker & Ors.*[11]

18. Vickery J relevantly said (omitting citations):

> [61] Relief by way of a declaration does not depend upon and is not confined to claims for equitable relief. Further, although it is discretionary in nature, it is not a form of equitable relief.
>
> [62] As to declaratory relief, as was said by the High Court in *Ainsworth v Criminal Justice Commission*:
>
> *It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which "[i]t is*

[2010] VSC 59 (12 March 2010).

neither possible or desirable to fetter ... by laying down rules as to the manner of its exercise".

[63] In *Forster v Jododex Aust Pty Ltd* Gibbs J considered the jurisdiction of a superior court to grant declaratory relief.

...

The jurisdiction to make a declaration is a very wide one. Indeed, it has been said that, ... [under the relevant rule] the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion.

[64] Speaking extra-curially in 2007, Justice RS French in his paper "Declarations — Homer Simpson's Remedy — Is there anything they cannot do?" considered the function of a declaration. Noting its inherent flexibility and procedural simplicity, the following question was posited: "Well may we ask rhetorically of declarations as Homer Simpson asked of donuts — 'is there anything they can't do'?"

His Honour analysed the nature of the remedy in the following terms:

... [The question is raised as to] whether a declaration is, strictly speaking, an exercise of power at all. A judicial declaration says something about something. It is a formal statement which may be of fact or law or mixed fact and law.

[65] In the same paper, his Honour noted that: "Importantly, it [a declaration] does not create rights capable of enforcement without a further order of the Court". His Honour proceeded:

As PW Young observed in the 2nd edition of his text, "Declaratory Orders":

The enforceability of a declaratory order is the weak spot in its armour, as there is no sanction built into declaratory relief.

Zamir and Woolf put it thus in the 3rd edition of "The Declaratory Judgment":

A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory in other words coercive, judgment which can be enforced by the courts.

Nevertheless, declarations by courts have legal consequences. A declaration is not "a mere opinion devoid of legal effect". It "operates in law either as a res judicata or an issue estoppel and such an order is a final order for the purposes of appeal". ...

19. In *Ainsworth v Criminal Justice Commission,*[12] the High Court said (in the passage referred to by Vickery J in *Ambridge*):

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

20. The question of the plaintiff's standing to seek declaratory relief is dealt with separately below.

21. A further and fundamental impediment to the grant of the declaration sought by the plaintiff is that, if made, it constitutes a statement of fact and law directly or indirectly impugning the conduct of the DSE.

22. The primary responsibility in respect of the lawfulness of any timber harvesting in advance of the actual operations lies with the DSE (ie. planning and consents, implementation of SPZ/SMZ's). Further, the proposed harvesting operations are intended to be conducted by VicForests in consultation with the DSE (see Modified Tree Habitat Prescriptions etc).

23. A declaration that any timber harvesting operations in the Brown Mountain Forestry Coupes are unlawful would indicate that the DSE has acted unlawfully or improperly in, inter alia:

    (a) failing to act on alleged detections of species by implementing the protocols in the Action Statements;

    (b) failing to implement an SMZ and retained habitat in respect of the long footed potoroo;

(1992) 175 CLR 564 at 581.

(c) failing to implement an SPZ in respect of the gliders;

(d) failing to declare an Interim Conservation Order in respect of the coupes;

(e) failing to make a declaration a Critical Habitat in respect of the coupes;

(f) failing to restrain VicForests from harvesting in the coupes;

24. The plaintiff has elected not to join the DSE (the Secretary or the Minister) as parties. Rule 9.05 recognises that non-joinder of a party or person does not defeat the proceeding and provides that the Court may determine all questions in the proceeding *so far as they affect the rights and interests of the parties.*[13] However, non-joinder will restrict the Court's ability to affect the rights or interests of persons who are not parties.[14]

25. In *Financial Wisdom vLtd v Newman & Ors* [15], the Court of Appeal said:

> Generally speaking a court has no jurisdiction over any person other than those properly brought before it as a party or as a person treated as if they were a party under statutory jurisdiction or a person coming in and submitting to the jurisdiction of their own free will to the extent to which they do submit. There is no jurisdiction to make an order against a person not so before it merely because an order made or to be made may or will be ineffectual without it.

26. Since the plaintiff has elected not to join the DSE it would be inappropriate, both as a matter of substance and in the exercise of discretion, for the Court to make the declaration sought by the plaintiff.

27. Further, in so far as the declaration sought by the plaintiff relates to the lawfulness of conduct that will occur during operations, it involves future and hypothetical circumstances whose lawfulness cannot be determined at this time, and should not be the subject of a declaration.

B. DUTIES OF IMPERFECT OBLIGATION

28. In its defence VicForests pleads that the East Gippsland Forest Management Plan and the precautionary approach do not create obligations actionable at law (paragraphs 23A and 74 respectively).

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[13] Emphasis added.
[14] *Tedeschi v Legal Services Commissioner* (1997) 43 NSWLR 20 at 30.
[15] (2005) 12 VR 79 at [49], per Eames, Nettle JJA and Williams AJA.

29. Where a statute sets out, in respect of a public authority, objectives to be achieved or duties to be performed in general terms, without specifying any particular remedy for their enforcement, and where the authority is granted considerable discretion concerning how the objectives may be achieved or the duties performed, such obligations have been described as "duties of imperfect obligation".

30. Duties of imperfect obligation have been described in these terms:

(a) 'laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions'.[16]

(b) They merely create duties, without any correlating rights.[17]

(c) They are unconditional general directives; they go to the root of the authority's activities in the provision of services; and they contain significant elements of discretion – these are the hallmarks of an imperfect duty.[18]

31. The law has recognized duties of imperfect obligation in several contexts. Thus:

(a) "while company directors may owe a duty to take into account the interests of creditors, this does not confer upon creditors any general law right against former directors of the company to recover losses suffered by those creditors. "The result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator."[19]

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[16] David Campbell and Philip Thomas (eds), *The Province of Jurisprudence Determined by John Austin* (1988), p.21. cited in Spiegelmann, *Lying Through Legislation? Communications Regulations and Duties of Imperfect Obligations*, (2007) AIAL Forum No.54, 45.

[17] Ibid, p.14.

[18] AJ Harding, *Public Duties and Public Law* (1989), pp. 26-7.

[19] *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 122 ALR 531 at 550, Gummow J, cited with approval by the High Court in *Spies v R* (2000) 201 CLR 603 at [94].

(b) "Every citizen in whose presence a breach of the peace is being or reasonably appears about to be committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation." [20]

(c) In *Ebner v Official Trustee in Bankruptcy,* Gleeson CJ and McHugh, Gummow and Hayne JJ described the issue of a judge making an early disclosure of any interest or association of which the judge may be aware as a 'matter of prudence and professional practice for a judge'.[21] Their Honours eschewed any attempt to describe the practice in terms of rights or duties, observing that any such duty to disclose would be a 'duty of imperfect obligation'.[22]

(d) It is accepted that there is some kind of duty owed by the State to its overseas nationals. For example, in *Mutasa v Attorney General* [23], Boreham J spoke of the Crown having a duty to protect a citizen from unlawful detention but of that duty being one of imperfect obligation and thus unenforceable. So too, in *China Navigation Company Ltd v Attorney General,* [24] Rowlatt J spoke of an alleged duty to assist a citizen against piracy as being but a "political" duty:

> It is a different sort of thing in a different region altogether. It is merely what I venture to call a political duty, using the word "political" in its proper and original sense. It is what any government would be expected to do for its people, but the court cannot examine it. Nobody could come to the Court and say whether the government of any country did or did not perform its duty in that respect. That confusion with the double use of the word "duty" lies at the bottom of the whole argument in this case.[25]

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[20] *Albert v. Lavin* [1982] AC 546 at p.565, per Lord Diplock.
[21] [2000] 205 CLR 337 at [69].
[22] [2000] 205 CLR 337 at [70].
[23] [1980] QB 114 at 118-120.
[24] (1931) 40 Ll L Rep 110 at 112.
[25] [2000] 205 CLR 337 at [69].

The characterisation of such duty as a duty of imperfect obligation was accepted by Tamberlin J in *Hicks v Ruddock*.[26]

32. Courts have held that duties such as these are non-justiciable, considering them to be political duties, rather than legal duties, which cannot be enforced by a court of law.[27]

33. Thus, in *Yarmirr v Australian Telecommunications Corporation*[28], applicants representing two aboriginal communities sought mandamus to enforce what they believed to be Telecom's obligation to provide them with interim satellite telephone services to replace their current system, which was unreliable and lacked a duplex speech path. The provision they relied upon was that the performance standards of telephone services accessible to Australians meet the social, industrial and commercial needs of the Australian community. Burchett J said:

> When Parliament imposes on a functionary a broad duty involving the development and application of policy, to be performed nationally, the fulfilment of which must be subject to many constraints and may be achieved in many different ways, according to the measure allowed to those constraints, but cannot be achieved absolutely, if only because it involves an ideal, detailed supervision by the courts of the manner of performance of the duty is not likely to have been intended.
>
> In *Wade on Administrative Law*, 6th ed, 1988, p 614 it is stated:
>
> A *power* enables an authority to do what would otherwise be illegal or ineffective. It is always subject to legal limits, and it is safe to assume that Parliament did not intend it to be exercised beyond those limits. A *duty*, on the other hand, may or may not be legally enforceable. Parliament has recently become fond of imposing duties of a kind which, since they are of a general and indefinite character, are perhaps to be considered as political duties rather than as legal duties which a court could enforce. Many such duties may be found in statutes concerned with social services and nationalisation. Thus the opening words of the National Health Service Act 1977 are: 'It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service... .'
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> ...

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[26] (2007) 156 FCR 574 at 593-594, [62]- [66].

[27] See, eg, *Attorney General v Tomline* (1880) 14 Ch D 58, 66; *China Navigation Co Ltd v Attorney General* (1931) 40 Ll LR 110, 112-3; *Mutasa v Attorney General* [1980] QB 114 at 118-120; *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739, 749.

[28] (1990) 96 ALR 739.

> The words of Brennan J in *Re Citizen Limbo* (1989) 92 ALR 81 at 82 ; 64 ALJR 241 at 242, though written in a different context, are apposite:
>
> But when one comes to a court of law it is necessary always to ensure that lofty aspirations are not mistaken for the rules of law which courts are capable and fitted to enforce. It is essential that there be no mistake between the functions that are performed by the respective branches of government. It is essential to understand that courts perform one function and the political branches of government perform another. One can readily understand that there may be disappointment in the performance by one branch or another of government of the functions which are allocated to it under our division of powers. But it would be a mistake for one branch of government to assume the functions of another in the hope that thereby what is perceived to be an injustice can be corrected.[29]

34. In the present case, the plaintiff has identified various duties or obligations imposed upon the defendant by legislation or subordinate instruments. It is submitted that, with limited exceptions, those duties or obligations are duties of imperfect obligation and thus unenforceable against the defendant.

B.1. ***Flora and Fauna Guarantee Act 1988*** **(Vic)**

35. By operation of s 4(2), VicForests must be administered so as to have regard to the flora and fauna conservation and management objectives set out in s 4(1) of the Act.

36. These objectives include:

    (a) to guarantee that all taxa of Victoria's flora and fauna other than a taxa listed in the Excluded List can survive, flourish and retain their potential for evolutionary development in the wild.

37. It is submitted that these objectives are statements of general principle and do not create legally enforceable obligations. No particular remedy for their enforcement is specified, and those entities who are to have regard to the objectives are granted considerable discretion concerning how the objectives may be achieved.

38. By contrast, section 19 provides for the preparation by the Secretary of action statements. The action statements set out, inter alia, particular action that must

[29] (1990) 96 ALR 739, 749.

be taken by VicForests or the DSE in the event that particular species are detected.

39. VicForests accepts that, to the extent that the action statements require it to take specified action, they create enforceable obligations on VicForests.

40. The Secretary of the DSE is responsible for administering the Act in such a way as to promote the flora and fauna conservation and management objectives: s 7(1).

41. Section 7(2) of the Act creates a scheme whereby if the Secretary is of the opinion that action taken or to be taken by a public authority is likely to threaten the survival of a listed taxon or community of flora or fauna or a critical habitat the Secretary may require the public authority to consult with the Secretary either before the action starts, or if the action has already started within 15 days of the request being made

42. The evidence establishes that the Secretary is not of the opinion that the harvesting of the Brown Mountain coupes by VicForests is likely to threaten the survival of a listed taxon or community of flora or fauna or a critical habitat. Nor has the Secretary required VicForests to consult with him within the meaning of s 7(2) of the Act.[30]

B.2. ***Sustainable Forests (Timber) Act 2004*** **(Vic)**

43. The purpose of this Act is to provide a framework for sustainable forest management and sustainable timber harvesting in State forests (s 1(a)).

44. Section 5 sets out "principles of ecologically sustainable development".

45. S. 5(1) the Act states that:

> In undertaking sustainable forest management in accordance with this Act, regard is to be had to the principles of ecologically sustainable development set out in this section.

46. The objectives of ecologically sustainable development are defined in s 5(1)(3) to be:

[30] Paragraph 93 of Lee Miezis' statement (**Exhibit N**).

(a) to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations;

(b) to provide for equity within and between generations; and

(c) to protect biological diversity and maintain essential ecological processes and life-support systems.

47. It is submitted that these are plainly statements of general principle and do not create legally enforceable obligations.

48. Further, it should be noted that the language in which these principles are expressed indicates that they are matters to be considered, rather than matter required to be given effect to.[31] This follows from:

(a) the very general language used in s. 5;

(b) the reference to "the objectives of ecologically sustainable development" in s. 5(3);

(c) the expression "regard is to be had to the principles" in s. 5(1);

(d) the expression "guiding principles" in s. 5(4).

49. Again, no particular remedy for their enforcement is specified, and those entities who are to have regard to these principles or objectives are granted considerable discretion concerning how these principles may be applied or objectives may be achieved.

50. Several of the guiding principles set out in s. 5(4) comprise elements of or relate to the precautionary principle. However, s.5(4) does not impose an enforceable obligation upon VicForests to apply the precautionary principle.

51. The Act provides that the Minister may develop a Sustainability Charter (s 11(1)), and in the event that the Minister does, that VicForests must develop initiatives and targets for those initiatives which respond to, and support the objectives set out in, the Charter in its statement of corporate intent (s 12).

52. On page 28 of its *Statement of Corporate Intent 2009/10 to 2011/12*[32] VicForests sets out its response to the Sustainability Charter for Victoria's

[31] See *Western Water v Rozen* [2008] VSC 382 at [57].

State Forests – VicForests' Sustainable Forest Management System objectives, actions and targets.

B.3. The East Gippsland Forest Management Plan

53. The East Gippsland Forest Management Plan **(the FMP)** **[AB 1:0195]** is a working plan within the meaning of s 22 of the *Forests Act 1958* and was published in 1995.

54. The stated purpose of the FMP is to "establish strategies for integrating the use of State forest for wood production and other purposes, with conservation of natural, aesthetic and cultural values across the whole FMA": cl 1.1.[33]

55. One of the informing principles of the FMP, as set out on page 4, is that '[e]mphasis should be placed on modified timber-harvesting practices to accommodate significant biological values rather than on automatic exclusion of harvesting.'

56. The FMP includes conservation guidelines intended to 'provide a systemic basis for management decision and a framework for reviewing these as more information becomes available.' (Page 7).

57. The purpose of the guidelines (set out on page 28) is to:

(a) provide planned protection for sensitive and threatened species in State forest to meet the requirements of the *Flora and Fauna Guarantee Act 1988* and the precautionary principle outlined in the National Forest Policy Statement;

(b) *take account of the contribution of national parks and other conservation reserves towards meeting these requirements;* and

(c) initiate an orderly process for ongoing reconciliation of timber production with conservation of threatened species. [Emphasis added].

58. The FMP has separate chapters dealing with, inter alia, biodiversity conservation, forest production, forest protection and cultural values.

Osborn:
AO takes the FMP + "fixes it" as something that is reqd.
∴ > what it would be if not picked up in the AO!
once that's occured, past a set of tools / steps.
AO – they've been expressed as conditions.
Some are expressed as provisional but others are specific + prescriptive
AB 408, 411
⇒ arborals could be a "standard" or "condition" (AO) ∴ VF reqd to comply.

FMP on DSE website
infuse with life with some other statutory powe
but TRP comes after.
2007 + 2009.
"spent instrument"

[32] Exhibit **CM22** to the fourth MacDonald affidavit.

[33] The plan is expressed to apply until 2006 unless a substantial change of circumstances (such as major wildfire) warrants a review before then: cll 1.1, 8.1.

59. In this proceeding almost exclusive attention has been given to the chapter on biodiversity conservation. That chapter introduces "conservation guidelines" which "are intended as tools to help devise a network of protected habitat catering for all forest fauna in the FMA". [34] Further, the purpose of the guidelines is to:

(a) provide planned protection for sensitive and threatened species in State forest to meet the requirements of the *Flora and Fauna Guarantee Act 1988* and the precautionary principle outlined in the National Forest Policy Statement;

(b) take account of the contribution of national parks and other conservation reserves towards meeting these requirements; and

(c) initiate an orderly process for ongoing reconciliation of timber production with conservation of threatened species. [35]

60. The FMP further states that the guidelines:

(a) are a step towards more comprehensive conservation strategies to be developed as more information becomes available;

(b) may be superseded by FFG action statements. [36]

61. It is submitted that the FMP does not create legally enforceable obligations on VicForests. It is a strategic documents which provides guidance as to how to integrate the use of State forest for wood production and other purposes, with conservation of natural, aesthetic and cultural values across the whole FMA. No particular remedy for enforcement is specified. The language in which the guidelines are expressed indicates that they are matters to be considered, rather than matter required to be given effect to.

B.4. The Code of Practice for Timber Production 2007

62. The Code is a 'Code of Practice' within the meaning of Part 5 of the *Conservation, Forests and Lands Act 1987* (Vic). Under the heading 'Why a Code of Practice for Timber Production?' on page 4, it states:

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[34] AB 1:408.
[35] AB 1:408.
[36] AB 1:408.

Maintaining the benefits to society provided by forestry depends on balancing community needs and concerns with careful stewardship and responsible management. The effective implementation of a Code of Practice helps to ensure that the activities of timber growing and harvesting are compatible with the conservation of the wide range of values associated with forests, and of any such values associated with land on which commercial plantation development is proposed.

63. The purpose of the code is set out on page 5:

The purpose of this Code of Practice is to provide direction and guidance to forest managers and operators to deliver sound environmental performance when undertaking commercial timber growing and harvesting operations in such a way that:

- *permits an economically viable, internationally competitive, sustainable timber industry;*
- *is compatible with the conservation of the wide range of environmental, social and cultural values associated with timber production forests;*
- *provides for the ecologically sustainable management of native forests proposed for continuous timber production;*
- *enhances public confidence in the management of Victoria's forests and plantations for timber production.*

64. 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: page 6.

65. Figure 1, on page 12, introduces the Forest Management Areas in Victoria. On page 13 it is explained that Forest Management Plans identify three management zones within State forest: the SPZ; the SPZ Zone; and the General Management Zone (**GMZ**). The management zones are explained in the following terms on page 13:

SPZs are managed for particular conservation values, forming a network designed to complement the formal conservation reserve system. Timber harvesting is excluded from this zone. SMZs are managed to conserve specific features, while catering for timber production under specific management

conditions. GMZs are managed for a range of uses and values, but timber production will have a high priority. Modifications to management zone locations and conditions may be undertaken from time to time to reflect new knowledge (such as the discovery of a threatened species).

All zones are managed within the meaning of sustainable forest management found in the Sustainable Forests (Timber) Act 2004.

66. The power to define and amend the applicable zones resides with the DSE. The DSE document titled *Management Procedures for timber harvesting operations and associated activities in Victoria's State forests 2007* (**the Management Procedures 2007**) [**AB 2:0724**] sits underneath the Code of Practice in the regulatory hierarchy (see page 1). The Management Procedures 2007 were applicable until the end of September 2009. The objectives, as set out on page 2, include providing instruction on operational and administrative procedures.

67. Part 3 of the Management Procedures 2007 is titled 'DSE Procedures'. This part, as page 2 makes clear [**AB 2:0734**] applies only to the DSE. In section 3.2.3 (on page 52) under the heading 'Amendment of Forest Management Plan Zoning Schemes and Text' it states:

Amendments to the Forest Management Zoning scheme must be in accordance with Schedule 11 of these Procedures and take into account the intent of the FMP and any relevant Regional Forest Agreement.

68. Schedule 11 [**AB 2:0815**] explains in the third row down, if there is to be a conversion from GMZ to SPZ based on new flora or fauna records, the Regional Director is to approve all changes with advice to the Director Public Land Policy, subject to appropriate consultation.

69. Since October 2009 the *Management Procedures for timber harvesting, roading and regeneration in Victoria's State forests, 2009* (**Management Procedures 2009**) [**AB 2: 0842**]. The Management Procedures 2009 are similarly structured, and Part Three is expressed (at [**AB 2:0859**] to only apply to DSE.

70. Section 3.2.4 (b) reads [**AB 2:0919**]:

An amendment to the FMZ scheme must be approved by the Director, Forests except as described in 3.2.4(f) of these Procedures.

71. 3.2.4(f) creates an exception of no relevance to this proceeding.

72. The significance of the foregoing is that:

(a) it is the DSE that has the power to amend the zoning scheme;

(b) VicForests does not have the power to declare or amend the zoning scheme.

73. The Code is expressed in more forthright and definitive language than the FMP. It sets out certain "Mandatory Actions". Forest managers and operators must undertake all relevant mandatory actions to meet the objectives of the Code. Mandatory actions are focused on practices or activities. Failure to undertake a relevant Mandatory Action will result in non-compliance with the Code.[37]

74. One of the principles of the Code is the conservation of biodiversity. Pursuant to clause 2.2.2 of the Code, a mandatory action directed to this principle is that:

Forest management planning and all forestry operations must comply with measures specified in relevant Flora and Fauna Guarantee Action Statements and Flora and Fauna Guarantee Orders.

75. Further, the Code states:

To facilitate the protection of biodiversity values, the following matters must be addressed when developing and reviewing plans and must be adhered to during operations:

• *application of the precautionary principle to the conservation of biodiversity values, consistent with monitoring and research to improve understanding of the effects of forest management on forest ecology and conservation values;*

• *consideration of the advice of relevant experts and relevant research in conservation biology and flora and fauna management at all stages of planning and operations;*

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[37] See also *Hastings v Brennan (No 3)* [2005] VSC 228 at [26], per Harper J.

• *use of wildlife corridors, comprising appropriate widths of retained forest, to facilitate animal movement between patches of forest of varying ages and stages of development, and contributing to a linked system of reserves;*

• *providing appropriate undisturbed buffer areas around significant habitats;*

• *maintaining forest health and ecosystem resilience by managing pest plants, pest animals and pathogens; and*

• *modifying coupe size and dispersal in the landscape, and rotation periods, as appropriate.*

At the coupe planning and harvesting level, the retention of habitat trees or patches and long- lived understorey elements in appropriate numbers and configurations, and provision for the continuity and replacement of old hollow-bearing trees within the harvestable area, must be allowed for.

76. The 'precautionary principle' is defined in the glossary to the Code (at page 78) in the following terms:

when contemplating decisions that will affect the environment, the precautionary principle requires careful evaluation of management options 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.

77. While VicForests accepts that it must comply with obligations imposed upon it by FFG action statements, it is submitted that reference in the Code to the application of the precautionary principle does not create a legally enforceable obligation on VicForests. The nature and application of the precautionary principle is considered in more detail below.

78. Alternatively, even if such an obligation exists, it is an obligation to *apply* the precautionary principle. The application of the principle itself involves various subjective and discretionary judgments and assessments. The particular manner in which VicForests has applied the precautionary principle is not justiciable.

79. It may be different if it could be shown that VicForests had not applied the precautionary principle at all. This is not the case here. Whether or not there is a legally enforceable obligation on VicForests to apply the principle, the evidence clearly demonstrates that VicForests has applied (and will apply) a precautionary approach at every stage of its planning and operations.

C. STANDING

C.1. Applicable legal principles

80. To have standing to bring proceedings to prevent the violation of a public right or to enforce the performance of a public duty, a plaintiff must demonstrate that it has 'a special interest in the subject matter of the action.'[38]

81. In *Australian Conservation Foundation Inc v Commonwealth of Australia*, Gibbs J considered whether the Australian Conservation Foundation (**Foundation**) had such 'special interest in the subject matter of the action.' In that case, the plaintiff sought declaratory and injunctive relief in the High Court in relation to an approval to an exchange control transaction granted under the *Administrative Procedures*. Whilst his Honour was of the view that a person might have a special interest in the preservation of a particular environment, an 'interest' for the purposes of standing does not mean 'a mere intellectual or emotional concern.'[39] His Honour said that a belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, 'does not suffice to give its possessor locus standi.'[40]

82. Justice Gibbs also said that the fact that the Foundation had made written comments regarding a draft Environmental Impact Statement and that the Foundation had adopted the position of commentator on environmental matters was irrelevant to establishing standing.[41] Indeed, his Honour continued:

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[38] *Australian Conservation Foundation Inc v the Commonwealth of Australia* (1980) 146 CLR 493 **(ACF v Commonwealth)**.
[39] (1980) 146 CLR 493 at 530.
[40] Ibid.
[41] (1980) 146 CLR 493 at 531.

> A person who is concerned enough about proposed action to furnish his comments on it does not necessarily have any interest in the proposed action in the relevant sense. The fact that the [Foundation] sent the written comments ... is logically irrelevant to the question whether it has a special interest giving it standing.[42]

83. In the same case, Stephen J considered the bases on which the Foundation could establish 'special damage peculiar to himself', as the test was expressed by Buckley J in *Boyce v* Paddington *Borough Council,*[43] and subsequently restated by Gibbs J in the terms expressed above. Stephen J said that one basis might be the Foundation's concern for Australia's environment and the particular interest it had in the regional area the subject of proposed development works. His Honour concluded that if the Foundation were to establish standing on this ground, then any person with genuinely held convictions upon a topic of public concern 'thereby acquires standing to enforce a public right to breach of which it takes exception.'[44] His Honour continued: 'That is not the current state of the law. To hold otherwise would be radically to alter the existing law as it now stands.'[45]

84. Mason J (as he then was) expressed his agreement with Gibbs J and said:

> In this difficult field there is one proposition which may be stated with certainty. It is that a mere belief or concern, however genuine, does not in itself constitute a sufficient locus standi in a case of the kind now under consideration.[46]

85. ACF v Commonwealth was considered in North Cost Environment Council Incorporated v Minister for Resources,[47] where Sackville J had to consider whether the plaintiff was a 'person aggrieved' for the purpose of the Administrative Decisions (Judicial Review) Act 1977 (Cth). His Honour picked up the language used by Gibbs J in ACF v Commonwealth and said that there must be more than a 'mere intellectual or emotional concern' for the

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[42] Above.
[43] [1903] 1 Ch 109. Although the test in *Boyce* was described by Gibbs J as "not entirely satisfactory" (at 527), the High Court in *Onus v Alcoa of Australia* (1981) 149 CLR 27, at 35-36, 42-43, 60-61 and 68-69, accepted the statement of Gibbs J that the expression "special damage peculiar to himself" used by Buckley J in *Boyce* was equivalent in meaning to "having a special interest in the subject matter of the action".
[44] (1980) 146 CLR 493 at 539.
[45] Ibid.
[46] Above, at 548.
[47] (1994) 55 FCR 492 (**North Coast v Minister for Resources**).

preservation of the environment and that a person could not rely solely on its objects or its role as commentator to establish standing.[48]

86. It is worth considering the particular position of the plaintiff in *North Coast v Minister for Resources* as Sackville J there found that the plaintiff had standing to bring the proceeding. The following factors were found by his Honour to be relevant to finding the plaintiff had standing to bring the proceeding: [49]

(a) The plaintiff was a peak environmental organisation in the north coast region of New South Wales, having 44 environmental groups as members.

(b) The plaintiff's activities related to the areas affected by the operations the subject of its complaint.

(c) The plaintiff had been recognised by the Commonwealth since 1977 as a significant and responsible environmental organisation. This recognition had taken the form of regular financial grants for the general purposes of the organisation. Although the grants were modest, ranging in sums between $8,000 and $10,000 for the years 1991 – 1994, the grants were recurrent and reflected an acceptance by the Commonwealth of the significance of the role played by the plaintiff in advocating environmental values.

(d) The plaintiff was recognised by the Government of New South Wales as a body that should represent environmental concerns on advisory committees.

(e) The plaintiff had conducted or co-ordinated projects and conferences on matters of environmental concern, for which it had received significant Commonwealth funding.

(f) The plaintiff had made submissions on forestry issues to the Resource Assessment Commission and had funded a study on old growth forests.

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[48] (1994) 55 FCR 492 at 512.
[49] Ibid.

87. In Australian *Conservation Foundation v Minister for Resources*,[50] Davies J found that the plaintiff had standing. Davies J found that the factors suggesting standing were that the plaintiff was the major national conservation organisation in Australia. His Honour continued:

> While the [Foundation] does not have standing to challenge any decision which might affect the environment, the evidence thus establishes that the [Foundation] has a special interest in relation to the South East Forests and certainly in those areas of the South East Forests that are National Estate. The [Foundation] is not just a busybody in this area. It was established and functions with governmental financial support to concern itself with such an issue. It is pre-eminently the body concerned with the issue.[51]

C.2. Application of the legal principles to the facts

88. In *Australian* Conservation *Foundation v Minister for Resources*, [52] Davies J said that it was necessary in every case to examine the question of the standing of the application 'in the light of the issue which is to be considered.' ". In *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Fund Pty Ltd*,[53] Gaudron, Gummow and Kirby JJ commented in their joint judgment that '[i]n private law there is, in general, no separation of standing from the elements in a cause of action.' Finally, in the joint judgment of Brennan, Dawson, Toohey, Gaudron and McHugh JJ in *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*,[54] their Honours stated: 'the nature and subject matter of the litigation will dictate what amounts to a special interest.'

89. The evidence contained in the affidavit of Jill Redwood sworn on 28 August 2009 falls short of the facts Sackville J considered persuasive and also demonstrates that the plaintiff falls short of the sufficiency of interest to support the equitable relief it seeks.

90. Although incorporated on 7 August 1991,[55] the plaintiff has only made submissions to the Victorian Government since 2007.[56] Of those submissions Ms Redwood deposes the plaintiff has made, only one relates to timber

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[50] (1989) 76 LGRA 200.
[51] Above, at 206.
[52] Above, at 204.
[53] (1998) 194 CLR 247, at 264.
[54] (1995) 183 CLR 552, at 558.
[55] Affidavit of Jill Redwood sworn 28 August 2009 (**First Redwood Affidavit**), [2].
[56] First Redwood Affidavit, [4](g).

harvesting, being the comments on the East Gippsland Timber Release Plan in 2009.

91. At subparagraphs [4](a) - (i) to the First Redwood Affidavit, Ms Redwood deposes that, amongst other things, the plaintiff produces quarterly newsletters, publishes articles in magazines which are distributed nationally and runs 'forest ecology camps' in the Brown Mountain Area. Whilst demonstrating that the plaintiff has an 'intellectual or emotional concern' with timber harvesting in East Gippsland, such concern cannot be elevated to establish that the plaintiff has standing to bring this proceeding in the sense described by Sackville J in *North Coast v Minister for Resources*.

92. In her affidavit sworn on 17 November 2009,[57] Ms Redwood deposes to the fact that the plaintiff has received the following government funding:

(a) an undisclosed sum in 1990 to produce a "Bonang Highway Tour Leaflet";[58]

(b) $5,000 in 1997 from the Department of Prime Minister and Cabinet to produce an 'Illustrated Guide to the RFA Process';[59]

(c) about $500 in 2002 from the federal government to attend monthly meetings at the East Gippsland Regional Forest Agreement Reference Group.[60]

93. There is no evidence that the plaintiff is a significant and responsible environmental organisation in the sense described by Sackville J in *North Coast v Minister for Resources*. Whilst there is evidence of some recognition of the plaintiff by the Commonwealth and State Government, there is no evidence of regular financial grants for the general purposes of the plaintiff – indeed the plaintiff has received no government funding since 2002. In evidence, Ms Redwood described government funding to the plaintiff as "absolutely limited",[61] "sporadic"[62] and admits that there has been no

[57] **(Second Redwood Affidavit)**.
[58] Second Redwood Affidavit, [3](a).
[59] Second Redwood Affidavit, [3](b).
[60] Second Redwood Affidavit, [3](c).
[61] T:228:5-6.
[62] T:228:7.

recurrent grants to the plaintiff from either the Commonwealth or State Government.[63]

94. Certainly the Government of Victoria treats the plaintiff no differently than any other member of the public. Exhibit 15 to the first Redwood Affidavit is a standard form response which Ms Redwood admitted in evidence, [64] is sent to persons who have contacted the Minister for Environment and Climate Change expressing their concerns regading timber harvesting in East Gippsland. That letter is addressed to "Dear Sir/Madam". Similarly, it would be an exageration to state, as Ms Redwood does in the first Redwood Affidavit, that the Plantiff has been invited to comment on a discussion paper concerning the Gippsland Region Sustainable Water Strategy.[65] Ms Redwood admitted in evidence that any member of the public was able to provide comment on the Gippsland Region Sustainable Water Strategy.[66] Likewise, the plaintiff did not put itself forward to the East Gippsland Shire Council when that council called for expressions of interest from community members to be appointed to the Environmental Sustainability Advisory Board.[67]

95. The plaintiff has not conducted or co-ordinated projects and conferences on matters of environmental concern, for which it had received any Commonwealth or State Government funding which were matters referred to by Sackville J as evidencing the necessary "special interest" to establish standing".

96. In *North Coast v Minister for Resources*, the plaintiff was an "umbrella organisation" for about 80 environmental and scientific societies promoting the cause of conservation throughout New South Wales. The plaintiff is not a peak environmental group and there is no evidence that it is, likewise, an "umbrella organisation" for community conservation and environmental groups in East Gippsland. The plaintiff itself does not have any environmental

[63] T:228:12.
[64] T:225:21-28.
[65] Paragraph 4(h) and exhibit JR-8 to the first Redwood Affidavit.
[66] T:229:20-21.
[67] T:230:22.

groups as members,[68] which might evidence its status as an "umbrella organisation".

97. Ms Redwood gave evidence that there many people both within East Gippsland, Victoria, Australia and outside Australia who are concerned and "equally passionate" about the harvesting of the four coupes the subject of this proceeding.[69] Indeed, even within the Goongerah region, there are other organisations who are passionate and concerned about the proposed harvesting. Ms Redwood gave evidence regarding the existence of Goongerah Environment Centre (**GECO**) and she agreed that GECO is an independent grass-roots environment organisation based in East Gippsland which is dedicated to protecting old growth forest in the region.[70]

98. Even within the broader East Gippsland region, the plaintiff cannot be said to be an umbrella organisation or peak environmental body. Ms Redwood admitted in evidence that the Victorian Forest Alliance is a group concerned with protecting the forests in East Gippsland and "is an umbrella group encompassing many environment groups that are involved in forest protection in Victoria".[71] Likewise, there is also evidence before the Court that Concerned Residents of East Gippsland (the former name of the plaintiff) still operates in some capacity in making submissions to the 2003 Victorian Bushfire Inquiry.[72]

99. The plaintiff does not have a special interest in the subject matter of the action in the sense described in *ACF v Commonwealth* and *North Coast v Minister for Resources*. At most, the plaintiff has an intellectual or emotional connection with the subject matter of the proceeding however this is not sufficient and, as such, the plaintiff lacks standing to bring this proceeding on any basis.

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[68] T:227:17-20.
[69] T:225:5-20.
[70] T:226:2-7.
[71] T:226:26-31 – T227:1-11.
[72] T:234 et seq.

D. THE RELEVANT REGULATORY SCHEME

D.1. Historical context

100. Professor Ferguson sets out the history and background of the regulatory scheme relevant to harvesting of timber on public land in pages 3 – 11 of his expert report. The history reveals the need to balance the ecological processes and biological diversity of public forests, with the full range of environmental, economic and social benefits.

101. Notably, Professor Ferguson was appointed the Chairperson of the Victorian Government's Board of Inquiry into the Timber Industry in Victoria in 1984. The principal recommendation of relevance resulting from the inquiry was that:

The objective for managing public forests should be to maximize the net social benefit to the community, an objective best translated into four operational principles:

The provision of wood and other market (i.e. commercial) goods should be

** Economically viable.*

** Environmentally sensitive with respect to the provision of environme services and non-market goods.*

** Sustainable with respect to the interests of future generations.*

** Assisted by public participation in the planning process.*

102. In accordance with these recommendations, forest management plans were developed, as was a *Code of Forest Practices for Timber Production* in 1989. The *Flora and Fauna Guarantee Act 1988* (Vic) also came into operation.

103. Although the Commonwealth does not have constitutional control over state forests, a joint policy statement between the Commonwealth and the states was finalised in 1995. As summarised by Professor Ferguson[73], the *National Forest Policy Statement* rests on three main principles as the basis for sustainable forest management:

(a) maintaining ecological processes;

[73] At page 6 of his expert report.

(b) maintaining biological diversity; and

(c) managing for the full range of environmental, economic and social benefits.

104. Following the *National Forest Policy Statement*,[74] Regional Forest Agreements were concluded between the Commonwealth and the states that sought to:

(a) establish a comprehensive, adequate and representative national reserve system; and

(b) provide greater certainty regarding the native forest resource available for wood production by integrating industry and conservation policy and by encouraging downstream processing of the native forest resource, and the export of unique Australian wood products.

105. In 2002 the Victorian Government announced a policy statement on forests titled *Our Forests Our Future*.[75] This policy statement explained, amongst other things, that:

(a) sawlog harvesting in State forests would be cut by about a third, to ensure that forests, the timber industry and their communities are protected for the long term;

(b) 900,000 hectares had been added to the reserve system in Victoria as a result of the Regional Forests Agreements process;

(c) in 1999, the Victorian timber industry contributed around $1.8 billion to Victoria's total Gross State Product of $160.5 billion;

(d) the Government is determined to ensure that small and medium-sized timber enterprises in regional and rural communities are sustainable and make the most of the forest resource available.

106. *Our Forests Our Future* also announced the 'creation of a separate commercial forest service entity, VicForests, [that] will transparently

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[74] **Exhibit 50.**

[75] Exhibit **CM20** to Cameron MacDonald's affidavit sworn on 27 November 2009 (**the fourth MacDonald affidavit**).

disentangle the commercial objectives from the regulatory functions of Government.'

107. In 2004 the *Sustainable Forests (Timber) Act 2004* (Vic) came into operation.

D.2. The Allocation Order process

108. The system of allocation of timber to VicForests is set out in Part 3 of the *Sustainable Forests (Timber) Act 2004* (Vic). The Minister is empowered to make an allocation order to VicForests for the purposes of harvesting and selling timber (s 13). Amongst other things, the allocation order to VicForests must provide details of the allocated timber to which VicForests has access (s 15(a)), but also the conditions to which VicForests is subject in carrying out its functions under the allocation order, including any applicable performance measures and standards: s 15(c).

109. There are two allocation orders relevant to this proceeding:

(a) an allocation order dated 29 July 2004 **[AB 1:0009]** **(the first Allocation Order)**; and

(b) an allocation order dated 21 March 2007 **[AB 1:0023]** **(the Amended Allocation Order)**.

110. The Amended Allocation Order had the objective of amending the first Allocation Order as a result of fire in 2003 and 2006/7.

111. The combined effect of these allocation orders is to allocate timber to VicForests over a 15-year period, in an area that relevantly includes the East Gippsland Forest Management Area (**FMA**) (see the map attached to the first Allocation Order at **[AB 1:0015]** and also **Map 1**).

112. By the Amended Allocation Order VicForests is allocated timber in the forest stands[76] described in tables 1 – 3 of the order for three, five-year periods and has access to those stands for the purposes of harvesting and selling timber resources. **Map 9** shows the forest stands within forest block 840 (the relevant

[76] "Stand" is a term used to refer to a defined forest type that is relatively uniform in species, age, structure, quality and composition: paragraph 15 of Lachlan Spencer's affidavit sworn on 27 November 2009.

forest block within the East Gippsland FMA that contains all of the coupes the subject of this proceeding).

113. The Minister for Environment and Climate Change is required to review the allocation of timber resources every 5 years: s 18(1). In conducting the review the Minister must have regard to those matters listed in s 19 of the Act, relevantly:

(a) the principles of ecologically sustainable development;

...

(c) the structure and condition of the forest and its impact on future timber resource;

(d) VicForests' compliance with the allocation order, including the conditions specified in the order, during the previous 5 years; and

...

(f) VicForests' compliance with any Code of Practice during the previous 5 years.

114. The *Allocation to VicForests Order 2009 Review*[77] recommended that the Allocation Order be amended, primarily based on the need to address the impacts of two landscape scale fires (2006-07 and 2009) on the structure and condition of the forest, and therefore on the timber resources in State forests which are available for timber harvesting (p 28). The review states on page 27 that the Department's audit showed that VicForests had complied with the *Code of Practice for Timber Production 2007* [**AB 1:0106**].

115. Based on the findings of the review, the Minister has determined that the Allocation Order will be amended to address:

(a) the impacts of the two landscape scale fires;

(b) the addition of areas of State forest to the conservation system in East Gippsland;

(c) changes to forest management zoning and harvesting prescriptions resulting from new and revised Action Statements; and

[77] **Exhibit LAM-8** to Lee Miezis' witness statement (**Exhibit N**).

(d) the addition of a new five year period (period 4) to the Allocation Order, ensuring that it remains a 15-year allocation of State forest area to VicForests for the harvesting and/or selling of timber resources.[78]

D.3. Timber Release Plan process

116. Pursuant to s 37 of the Act, VicForests must prepare a timber release plan in respect of an area to which an allocation order applies for the purposes of –

(a) harvesting and selling, or harvesting or selling timber resources; and

(b) undertaking associated management activities in relation to those timber resources.

117. Pursuant to s 40 of the Act, the Secretary may approve a timber release plan if the Secretary is satisfied that the plan is not inconsistent with –

(a) the allocation order to which it relates; and

(b) any Code of Practice relating to timber harvesting.

118. The Secretary approved the East Gippsland FMA timber release plan (**2004 TRP**) on 30 July 2004. At this time, the applicable policy document setting out the steps the DSE must undertake prior to approving or not approving a TRP was titled *Wood Utilisation Planning Guidelines incorporating the TRP Endorsement and Approvals Process August 2005*.[79] These guidelines required DSE to:

(a) assess whether VicForests has prepared the proposed change to an approved TRP in accordance with relevant legislation, plans, policies and procedures; and

(b) assess whether economic, environmental and cultural values have been identified and are adequately protected.

119. By a letter dated 5 July 2007,[80] the Secretary approved amendments to the 2004 TRP that, amongst other things, had the effect of approving new coupes for harvesting by VicForests within the East Gippsland FMA. The new coupes

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[78] Paragraph 39 of Lee Miezis' witness statement (**Exhibit N**).

[79] Exhibit **LAM2** to Lee Miezis' witness statement.

[80] Exhibit **LRS5** to Lachlan Spencer's affidavit sworn on 27 November 2009. See the table at Attachment 3 where coupes 15 and 19 are added.

included coupes numbered 840-502-0015 and 840-502-0019 (**coupe 15** and **coupe 19** respectively).

120. By 2009, the internal DSE guideline which specified the process for review and approval of a proposed TRP was entitled *Guidelines for the Review and Approval of a Timber Release Plan 2008 Version 2* (**TRP Guidelines 2008**).[81]

121. The TRP Guidelines 2008 require DSE to:

(a) review a proposed TRP as prepared by VicForests and provide advice on the identification and planning for the protection of values within coupes (or parts thereof) proposed for inclusion in the TRP and on forest management activities within or adjacent to those coupes; and

(b) verify a proposed TRP as prepared by VicForests is consistent with the Allocation Order, the Code of Practice for Timber Production 2007 and the Code of Practice for Fire Management on Public Land, Revision No. 1, 2006.

122. By notice published in the Victoria Government Gazette on 9 June 2009, a new timber release plan was approved by the DSE (**the 2009 TRP**) [**AB 1:0033**]. In table 3 of the notice [**AB 1:0045**] coupes numbered 840-502-0026 and 840-502-0027 (**coupe 26** and **coupe 27** respectively) are listed as new coupes within the East Gippsland FMA.

123. The effect of the publication of the notice relating to the approval of the 2009 TRP is that:

(a) property in the timber resources to which the 2009 TRP applies is vested in VicForests: s 42(1); and

(b) VicForests has been lawfully authorised to commence harvesting in each of the coupes the subject of this proceeding.

124. Pursuant to s 46 of the Act, VicForests must comply with the *Code of Practice for Timber Production 2007* [**AB 1:0106**], and the Minister may direct an audit in this regard: s 47.

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[81] Exhibit **LAM5** to Lee Miezis' witness statement.

D.4. Action Statements

125. By s 19 of the Act, the Secretary must prepare an action stated for any listed taxon or community of flora or fauna or potentially threatening process as soon as possible after that taxon, community or process is listed.

126. The action statement must set out what has been done to conserve and manage that taxon or community or process and what is intended to be done and may include information on what needs to be done: s 19(2).

127. Of relevance to this proceeding are seven action statements:

(a) the Long-footed Potoroo [**AB 2:0542**];

(b) the Spot-tailed Quoll [**AB 2:0555**];

(c) the Orbost Spiny Crayfish [**AB 2:0566**];

(d) the Sooty Owl [**AB 2:0571**];

(e) the Powerful Owl [**AB 2:0589**];

(f) the Giant Burrowing Frog [**AB 2:0600**]; and

(g) the loss of hollow-bearing trees from Victorian native forests and woodlands [**AB 2:0579**].

128. There have not been action statements issued for the Square-tailed Kite and the Large Brown Tree Frog.

D.4.1. Action Statement for the Long-footed Potoroo

129. The action statement for the Long-footed Potoroo (as revised in 2009) notes, on page 2, that 'Long-footed Potoroos have been detected in a range of forest age classes from eight-year regrowth post-timber harvesting to old growth forests'.

130. At page 6, in reference to a 2006 study, the statement notes:

Long- footed Potoroos showed a preference for lower slopes and gullies before harvesting. The main gullies and some lower slopes remained unharvested and the species persisted in these areas; generally avoiding the harvested areas until regeneration was established.

131. On page 8, under the intended management actions set out under 'Conservation Objective', the following relevant actions are listed:

Action 1 Implement Long-footed Potoroo Core Protected Area for East Gippsland

A network of protected areas of primary habitat in East Gippsland has been identified, comprising in excess of 40,000 ha of conservation reserves and State forest SPZs. This Core Protected Area will replace the current SMA-based approach and will consist of existing conservation reserves, existing and proposed SPZs and proposed new and expanded conservation reserves. This area is considered sufficient to support more than 2000 individuals, based on a conservative estimate of Long-footed Potoroo density (0.05 animals per ha).

Responsibility:DSE

...

Action 4 Protect Long-footed Potoroo habitat at detection sites on public land outside the Core Protected Area

Establish additional protected areas where Long-footed Potoroos have been detected in State forest or other public land outside the Core Protected Area. In State forest, apply the protection measures specified in Appendix I. The protection measures will be formally reviewed in 2014.

Responsibility:DSE, VicForests

132. Appendix I then provides:

Appendix I: Prescriptions to be applied in State forest:

1. *Each Long-footed Potoroo (LFP) detection site outside the Core Protected Area will generate a Special Management Zone (SMZ) of approximately 150 ha.*
2. *As far as possible, SMZ boundaries will follow recognisable landscape features such as ridges, spurs and watercourses.*
3. *Within each SMZ, at least one third (~50 ha) will be protected from timber harvesting and new roading.*

4. *This will be known as Long-footed Potoroo Retained Habitat.*

5. *The LFP Retained Habitat will include the best LFP habitat in the SMZ, which will generally be in gullies and on lower, sheltered slopes.*

6. *The LFP Retained Habitat may include areas otherwise unavailable for timber harvesting due to restrictions under the Code of Practice for Timber Harvesting.*

7. *The SMZ will also have a general restriction of one third of the total area that can be harvested in any three year period. If more than one coupe is to be harvested in an SMZ in the same year, the coupes must be separated by at least the equivalent of another coupe width.*

8. *The SMZ, with the LFP Retained Habitat clearly delineated, will be shown as part of the Forest Management Area zoning scheme.*

9. *The SMZ will be designed by DSE, in consultation with VicForests, and approved by DSE.*

10. *If the ~150 ha area includes any part of an existing conservation reserve or Special Protection Zone (SPZ), these areas will retain their existing reservation or zoning status but will be considered for inclusion as part of the area of retained habitat. In such cases, the final area designated as SMZ may be correspondingly smaller.* [Emphasis added].

D.4.2. Action Statement for the Spot-tailed Quoll

133. The action statement for the Spot-tailed Quoll notes, at page 2, that:

male Quolls can move over large distances, animals can occasionally be encountered in 'non-typical' habitats including heathland, coastal dunes, farmland and even outer urban residential areas bordering on forested land.

...

Spot-tailed Quolls are generally solitary animals (Belcher 1994), usually occur at low densities (Jones and Rose 1996) and occupy large home ranges, from 2000 – 4500 ha for males, and 600 – 1200 ha for females, with size of

home range related to habitat quality, particularly the availability of den sites and the density of mammal prey items (Belcher 2000a).

134. Relevantly, on pages 4 and 5 the statement notes that:

In considering any impact of logging on Spot-tailed Quolls, the amount of protected and retained habitat across the landscape is important. Substantial areas of potentially suitable habitat throughout its range in Victoria are already protected, both in the parks and reserves system and in areas of State forest unavailable to logging. Across virtually all of the Quoll's current range in Victoria, the area of public land totals about 4.9 million ha, essentially all with native vegetation cover. Of this area, 2.1 million ha is in parks and reserves, 1.2 million ha is protected through exclusions from timber harvesting (SPZ, Code of Forest Practices exclusions) and a further 0.6 million ha is considered unproductive forest, totalling 3.9 million ha of protected habitat within the total area. Of the area available for timber harvesting, less than 1 million ha is suitable. In East Gippsland, of the 1.1 million ha of public land, approximately 440 000 ha (40%) is in parks and reserves, 231 000 ha (21%) is protected through exclusions and 110 000 ha (10%) is considered unproductive for timber harvesting, totalling about 781 000 ha of protected habitat (71% of East Gippsland) (NRE 1995). If Quolls were threatened by timber harvesting alone, then the species should be secure and common in the substantial area of protected habitat established throughout its range, especially considering the broad habitat range the species utilises. That Quolls are apparently not secure even in the large areas of protected habitat suggests that factors other than timber harvesting are threatening Quolls. [Emphasis added].

135. It should be noted that the figures quoted above do not include the new areas added to the reserve system in 2009.

136. Under the subheading 'Habitat Protection' the follow requirements are relevant (pages 8-9):

Implement a standard habitat protection prescription of a 500 ha Special Protection Zone (SPZ) and a 1000 ha Special Management Zone (SMZ) for all confirmed Quoll records in State forest throughout Victoria, up to targets

specified in individual FMPs. The location of the SPZ and SMZ will based on protecting preferred habitat features for Quolls. The SPZ will include known den and latrine sites (protected by at least a 200 m radius), and may include other detection sites, based on habitat quality and the proximity of existing protected habitat. Detection sites not included in the SPZ will generally be included within the SMZ, unless there are compelling reasons for excluding them (eg. a record in a clearly unsuitable location for habitat protection, proximity of existing protected habitat etc). Site protection for Quolls will be prioritised according to habitat quality, current reservation status of the site, linkage to other reserves and the presence of complementary values. Records within 2 km of each other will be generally regarded as the same animal unless proved otherwise. In East Gippsland (the area covered by the FMP), there will be a target of 75 Quoll sites in protected habitat (ie. parks, reserves and State forest SPZ/SMZ). Currently, there are 71 sites of Quoll records protected in East Gippsland, including 21 in State forest (note that this prescription exceeds the target of 50 protected records specified in the East Gippsland FMP). In the North East FMP and Gippsland FMP, there are targets of 10 records in State forest triggering habitat protection. [Emphasis added].

D.4.3. Action Statement for the Orbost Spiny Crayfish

137. The action statement for the Orbost Spiny Crayfish contains the following relevant requirements under the sub-heading 'Habitat Protection':

Linear Reserves consisting of an undisturbed buffer of approximately 100m on each bank of the stream for one kilometre upstream and downstream of the detection site will be established at all sites on public land where Orbost Spiny Crayfish are recorded. Construction of new roads will be avoided within the Linear Reserve, and any fuel reduction or regeneration burning in the vicinity will be strictly controlled and managed to ensure that linear reserves are not burnt. These measures will be reviewed once 20 sites have been located. The measures outlined above have been incorporated into the Special Protection Zone criteria of the East Gippsland Forest Management Plan (NRE 1995), and will be included in all relevant park management plans.

Roading across the headwaters of those streams inhabited by the Orbost Spiny Crayfish (but outside the prescribed linear reserves) will be avoided wherever possible. The location of future roads will be planned to minimise adverse impact on Orbost Spiny Crayfish habitat.

Responsibility: DSE (Biodiversity & Natural Resources Division, Forests Service, Gippsland Region), Parks Victoria [Emphasis added].

D.4.4. Action Statement for the Sooty Owl

138. The action statement for the Sooty Owl relevantly requires, on page 5, that:

All confirmed nesting and roosting sites utilised recently and frequently (based on reliable observation or physical evidence such as pellets or wash) located outside SOMAs will be protected by a 3ha SPZ around the site and a 250-300m radius (or equivalent linear area) SMZ buffers around identified localities, unless they are already protected. In these cases, habitat for foraging is provided in areas excluded from timber harvesting by general prescription including wildlife corridors, steep areas and unmerchantable areas and areas protected for other management purposes.

Responsibility: DSE (Parks and Forests Division; Regions) [Emphasis added].

D.4.5. Action Statement for the Powerful Owl

139. Page 7 of the action statement for the Powerful Owl relevantly requires that:

Unless otherwise protected, all confirmed nesting and roosting sites will be protected by a 3ha SPZ around the site and a 250-300m radius (or equivalent linear area) SMZ buffers around identified localities. Outside of POMAs, habitat for foraging is provided in areas excluded from timber harvesting by general prescription including wildlife corridors, steep areas and unmerchantable areas and areas protected for other management purposes. [Emphasis added].

D.4.6. Action Statement for the Giant Burrowing Frog

140. Under the subheading 'Intended Management Action' the action statement for the Giant Burrowing Frog relevantly states:

Timber Harvesting

Introduce the following management practices at all sites where the Giant Burrowing Frog has been recorded since 1980 and at all sites discovered after the production of this action statement:

- *Stream records on first-order stream: no harvesting or new roading in the catchment.*
- *Stream records on second or higher order stream: no harvesting or new roading inside a 100 m buffer each side of the stream for 1 km upstream and downstream of the record.*
- *Offstream records: no harvesting or new roading inside a 50 ha block of forest around the record or equivalent area of suitable habitat nearby. This prescription will be included in the conservation zoning system of Forest Management Plans for State forests.*

These prescriptions may be varied at particular sites in consultation with flora and fauna staff depending on site conditions. Note: For the purposes of this action statement, a first order stream is the headwaters of a catchment and is the smallest stream mapped on the 1:100 000 Nat map series. Second order streams are the next level of stream further down the catchment. For first order streams the size of each catchment will vary, however target size is approximately 50 ha.

D.4.7. Action Statement for loss of hollow-bearing trees

141. The action statement for the loss of hollow-bearing trees has the following relevant 'intended management actions' (on page 6):

State forest

7. *Continue to identify significant areas or stands of hollow-bearing trees in State forest, using the State Forest Resource Inventory and other relevant information, to inform management decisions.*

   Responsibility: DSE Parks and Forests Division, DSE Regions

8. *Continue to implement a range of measures to maintain or enhance the extent and/or density of hollows in State forest where this is known to*

be limiting the distribution and/or abundance of hollow-dependent species. These measures include:

- *Application of management guidelines, including forest management zones and prescriptions, for fauna species as provided in Forest Management Plans (e.g. Leadbeaters Possum Special Protection Zones and prescriptions).*
- *The development and application of revised habitat retention prescriptions for areas within the General Management Zone (GMZ) in accordance with the principles and objectives established by the State Forest Flora and Fauna Habitat Management Working Group.*

Responsibility: DSE Forests Service, DSE Regions

D.5. Critical habitats and interim conservation orders

142. Pursuant to s 20 of the Act, the Secretary may determine that the whole or any part or parts of the habitat of any taxon or community of flora or fauna is critical to the survival of that taxon or community.

143. On 29 January 2009 the plaintiff sent a letter to the Secretary requesting him to determine, pursuant to s 20, that an area (which included Brown Mountain) 'is critical to the survival of all or any one or more of the Long-footed Potoroo ... the Spot-tailed Quoll ... the Sooty Owl ... the Powerful Owl ... and the Orbost Spiny Crayfish'.[82]

144. The Secretary has not made any determination under s 20 related to any of the Brown Mountain coupes.

145. Section 26 of the Act enables the Minister to make an interim conservation order of a listed taxon or community of flora or fauna. Such an order may provide for the prohibition or regulation of any activity or process which takes place on the land which is the subject of the order: s 27.

146. On 29 January 2009 the plaintiff sent a letter to the Minister requesting him to make in interim conservation order 'to conserve the critical habitat of the Long-footed Potoroo ... the Spot-tailed Quoll ... the Sooty Owl ... the

[82] Exhibit **JR21** to Jill Redwood's affidavit sworn on 28 August 2009.

Powerful Owl ... and the Orbost Spiny Crayfish'.[83] The land over which the interim conservation order was sought included Brown Mountain. The plaintiff requested that the interim conservation order provide for, amongst other things, the prohibition on logging within the critical habitat.

147. The Minister has not made the interim conservation order as requested.

D.6. Relevant East Gippsland FMP Guidelines

D.6.1. The Square-tailed Kite

148. The conservation guideline relevant to the Square-tailed Kite reads (page 31):

> *All known nest sites will be included in Special Managements Sites with a 250-m radius around the site. Timber harvesting, road construction and fuel-reduction burning will be avoided in this area during the breeding season. At other times harvesting and road construction will be permitted to within 100 m of nest trees. Visitors will be discouraged and sites will not be publicised.* [Emphasis added].

D.6.2. The Giant Burrowing Frog

149. The conservation guideline relevant to the Giant Burrowing Frog reads (page 32):

> *The guideline for this species is consistent with its Flora and Fauna Guarantee Action Statement (Mazzer 1994). At all sites where Giant Burrowing Frog is recorded on first-order streams or at sites away from streams, approximately 50 ha (preferably a sub-catchment unit) will be included in the SPZ. Sites on second- or higher-order streams will be included in a linear reserve (SPZ) extending 100 m from each bank for one 1 km upstream and 1 km downstream from the detection site. Construction of new roads within these parts of the SPZ will be avoided.*
>
> *When 50 sites (in Victoria) have been located, this guideline may be reviewed.* [Emphasis added].

[83] Exhibit **JR19** to Jill Redwood's affidavit sworn on 28 August 2009.

D.6.3. Crayfish

150. The conservation guideline relevant to Crayfish reads (page 33):

Sites supporting rare or threatened crayfish species and forest extending approximately 100m from each bank of the watercourse, for 1 km upstream and 1 km downstream of those sites will be included in the SPZ. Construction of new roads within these reserves will be avoided. When 20 sites of a given species have been located, this guideline may be reviewed for that species. [Emphasis added].

D.6.4. Gliders

151. The conservation guidelines relevant to gliders (arboreal mammals) reads (page 30):

Arboreal mammals. *For each of the following occurrences, approximately 100 ha of suitable habitat will be included in the SPZ:*

- *resident Koala populations.*
- *Greater Glider and Common Brushtail Possum - <2 individuals per ha, >10 per km, or >15 per hour of spotlighting.*
- *Yellow-bellied Glider - >0.2 per ha, >5 per km, or >7 per hour of spotlighting.*
- *Eastern Pygmy Possum - >5 per standard pitfall line over 5 days.*
- *substantial populations of the above species that are isolated or in unusual habitat.*

Rich mammal sites. *Well-documented sites that are particularly rich in mammal species will be included in the SPZ or SMZ wherever practical.*

D.7. The Precautionary Approach

152. In paragraphs 74 – 83 of the amended statement of claim the plaintiff alleges that VicForests has failed to take a precautionary approach to timber harvesting.

153. As Professor Ferguson explains on page 11 of his report:

Forest practices often involve choices between commercial uses, such as timber, whose outcomes can generally be measured in market values, and non-commercial uses, such as conservation and the environment, that cannot

be so readily measured, if at all. An appropriate balance has to be sought between competing uses. The Precautionary Principle requires that the risk-weighted consequences of the options be assessed but does not itself indicate how this measurement should be addressed.

D.7.1. Defining the Precautionary Principle[84]

154. Section 2.2.2 of the *Code of Practice for Timber Production* (**Code**),[85] relevantly provides:

"To facilitate the protection of biodiversity values, the following matters must be addressed

when developing and reviewing plans and must be adhered to during operations:

• application of the precautionary principle to the conservation of biodiversity values,

consistent with monitoring and research to improve understanding of the effects of forest

management on forest ecology and conservation values…"

155. The "precautionary principle" is defined at page 78 of the Code as follows:[86]

"when contemplating decisions that will affect the environment, the precautionary principle requires careful evaluation of management options 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."

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[84] Section 5(4) of the *Sustainable Forests (Timber) Act 2004* (Vic) also sets out as "guiding principles" matters comprising or relating to the precautionary principle.
[85] [AB:0130].
[86] [AB:0185].

D.7.2. Content and application of the "precautionary principle"

D.7.2.1. Overview

156. Since the early 1990s, there has been much judicial and non-judicial consideration of the applicability, scope and content of the "precautionary principle".

157. In *Leatch v* National *Parks and Wildlife Service*,[87] Stein J discussed the precautionary principle noting that, while there was no express provision in the relevant legislation requiring consideration of it, the adoption of a cautious approach in protection of endangered fauna was consistent with the subject matter, scope and purpose of the *National Parks and Wildlife Act 1974* (NSW) (**National Parks Act**). *Leatch* concerned an application by the Shoalhaven City Council to the Director-General of the National Parks and Wildlife Service for a licence to take or kill endangered fauna. The need for a licence arose from the granting of development consent by the Council to itself for the construction of a road link over a creek. The licence application was supported by a fauna impact statement pursuant to section 92B of the *National Parks Act*. The Director-General granted the licence subject to certain conditions. An objector (Leatch) appealed to the Land and Environment Court.

158. The *National Parks Act* did not contain a reference to the "precautionary principle". However, the Act did provide that in any appeal to a Court under the Act, the Court must take into account "any other matter which the Committee considers relevant".[88] The reference to "Committee" is a reference to the scientific committee established pursuant to the *National Parks Act* which was appointed to review the schedule to the Act which provides a list of endangered fauna.

159. One of the issues that arose before Stein J was the question of the application of the "precautionary principle" and in particular, whether, if the principle is relevant, it may be raised in the appeal. His Honour said:

> In my opinion the precautionary approach is a statement of commonsense and has already been applied by decision-makers in

[87] (1993) 81 LGERA 270 (**Leatch**).
[88] *National Parks Act*, section 92A(6).

> appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious.[89]

160. The concept of "cautiousness" was picked up by Wheeler J in *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management.*[90] In *Bridgetown Friends*, the plaintiff sought a declaration that certain logging operations were in breach of the precautionary approach and sought an injunction restraining the defendant from carrying out those logging operations. The plaintiff argued that the logging of an area in the Kingston Forest was in breach of the precautionary approach because rare and endangered species were found within the forest, that logging would directly or indirectly kill or adversely affect those species and that there was, at the time, insufficient knowledge concerning the impact of logging on those species to establish that logging in the Kingston Forest would not have a serious or irreversible impact on the endangered species in the forest. In this case, the requirement to comply with the precautionary principle arose because the Minister for the Environment of Eastern Australia issued under the *Environmental Protection Act 1986* (WA) a statement of Ministerial Conditions applicable to the implementation of the defendant's proposed Forest Management Plan. Condition 3-2 required the defendant to apply a "precautionary approach" to its management of the forest under the Forest Management Plan.

161. Referring to the characterisation of "precautionary approach", her Honour said:

> a requirement that a decision maker "be cautious" says something about the way in which the decision must be made. There must be some research, or reference to available research, some consideration of risks and a more pessimistic rather than optimistic view of the risks should be taken.[91]

162. Her Honour continued:

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[89] Above at 282.
[90] (1997) 18 WAR 102 (**Bridgetown Friends**).
[91] Ibid, 118.

> No doubt there are extremes at either end of the spectrum, where one would be able to say that a decision maker had or had not been 'cautious'. Where endangered species are concerned for example, one can see that where readily accessible and unambiguous research material pointed to a serious risk that numbers of the species would be dramatically reduced by a course of action, then adopting that course of action, in the absence of any evidence of consideration of alternatives would seem to point inevitable to a finding that there had been no relevant 'caution'. At the other extreme, an absence of any action, other than research and study, is clearly cautious but is not the only option available in most cases. Although there has been very little judicial consideration of the precautionary approach or 'precautionary principle' (a similar or perhaps identical concept which appears in a number of intergovernmental agreements) the clear thread which emerges from what consideration has been given to the [precautionary] approach is that it does dictate caution, but it does not dictate inaction, and it will not generally dictate one specific course of action to the exclusion of others.[92]

163. Importantly, in that case, the factual material the plaintiff relied on to establish that the defendant had failed to take a "precautionary approach" is in some respects similar to the present case. The statement of claim and affidavit material supported the claim that logging will kill individuals of endangered species, will have indirect effects upon some by reducing the number of tree hollows available as habitat, will increase the access of introduced predators such as foxes, by clearing understory, and that burning of an area after logging will kill members of endangered species and will affect their habitat.[93] It was further alleged that there was very little scientific knowledge concerning the impact of logging and burning practices on fauna living in the forests of south-west Western Australia. Her Honour noted:

> If this material stood alone, one might be able to draw an inference that [the defendant] had simply failed to apply the precautionary approach.[94]

164. However, her Honour continued:

> On the other hand, [the defendant's] affidavits first set out its system of classification of forests, note that there are extensive reserves within the south-west of the State which will not be logged at all, and refer to its system of establishing river and stream reserves even within logged areas. They refer to its adoption of a method of logging, which involves leaving unlogged areas scattered throughout logged areas, which is said to minimise

[92] Ibid, at 118-119.
[93] Ibid, at 119.
[94] Ibid.

> the effects of logging by providing refuges for fauna and areas from which logged areas can later be recolonised ...
>
> [T]he affidavit material filed on behalf of [the defendant] demonstrate that [the defendant] has engaged and is engaging in a process of assessment of the risks and consequences involved in a variety of logging methods.[95]

165. Her Honour found that the plaintiff failed to establish a serious question to be tried concerning breach of the "precautionary approach".[96]

166. In *Nicholls v Director-General of National Parks and Wildlife*,[97] Talbot J referred to the statements of principle expressed by Stein J in *Leatch*, but issued a word of caution:

> Furthermore, the statement of the precautionary principle, while it may be framed appropriately for the purpose of a political aspiration, its implementation as a legal standard could have the potential to create interminable forensic argument. Taken literally in practice it might prove to be unworkable. Even the applicant concedes that scientific certainty is essentially impossible. It is only 500 years ago that most scientists were convinced the world was flat. The controversy in this matter demonstrates that all is not yet settled.[98]

167. *Telstra Corporation Ltd v Hornsby Shire Council*,[99] concerned an appeal pursuant to the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), against the refusal of the relevant local council to consent to a development application to construct a mobile telephone base station to an existing building. Section 4(1) of the *EPA Act* adopted the formulation of "precautionary principle" in section 6(2) of the *Protection of the Environment Administration Act 1991* (NSW) which provided:

> **6. Objectives of the Authority**
>
> ...
>
> *(2)(a) ... 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. In the*

[95] Ibid, at 119-120,
[96] Ibid, at 121.
[97] (1994) 84 LGERA 397 (**Nicholls**).
[98] Above, at 419.
[99] (2006) 67 NSWLR 256 (**Telstra v Hornsby**).

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."[100]

168. In *Telstra v Hornsby*, Preston CJ gave detailed consideration to the applicability, meaning, scope and content of the precautionary principle, including the threshold that must be reached before the precautionary principle is applied.

D.7.2.2. Conditions Precedent

169. The application of the precautionary principle and the associated need to take precautionary measures is triggered by the satisfaction of two conditions precedent:

(a) a threat of serious or irreversible environmental damage; and

(b) scientific uncertainty as to the environmental damage.[101]

170. Once both conditions precedent have been satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage. The precautionary measures should be proportionate to the threat.[102]

D.7.2.2.1. Threat of serious or irreversible damage

171. The environmental damage threatened must attain the threshold of being serious or irreversible and if there is no threat of serious or irreversible damage, there is no basis for the precautionary principle to operate.[103] In assessing the seriousness or irreversibility of environmental damage, the following factors may be relevant:

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[100] This definition adopts the language used in the 1992 Intergovernmental Agreement on the Environment which was referred to by Stein J in *Leatch* as providing a guide in determining the content and scope of the "precautionary principle", see page 281 et seq.
[101] Above at 269.
[102] Ibid.
[103] Ibid, at 271.

(a) the spatial scale of the threat (i.e. local, regional, statewide, national or international);

(b) the magnitude of possible impacts;

(c) the perceived value of the threatened environment;

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

(e) the temporal scale of possible impacts;

(f) the manageability of possible impacts;

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

(h) the reversibility of the possible impacts.[104]

172. In addition, the threat of environmental damage must be adequately sustained by scientific evidence although determining the existence of a threat of serious or irreversible environmental damage does not involve, at this stage, any evaluation of the *scientific uncertainty* of the threat.[105]

D.7.2.2.2. Scientific uncertainty

173. This condition precedent does not require lack of "full" scientific certainty, although there has been some debate about how much scientific uncertainty must exist before this precondition is satisfied.[106] It has been suggested that "considerable scientific uncertainty must exist".[107]

174. It is only once both preconditions are satisfied (i.e. that there is a threat of serious or irreversible environmental damage and there scientific uncertainty) the precautionary principle is engaged. Once the precautionary principle is engaged, the evidentiary burden of proof shifts so that a decision-maker must assume that the threat of serious or irreversible environmental damage is a reality.[108]

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[104] Ibid, at 270.
[105] Ibid, at 271.
[106] Ibid, at 271-2.
[107] World Commission on the Ethics of Scientific Knowledge and Technology, "*The Precautionary Principle*", United Nations Educational, Scientific and Cultural Organisation, March 2005, referred to in *Telstra v Hornsby* at 272.
[108] Above at 273.

175. However, as Preston CJ noted in *Telstra v Hornsby*, the shifting of the evidentiary burden of proof goes only to one input of the decision-making process, namely the question of environmental damage.[109] Even if the decision-maker fails to discharge the burden to prove that there is no threat of serious or irreversible environmental damage, this does not mean that what is proposed must not go ahead.[110] Indeed, the precautionary principle, where triggered, does not necessarily prohibit the carrying out of a plan, development or project until full scientific certainty has been achieved.[111] Likewise, there is nothing in the formulation of the precautionary principle that requires decision-makers to give the assumed factor of the serious or irreversible damage overriding weight compared to other factors required to be considered (such as social and economic factors).[112] As Pearlman J said in *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd*:[113]

> [the precautionary principle] does not require that the greenhouse issue should outweigh all other issues.[114]

176. The precautionary principle should not be used to avoid all risks and a "zero risk precautionary standard is inappropriate".[115]

D.7.2.2.3. Degree of precaution required and proportionality

177. As Preston CJ said in *Telstra v Hornsby*, the type and level of precautionary measures that will be appropriate will depend on the combined effect of the degree of seriousness and irreversibility of the threat an the degree of uncertainty.[116]

178. However, the precautionary measures must be proportionate to the threat of serious and irreversible harm. As Preston CJ said in *Telstra v Hornsby*:

> [w]here there is a choice between several appropriate measures, recourse should be had to the least onerous measure and the

[109] Ibid, at 274.
[110] Ibid.
[111] Ibid, at 279.
[112] Ibid, at 274.
[113] (1994) 86 LGERA 143.
[114] Ibid, at 154.
[115] Above 275.
[116] Ibid, at 276.

> disadvantages caused should not be disproportionate to the aims pursued.[117]

179. In this sense, a balance should be struck between the precautionary measures to be applied and the seriousness and irreversibility of the potential threat. This is because precautionary measures will have associated costs, such as financial, opportunity costs and livelihood.[118] Additionally, regard must be had to the practicality of the precautionary measures and one element of practicability is the cost of the precautionary measures.[119]

180. An assessment of the risk-weighted consequences of the precautionary measures must be undertaken, although this does not involve a "cost-benefit" analysis and involves the assessment of monetary and non-monetary criteria.[120] Once the risk-weighted consequences of various options has been assessed, an option should be selected which affords the appropriate degree of precaution for the set of risks associated with that option.[121]

181. In this regard, Professor Ferguson gave the following evidence (T 1101:24-1102:28):

> *And that would bring me to try and weigh the risk-weighted consequences which seem in the case of the kite to be small both in terms of risk and probability and damage,against what I think are much more significant risk-weighted consequences in relation to the jobs in the industry that would be affected by a cessation of harvesting over those particular coupes.*
> *The concerns I have in relation to that change in jobs that would be triggered is that these coupes supply a species which are particularly critical in terms of the volumes of spanning out the allocation order program over the next 15 years or so, and beyond indeed, until such time as the regrowth harvesting comes into play, in the production, age of production and utilisation. The species, the ash type species are particularly critical in that. They are the ones that are most scarce by a very long shot relative to mixed species, and they have to be eked out over that time-span to provide sustainability for the industry over that period.*
> *HIS HONOUR: Is the shining gum the principal ash type species on these coupes, as I understand it? --- One of*

[117] Ibid, at 277.
[118] Ibid.
[119] Ibid.
[120] Ibid, at 278.
[121] Ibid, at 279.

them, yes. Of course there's also cut-tail, which you can say is an ash type species also, Your Honour.
Yes.
MR WALLER: Now, you mention - what particular product, timber product is produced from that species? --- Well, from a shining gum and the ash type species generally, go into higher valued joinery furniture, flooring type manufacture. They have a higher price in terms of stumpage, they have a much higher selling price in terms of the final product in general than some of the other species. One can find exceptions, obviously. I am talking about in general relative to the mixed species.

182. It cannot be the case that the effect of the precautionary principle is to place on VicForests obligations higher than those the executive has turned its mind to and spelt out in the various action statements it has promulgated. Nor can it be the role of the precautionary principle to require VicForests to assume for itself the role of second-guessing, and acting inconsistently with, decisions that have been taken by the DSE. It is clear on the evidence, and it was the plaintiff's position throughout, that the DSE has the relevant biodiversity and ecological expertise, and that VicForests does not. That is not surprising as VicForests was established as a commercial entity distinct from the DSE, with different functions, none of which involve biodiversity and ecological expertise.

E. EVIDENCE CONCERNING THE THREATENED SPECIES

E.1. Summary of submissions in respect of each of the threatened species

183. With the exception of the Long-footed Potoroo (which is dealt with separately below), there is no evidence of any "detections" or "detection sites" within the Brown Mountain coupes of any of the threatened species the subject of this proceeding.

184. Accordingly, harvesting in the coupes would not constitute a breach by VicForests of any of the action statements in respect of each of these threatened species. It is submitted that where an action statement has been issued in respect of a threatened species it supersedes any guidelines in respect of that species contained in the East Gippsland FMP.

185. For those threatened species that are not the subject of an action statement, (ie, the Square-tailed Kite and the Large Brown Tree Frog), VicForests' primary submission is that the East Gippsland FMP does not create any legally enforceable obligations on VicForests. In the alternative, we address below the evidence concerning these species and for the reasons we explain there has not been, nor will there be, any breach of the guidelines, or of the precautionary principle.

186. At a general level, VicForests relies on the vast amounts of reserve in the immediate vicinity of the Brown Mountain coupes, as a prism through which each of the breaches alleged against it must be analysed. As Professor Ferguson explains:[122]

Publicly owned forest in East Gippsland covers about 1 million ha. Over 400,000 ha were in nature conservation reserves prior to 2006. In 2006, the Victorian Government added a further 45,000 ha to the reserve system, much of it in the immediate vicinity of the Brown Mountain Forestry Coupes, to provide greater protection for endangered species and ecosystems, more diversity of forest and habitat types, and enhanced connectivity between parks and reserves.

187. To this of course must be added the further 400ha of the Brown Mountain area – immediately adjacent to the proposed coupes - as part of the establishment of old growth and icon reserves, which form part of a significant, unbroken link between the Errinundra and Snowy River national parks [**AB 3:1043**].

188. This analysis is consistent with the purpose of the guidelines in the East Gippsland FMP which (set out on page 28 [**AB 1:0408**]) is to:

(a) provide planned protection for sensitive and threatened species in State forest to meet the requirements of the *Flora and Fauna Guarantee Act 1988* and the precautionary principle outlined in the National Forest Policy Statement;

(b) *take account of the contribution of national parks and other conservation reserves towards meeting these requirements;* and

[122] At page 21 of his report (footnotes omitted).

(c) initiate an orderly process for ongoing reconciliation of timber production with conservation of threatened species.

[Emphasis added].

189. Harvesting is prohibited in the reserve system, so the reserve system operates as a retained habitat for each of the species the subject of this proceeding.

E.2. Long-footed Potoroo

190. In its opening, the plaintiff suggested that the evidence it would lead concerning the Long-footed Potoroo would establish that VicForests was in breach of the action statement, the East Gippsland FMP and the precautionary principle.

191. VicForests accepts that in planning and conducting its forestry operations it must comply with measures specified in applicable action statements.[123]

192. The first point to note is that it is the DSE that has the power and responsibility to declare an SMZ and Retained Habitat once a Long-footed Potoroo has been detected outside the Core Protected Area.[124]

193. The evidence of Cameron MacDonald is that:[125]

In the event that the DSE decides to declare a Long-footed Potoroo SMZ (including retained habitat where harvesting is not allowed) VicForests will modify the harvesting boundary in the coupe plans for Coupe 15 and Coupe 19 to accommodate this prescription.

194. The DSE has not declared an SMZ as, in its view, there has not been a verified detection of a Long-footed Potoroo within the meaning of the action statement.[126]

195. As at the time of the Minister's media release [**AB 3: 1043**] the DSE did not consider there had been a verified location of any Long-footed Potoroo within

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[123] See 63(a) of the defence.

[124] See the *Management Procedures for Timber Harvesting Operations and Associated Activities in Victoria's State Forests* for 2007 [**AB 2:0274**] and 2009 [**AB 2:0842**] in sections 3.2.3 and 3.2.4 respectively. See also exhibit LAM 30 to Mr Miezis' witness statement (**Exhibit N**) and the evidence of Lee Miezis to this effect at T 984:20; T 994:7; T 1010:27.

[125] Paragraph 94 of the fourth MacDonald affidavit.

[126] Paragraph 93 of Lee Miezis' statement.

the Brown Mountain coupes.[127] The hair-tubing detection of a Long-footed Potoroo by Barbara Triggs raised with the DSE in early February 2009[128] prompted the DSE to include surveys for the Long-footed Potoroo in the surveys that were conducted on Brown Mountain from January to March 2009 (T 997-8). No Long-footed Potoroos were detected in those surveys, so the DSE never considered there to be a verified detection.

196. Two days after the Minister's media release the DSE received by email a report from Andrew Lincoln concerning another alleged detection of a Long-footed Potoroo within proposed coupe 15.[129]

197. On 24 August 2009 Lee Miezis sent Andrew Lincoln and Jill Redwood emails concerning all footage and stills for verification of the detection.[130] It was Mr Miezis' evidence that there are three aspects to the verification process: is it the animal, is it the site and was the footage legitimately taken? (T 1048:15). Mr Miezis also said that by 25 August 2009 the DSE was satisfied that the Lincoln detection was of a Long-footed Potoroo, and was in the location it claimed to be (T 1051:23). But Mr Miezis also said (vat T 1051:28):

... we hadn't verified the sighting. We still had a third prong to go.

198. Later, at T 1053:14 Mr Miezis said:

If the sighting is able to be verified then the requirements of the action statement will be implemented.

199. Mr Miezis said "we would have required VicForests to comply with the requirements of the action statement." (T 1053:28) and that:

If we were unable to verify the site, there would be no reason for us to create a – take action under the action statement (T 1053:31).

200. In the events that followed, the DSE and VicForests did consult over a draft SMZ and retained habitat even though the DSE had not verified the Lincoln detection.[131] As Mr Miezis explained at T 1058:4:

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[127] T 996:11.
[128] Exhibit **LAM 19** to Lee Miezis' witness statement.
[129] Paragraph 85 of Lee Miezis' witness statement and Exhibit LAM 31 to it.
[130] Paragraphs 86 – 7 of Lee Miezis' witness statement.
[131] See generally paragraphs 75 – 94 of the fourth MacDonald affidavit.

we [the DSE] *were still hopeful that if the sighting was valid the footage would have been provided to enable us to verify it. So we were doing the work.*

201. It is clear that the plaintiff has not provided to the DSE the McLaren footage.[132] Certainly VicForests could not do so as it only became aware of it through this proceeding. Therefore the DSE has not considered what it will do, if anything, in response to the alleged McLaren detection.

202. Therefore the obligations cast upon VicForests by the action statement that otherwise might arise, are not enlivened. In the event that they may in the future, the evidence is that VicForests will comply with the action statement. Indeed, it has already started "consultation" with the DSE on the basis that the DSE may declare an SMZ and retained habitat.

203. Concerning the precautionary approach, and in the alternative, VicForests submits that by reason of:

(a) the couping up TRP process as outlined by Lachlan Spencer;

(b) the implementation of the stream-side buffer;

(c) the fact that it did not harvest pending survey results that included surveys for the Long-footed Potoroo;

(d) the fact that the survey results did not detect the presence of the Long-footed Potoroo;

(e) its consultation with the DSE concerning proposals for an SMZ and retained habitat pending the DSE's decision as to whether it would declare an SMZ; and

(f) the fact that the DSE has not declared an SMZ and the Minister has announced that VicForests can harvest on Brown Mountain in accordance with the agreed prescriptions;

that its approach has been precautionary.

204. Further, Professor Ferguson's opinion is that VicForests has taken a precautionary approach in relation to the proposed harvesting.[133]

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[132] T 1064:13.

[133] See paragraph 4.6 on page 22 of his report.

205. In summation there is not any aspect of VicForests' conduct related to the alleged detections of the Long-footed Potoroo that could properly be characterised as unlawful.

E.3. Orbost Spiny Crayfish

206. There have not been any confirmed detections of the Orbost Spiny Crayfish in the Brown Mountain area. The DSE Brown Mountain Report and the report of McCormack dated 7 December 2009[134] does not identify the presence of the Orbost Spiny Crayfish in Brown Mountain creek.

207. As a result, the DSE has not required, and nor was it obliged to require, that the prescriptions in the action statement be implemented.[135] The implementation of the 100m stream-side buffer was a result of the elevated levels of arboreal mammals.[136]

208. There is no evidence that the DSE has been informed by the plaintiff about the alleged detection of the Brown Mountain taxon. Mr McCormack said there had been no official communication between him and the DSE concerning the alleged new taxon (T 590:5).

209. The expert report of Professor Ian Ferguson,[137] provides that both the Orbost Spiny Crayfish and the Brown Mountain taxon would be "well protected" by the 100 m stream side reserve in the form of a SPZ extending at least 1 km to the north and south of the mid-point of the coupes on the creek.

210. Further:

(a) Mr McCormack did not doubt comments in the action statement for the Orbost Spiny Crayfish [**AB 2:0566**] that:

(i) "the protection of streams inhabited by Orbost Spiny Crayfish will also benefit other resident species of aquatic flora and fauna" (T 575:25);

(ii) "protection of the riparian strip along streams inhabited by the Orbost Spiny Crayfish will also provide habitat for a number of

[134] **Exhibit 37.**
[135] Paragraph 51 to Lee Miezis witness statement.
[136] T 994:27; T 995:6.
[137] Report of Professor Ian Ferguson dated 29 January 2010, at 4.2.

rare or threatened birds and mammals, including the spot-tailled quoll, the long-footed potoroo, the powerful owl and the sooty owl." (T 576:2).

(b) Mr McCormack accepted the definition of the precautionary principle in the Code of Practice for Timber Production was accurate (T 593:23) and conceded that his definition omitted any mention of "risk-weighted consequences"; and

(c) Mr McCormack accepted that his conclusion in his report that a 100 m buffer was an appropriate precaution assuming a detection of the Orbost Spiny Crayfish, also applied to the new taxon (T 595:14).

211. In all of these circumstances the following conclusions of law follow:

(a) the requirements of the applicable action statement are not triggered because there has not been a "detection site" of the Orbost Spiny Crayfish within the Brown Mountain coupes;

(b) to the extent that the precautionary principle has content and applies to either the Orbost Spiny Crayfish or the alleged new taxon, it has been complied with by the imposition of the stream-side buffer.

E.3.1. Spot-tailed Quoll

212. There is no evidence of any detections of Spot-tailed Quolls in the Brown Mountain coupes. This means there has not been a "confirmed Quoll record" within the meaning of paragraph 13 of the action statement **[AB 2:0555]** and there are no obligations on VicForests that are enlivened.

213. Further, insofar as the protection of habitat is concerned, it is Professor Ferguson's opinion is that the surrounding reserve immediately adjacent to the proposed coupes addresses the concerns raised by Dr Belcher.[138]

214. That opinion is consistent with the action statement that states **[AB 2:0558]**

In considering any impact of logging on Spot-tailed Quolls, the amount of protected and retained habitat across the landscape is important. Substantial areas of potentially suitable habitat throughout its range in Victoria are

[138] See paragraph 4.5 on page 21 of his report.

already protected, both in the parks and reserve system and in areas of State forest unavailable to logging.

215. This is even more so with the new areas added to the reserve system on Brown Mountain in November 2009. Further, the target of 75 Quoll sites has been met in East Gippsland.[139]

216. Dr Belcher refused – unreasonably, and to an extent that affects his independence and the weight that should be given to his evidence in our submission – to accept that the new reserve to the west of coupe 15 was largely mature unlogged forest. This refusal was despite the fact that he gave evidence that "from the road there [it] is"[140] and he was shown the agreed maps which demonstrate that only a small portion of the new reserve has been previously logged.

217. The action statement notes (at page 4) that:

Spot-tailed Quolls appear to prefer mature forest, unlogged forest or forest that is less disturbed from timber harvesting that intensively harvested forest.

218. When page 3 of the action statement for the Orbost Spiny Crayfish was put to Dr Belcher, he agreed that protection of the riparian strip along streams will provide some habitat for the Spot-tailed Quoll (T 617:18). Dr Belcher also accepted that the modified habitat tree prescriptions would provide some habitat for arboreal mammals (T 617:26).

219. Further Dr Belcher accepted that the target of 75 Quoll sites in protected habitat as described on p 8 of the action statement [**AB 2:0562**] had been reached in East Gippsland. (T 618:16).

220. In assessing the precautionary principle Dr Belcher did not look at any consequences other than for the conservation of the Spot-tailed Quoll: T 620:11. It is also clear that Dr Belcher approached the precautionary principle on the basis that there had to be "zero, or close to it" risk for the Spot-tailed Quoll (T 624:27). In doing so Dr Belcher misdirected himself as to the proper test.

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[139] Paragraph 77 of the defence; paragraph 94 of Lee Miezis' witness statement.
[140] T 615:1.

221. The proposed harvesting does not present a serious or irreversible threat to the Spot-tailed Quoll, and therefore the conditions precedent to the application of the precautionary principle are not engaged. This is so because of:

(a) the proposed stream side buffer;

(b) the target of 75 Quoll sites in protected habitat has been met in the East Gippsland Forest Management Area;

(c) the additional reserve system that contains mature unlogged forests; and

(d) the absence of any detection of Spot-tailed Quolls within the Brown Mountain coupes; and

(e) the large home range of the Quoll.

E.3.2. Sooty and Powerful Owls

222. There have not been any confirmed nesting and roosting sites utilised recently and frequently (based on reliable observation or physical evidence such as pellets or wash) located within the coupes. Therefore the pre-condition for the establishment of a 3ha SPZ in the Sooty Owl action statement [**AB 2:0575**] and the Powerful Owl action statement [**AB 2:0595**] does not exist. Dr Bilney notes on page 23 of his report[141] that '[w]hether nesting sites fall within any of the four proposed logging couples [sic] is unknown.' In cross-examination Dr Bilney said he couldn't state with any confidence at all that there is a roost site there [within coupe 15]: T 519:3.

223. Insofar as the precautionary principle has content and applies to VicForests, the modified habitat tree prescriptions are relied upon in conjunction with the landscape analysis in answer to all of the breaches alleged against VicForests concerning both the Sooty and Powerful Owls. This is consistent with Professor Ferguson's analysis.[142]

224. Further, in Dr Bilney's report[143] he states his opinion that:

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[141] **Exhibit 30.**

[142] Paragraph 4.5 on page 21 of his report.

[143] **Exhibit 30.**

(a) the status (both federally and state) of both Sooty Owls and Powerful Owls is unlikely to change in the foreseeable future, primarily because attempts to address conservation concerns have been conducted (p 9);

(b) it is unlikely that the logging of the Brown Mountain coupes presents a threat to the overall population of Sooty Owls and Powerful Owls (p 24); and

(c) the four proposed coupes will form only a fraction of the area used by an individual of either species, and although they may still be important areas, they may not be used frequently (p 23).

225. Table J3 in Appendix J to the East Gippsland FMP also demonstrates that at least 120 POMAs and 131 SOMAs have been established in East Gippsland. Dr Bilney said he suspected those figures were correct (T 517:13 and T 518:14). At page 27 of Dr Bilney's report he noted that insofar as SOMAs are concerned that number actually exceeds the number of confirmed Sooty Owl records in the area. Therefore, based on surveys and habitat prediction, suitable habitat will be conserved as SOMAs in some areas even though the owls have not been officially recorded in those areas (but there is a high probability that there is).

226. It is also noteworthy that:

(a) Dr Bilney agreed with the comment on page 4 of the Powerful Owl action statement [**AB 2:0592**] that the key socio-economic issue in relation to protection of the Powerful Owl is that protection of its habitat will reduce the area of State forest available for timber production;

(b) Dr Bilney did not use the definition of the precautionary principle in the Code, and was only became aware of that definition the evening before he gave his evidence (T 521:7);

(c) Dr Bilney did not consider any factors other than environmental factors when he gave his opinion concerning the precautionary principle (T 522:12) nor did he consider that a balance had to be struck between the consequence of the precautionary measures and the

seriousness of the potential threat (T 523:6) and in these respects he misdirected himself.

227. By reason of the facts outlined above, and on an application of the proper test and a risk-weighted assessment:

(a) the precautionary principle is not engaged because the conditions precedent are not satisfied (there is no serious or irreversible threat); and

(b) alternatively, even if the precautionary principle is engaged, that it has been complied with.

E.3.3. Giant Burrowing Frog and Large Brown Tree Frog

228. There has not been a "record" of the Giant Burrowing Frog within the coupes within the meaning of the action statement [**AB 2:602**] and therefore the pre-conditions to the obligations set out in that statement do not arise.

229. VicForests otherwise relies on the stream-side buffer in answer to all of the breaches alleged against it concerning the Giant Burrowing Frog and the Large Brown Tree Frog. Dr Gillespie, in reaching his conclusions about the precautionary principle did not give any consideration to consequences other than those affecting the frog species (T 312:6). Nor did he direct himself to a risk-weighted analysis (T 314:10). Nor did he consider it or any relevance that there has been recent additions to the conservation system because he wasn't aware of them (T 315:25). Those reserves were not taken into account in forming his opinion (T 317:8). Yet Dr Gillespie admitted those reserves will offer some additional protection on the assumption that the large brown tree frog occurs in those areas (T 317:20).

230. Concerning the Giant Burrowing Frog, Dr Gillespie agreed that male frogs disperse on average 99m from their breeding sites (T 550:23), but also that there were no known breeding sites of this frog at Brown Mountain Creek (T 553:1). And although Dr Gillespie didn't agree with the argument, Penman and others (in a paper Dr Gillespie reference for the purpose of preparing his report) are of the opinion that where there are not known breeding sites that the remaining populations would be protected with standard prescriptions

designed to protect water quality and stream side habitat (T 554:8 and Exhibit G).

231. In these circumstances it is submitted that there is no evidence that the proposed harvesting will present a serious or irreversible threat to the Giant Burrowing Frog or the Large Brown Tree Frog, and accordingly the conditions precedent to the application of the precautionary principle have not been established.

232. In the alternative, it is submitted that, by reason of the streamside buffer and the fact that there has not been a known breeding site within the meaning of the applicable action statement, VicForests has adopted a precautionary approach. This is reinforced by reason of the fact that the action statement for the Giant Burrowing Frog requires that "stream records" on second or higher order streams would require a 100m buffer each side of the stream for 1 km upstream and downstream of the record. This requirement has been satisfied even though there has been no applicable "stream record" as Dr Gillespie was of the opinion that the Brown Mountain Creek was a second order stream: T 569:12.

E.3.4. The Square-tailed Kite

E.3.5. The Square-tailed Kite

233. There is no evidence of "known nest sites" or "nest trees" within the meaning of the East Gippsland FMP to trigger any guidelines relevant to the Square-tailed Kite.

234. Further:

(a) the Square-tailed Kite's conservation at the federal level is of "least concern" (T 642:13);

(b) Dr Debus accepted that "to some extent" the loss of habitat by harvesting might be offset by the creation of suitable openings in formerly extensive forest (T 645:8);

(c) the Kite's home range is 5,000 – 10,000 hectares (T 656:29) whereas the proposed harvesting would represent 1 - 2 percent of that range (T658:3 and T 662:10);

(d) Dr Debus acknowledged that his opinion had been predicated on an out of date map (which excluded the new reserves) and accepted that once the new reserves were taken into account, his conclusion on page 15 of his report[144] that the harvesting might displace one pair of Kites may no longer apply (T:668:1);

check

(e) Dr Debus accepted there was no indication of where the Kite spotted by Dr Bilney may be nesting (T 668:11);

(f) Dr Debus conceded that:

(i) he would have to "moderate" his conclusions concerning the precautionary principle in the light of the new reserves (T 672:16);

(ii) he did not take into account any consequences other than those for the Kite (T 672:24);

(iii) "over the long-term the habitat is going to regnerate, so I would assume if you take a long-term perspective, [the harvesting] won't result in irreversible damage" (T 674:3).

(g) Dr Debus agreed that the proposed harvesting in Brown Mountain (factoring in the additional reserves) would replicate the study area reviewed by Kavanagh and others in 2003 as referred to in answer to question 15(b) in his report (T 669:25) and in that situation there did not appear to be any threat to the Kite (T 659:5-10);

235. Accordingly, it is against the weight of the evidence to suggest that the proposed harvesting presents a serious or irreversible threat to the Square-tailed Kite. The precautionary principle is thus not engaged.

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[144] **Exhibit 44.**

E.3.6. The Gliders

236. There is no factual dispute concerning the elevated levels of arboreal mammals detected in the DSE Brown Mountain report [**AB 3:1052**]. VicForests relies upon the stream side buffer (which was initially implemented in response to this detection as it was on the lower gullies near Brown Mountain creek where most of the gliders were detected), and also the DSE's decision not to declare an SPZ for the reasons set out in its memorandum dated 18 June 2009 to the Minister for Environment and Climate Change.[145]

237. That memorandum relevantly states:

> ***RECOMMENDATIONS***
>
> *1. That you note the results of fauna surveys undertaken at Brown Mountain.*
>
> *2. That you note that in this case and following consideration of all relevant matter, the Department of Sustainability and Environment does not intend to create a Special Protection Zone at Brown Mountain. Timber harvesting will be allowed under modified prescriptions.*
>
> *3. That you note the attached media release regarding this decision (Attachment 1).*
>
> *4. That you note that the Department is assisting VicForests to develop a process for the conduct of pre-harvesting surveys and is developing a decision framework to assist in responding to other flora and fauna surveys conducted by members of the public in timber harvesting areas. It is intended that this decision framework be made publicly available.*
>
> ...
>
> ***BACKGROUND***
>
> ...

[145] Paragraph 86 of Lee Miezis' statement.

82.

10. *The purpose of the East Gippsland Forest Management Plan is to establish strategies for integrating the use of State forest for wood production and other purposes, with conservation of natural, aesthetic and cultural values across the whole East Gippsland Forest Management Area. In particular, the Forest Management Plan:*

- *establishes guidelines for forest fauna species, including high density populations of arboreal mammals, and*
- *provides for the maintenance of sawlog supplies to meet industry commitments.*

11. *In the Forest Management Plan, a conservation guideline is defined as specifying the minimum levels of planned protection to be provided for natural values in State forest, taking into account the extent of those values in national parks and conservation reserves. The plan notes that where insufficient information is known about an area, a precautionary approach has been adopted in specifying conservation reserves.*

...

Intended course of action

49. *The intention of the conservation guideline for arboreal mammals is to ensure that suitable habitat is protected to support high density populations, by including it in a Special Protection Zone.*

50. *Suitable habitat to support a high density population of Greater Gliders and Yellow-bellied Gliders is extensively represented in areas in close proximity to the Brown Mountain that are already excluded from timber harvesting (including in the new and expanded conservation reserves) and the creation of a Special Protection Zone will have a material impact on timber production in the area.*

51. *A decision to not create a Special Protection Zone at Brown Mountain (and to allow further timber harvesting) will impact on the high density population of Greater Gliders and Yellow-bellied Gliders. However, it will not affect the conservation status or viability of either species, as both are common throughout East Gippsland.*

52. *Considering all relevant matter, the Department does not intend to create a Special Protection Zone at Brown Mountain. In this case, the application of conservation guideline for arboreal mammals would not allow the strategic intent of the East Gippsland Forest Management Plan to be achieved, which is to conserve natural values but allow for a viable timber industry.*

53. *To better achieve this balance and minimise impacts on the high density population of Greater Gliders and Yellow-bellied Gliders at the site, the Department intends to allow timber harvesting to occur at Brown Mountain to occur* [sic] *under modified prescriptions, namely:*

- *A 100 metre buffer along Brown Mountain Creek, where most animals were found during the survey that was conducted.*
- *The protection of hollow-bearing habitat trees identified by biodiversity officers of the Department (where it is safe to do so).*

54. *Subject to your comment on this decision, the Department intends to:*

- *Formally advise Environment East Gippsland (as proponents of the survey) and VicForests of the decision.*
- *Make the survey report available to the public on request.*
- *Assist VicForests in the development of a process for the conduct of pre-harvesting surveys.*
- *Continue to develop a decision framework to assist in responding to other flora and fauna surveys conducted by members of the public in timber harvesting coupes.*

55. *It is anticipated that this decision framework will be prepared in consultation with stakeholders and be made publicly available.*

238. The surrounding reserves and the habitat tree prescriptions address, in Professor Ferguson's opinion, the concerns identified by Dr Bilney.[146]

239. What is clear from the above memorandum is that the DSE considered all of the relevant evidence concerning the gliders, and it determined not to declare

[146] Paragraphs 4.4. and 4.5 on page 21 of his report.

an SPZ. It is not for VicForests to second-guess that decision when clearly the relevant power, and expertise, resides within the DSE. To place that obligation on VicForests would result in VicForests usurping the power and responsibility conferred by the executive arm of government on the DSE, let alone the practical consequences that would entail.

F. PROPOSED ORDERS

240. In the event that the Court is satisfied that:

(a) there has not been a 'detection site' of the Long-footed Potoroo (within the meaning of the action statement **[AB 2:0542]**;

(b) there have been no detections of any other threatened species within the meaning of applicable action statements;

(c) the precautionary principle does not create obligations actionable at law or otherwise is not engaged, or if engaged has been complied with;

it is submitted that the Court should dismiss the claim and order the plaintiff to pay VicForests' costs.

241. In the event that the Court is satisfied that there has been a 'detection site' of the Long-footed Potoroo (within the meaning of the action statement) then it is submitted that the following order is appropriate:

Conditional by:

> *Subject to further order, VicForests be restrained from harvesting in any of the Brown Mountain coupes until 31 May 2010 on condition that the plaintiff forthwith provide to the DSE all exhibits, evidence and any other documents in its possession relevant to the detection of a Long-footed Potoroo within any of the Brown Mountain coupes.*

242. This course of action would allow the relevant decision-maker (the DSE) to be provided with the information necessary for it to make an informed decision concerning whether to declare an SMZ and Retained Habitat for the Long-footed Potoroo.

243. In the event that the DSE does create an SMZ and Retained Habitat, there is no doubt that VicForests will harvest in accordance with such prescriptions.

244. In the event that the DSE does not create an SMZ and Retained Habitat, or does not create them to the satisfaction of the plaintiff, the plaintiff will be at liberty to join the DSE as a defendant to this proceeding and seek whatever relief it deems appropriate against the DSE or to take such other action as it may be advised.

245. This order recognises that it is the DSE and not VicForests that has the power to create an SMZ and Retained Habitat. The plaintiff ought to have provided to the DSE in a timely manner all documents in its possession relevant to the detection of a Long-footed Potoroo within any of the Brown Mountain coupes. Its failure to do so, and its decision to commence and pursue this proceeding against VicForests has caused significant cost and delay. In the circumstances, VicForests will seek an order that the plaintiff pay VicForests' costs of the proceeding.

DATED : 23 March 2010

I G WALLER

H L REDD

Counsel for VicForests

HWL Ebsworth

.....

HWL EBSWORTH

Solicitors for VicForests