IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

No. 8547 of 2009

BETWEEN

ENVIRONMENT EAST GIPPSLAND INC

Plaintiff

and

VICFORESTS

Defendant

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Filed on behalf of:	Plaintiff
Bleyer Lawyers Pty Ltd	Ph: 9600 4224
Level 1, 550 Lonsdale Street	Fx: 9600 4225
Melbourne 3000	Code: 101385
Em: vanessa@bleyerlawyers.com.au	Ref: Vanessa Bleyer

PLAINTIFF'S FINAL SUBMISSIONS : LEGISLATIVE AND REGULATORY SCHEME

SUMMARY

1. This proceeding concerns the proposed logging of four coupes on Brown Mountain, in East Gippsland, Victoria.[1] The coupes are in an area of forest linking the Errinundra National Park and Snowy River and Alpine National parks. The area in which the coupes lie has been assessed and listed as an old growth National Estate by the Commonwealth Heritage

[1] The coupes carry the numbers 840-502-0015, 840-502-0019, 840-502-0026, 840-502-0027; for forestry management purposes. In these submissions they are called **the coupes.**

Commission.[2] The coupes contain significant amounts of old growth forest stands.[3]

2. The Plaintiff's case is that:

   (a) the coupes are high quality habitat for a number of species,[4] each of which is, or is likely, to be present in, or using and traversing, all or some of the coupes. In that sense the conservation values of these coupes are very high, perhaps higher than some other coupes currently scheduled for logging.

   (b) VicForests has not in the past complied, and will not in the future comply, with obligations expressly imposed on it under the regulatory scheme in relation to the protection of these species from logging.

   (c) Forestry operations are not lawful and do not 'comply with' measures, standards and conditions required by the regulatory scheme for the protection of species and their habitat if undertaking those forestry operations prevents those measures, standards and conditions being fulfilled because the habitat has been cleared.

   (d) It is impermissible, and wrong, in a legal sense for VicForests to point to DSE's action or inaction in relation to the coupes, in order to excuse its own non compliance.

3. The Plaintiff seeks declarations in respect of VicForests' breaches of its obligations under the scheme, and the non compliance of its proposed forestry operations with the scheme, and permanent injunctions enjoining timber harvesting in the four coupes.

4. The sources of the compliance obligations and requirements identified by the Plaintiff are:

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[2] Affidavit of Jill Redwood sworn 28 August 2009 par [7]; Register of National Estate, Exhibit 2.

[3] Agreed Maps, Exh 12, map 10.

[4] Most of whom are listed as threatened under the *Flora and Fauna Guarantee Act* 1998 (Vic) (**the FFG Act**), but two of whom (Yellow Bellied Gliders and Greater Gliders) are protected by prescription under the FMP.

(a) Section 4(2) of the *Flora and Fauna Guarantee Act* (the **FFG Act**);

(b) The *Code of Practice for Timber Production*, read with s 46 of the *Sustainable Forests (Timber) Act* 2004 (Vic) (**SFT Act**) ;

(c) the Allocation Order made under the SFT Act, read with the FFG Act, the Code of Practice, and the East Gippsland Forest Management Plan 1995 (**FMP**).

(d) the 2009 – 2014 Timber Release Plan for the East Gippsland Forest Management Area, read with the FFG Act, the Code of Practice, and the FMP

(e) FMP → [illegible] force

5. Under this regulatory scheme properly construed, compliance or non compliance attaches to <u>activities</u> rather than persons (see the terms of the Allocation Order and the TRP, as well as the language in the Code of Practice), although responsibility for some measures may be expressed within the scheme as lying with a particular person. In other words, to be lawful, the activities (broadly, the planning and conduct of forestry operations) must meet certain standards, be in accordance with certain conditions, and fulfill certain measures.

VicForests case

6. On the other hand, VicForests' case is:

(a) The TRP approval constitutes permission to undertake timber harvesting in the coupes.

(b) No further approval is required, and all VicForests must do is adhere to any subsequent formal zoning decisions or prescriptions imposed on it by DSE, but need not postpone timber harvesting so that such formal decisions or prescriptions can be made.

(c) Therefore, irrespective of the likely or actual presence of any threatened species (in whatever numbers, and including 'verified' detections) unless (b) occurs, VicForests is free to start and complete timber harvesting operations.

(f) Action Statements

(g) Manager Procedures

7. The corollary of (b) and (c) above is that VicForests does not need to undertake any searches or surveys of the coupes in order to detect any species, even if put on notice of the presence or likely presence of threatened species. Two further corollaries are that VicForests need not itself respond to a conservation guideline trigger point under the FMP, and it can ignore evidence about presence or likely presence of threatened species unless DSE requires it to do something in a way VicForests regards as legally binding on it.

THE PARTIES

8. Environment East Gippsland (**EEG**) is a locally based community environmental organisation which was incorporated in 1991, having begun life as an unincorporated association called "Concerned Residents of East Gippsland". It has approximately 450 members in 2010. Its purposes include:

   (a) Promote conservation values and environmental awareness about East Gippsland;

   (b) Promote sustainability in environmental, economic and social terms;

   (c) Make representations to government regarding land use management;

   (d) Undertake research relevant to the above;

   (e) Adhere to and promote principles of non-violence; and

   (f) Cooperate with other groups having similar objectives.[5]

9. EEG engages in a range of activities, including:

   (a) Carrying out threatened species surveys in State forest;

   (b) Producing EEG quarterly newsletters;

   (c) Producing articles that are published in Wild and Living Now magazines, both of which are distributed nationally;

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[5] Affidavit of Jill Redwood dated 28 August 2009, [3].

(d) Engaging with print and radio media;

(e) Organising and running annual or biennial forest ecology camps, "Forest Forever" attended by up to 100 people, including families, ecologists, botanists and bushwalkers;

(f) Making submissions to government, including in relation to the Land and Biodiversity White Paper in 2007, the Environment Protection and Biodiversity Conservation Amendment Bill in 2007, the Victorian Bushfire Royal Commission in 2009 and the Timber Release Plan in 2009/2010 and 2013/2014; and

(g) Sitting on government committees, including the Regional Forest Agreement Consultative Committee in 2002 and the CMA Snowy River Group in 2004.[6]

10. Two of its principal activities, which have assumed some prominence in this proceeding, are its lobbying for the protection of old growth forests in and around Brown Mountain, and in other areas of East Gippsland; and the carrying out of fauna surveys in areas of forest scheduled for timber harvesting under the Timber Release Plan.

11. VicForests is a State body under s 14 of the *State Owned Enterprises Act 1992* (Vic), and was declared to be a State business corporation on 28 October 2003.[7] It is required to undertake, on a commercial basis, the sale and supply of timber resources in Victorian State forests, and it is relevantly the person who will undertake, whether by itself, its servants, agents or contractors, any forestry operations in the coupes.[8]

12. VicForests is required to:

(a) operate its business or pursue its undertakings as efficiently as possible consistent with prudent commercial practice;

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[6] Affidavit of Jill Redwood dated 28 August 2009, [4].

[7] Affidavit of Cameron MacDonald dated 31 August 2009, [3].

[8] See for example, Exh JR 46, the Minster's Press release where the Minister states *"VicForests would be allowed to recommence timber harvesting at Brown Mountain under modified conditions designed to provide grater protection to the area"*.

(b) be commercially focused and deliver efficient, sustainable and value for money services; and

(c) operate in a framework consistent with Victorian Government policy and priorities.[9]

13. The last obligation is important because, together with other aspects of the scheme, it is clear that the 'single focus' argument put by VicForests in this case is not reflected in the scheme itself.

THE RELIEF SOUGHT AND STANDING

14. The Plaintiff seeks injunctive and declaratory relief. An injunction is available to enjoin unlawful conduct including in the sphere of public law. As Gummow J explained in *Truth About Motorways v Macquarie*[10] statutes often impose obligations on administrators or might confer privileges with particular limitations upon them or third parties but provide no means or inadequate means for the enforcement of the obligation or to restrain ultra vires activity. This led to the engagement of the equity jurisdiction in matters of public law. Such proceedings enforce public duties and obligations rather than private rights, they entail "the use of the auxiliary jurisdiction in equity to fill what otherwise were the inadequate provision to secure compliance by others with particular statutory regimes or obligations of a public nature"[11]. Underpinning those principles is that equity will intervene to restrain a breach of the law. It follows that cases that relate to equitable enforcement of private rights have little relevance.

15. The development of this equity jurisdiction also led to the development of the modern concept of "standing"[12]. That history saw a movement away

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[9] Order of the Governor in Council dated 28 October 2008 pursuant to s 14 of the *State Owned Enterprises Act 1992* (Vic), AD1 and exhibited to the Affidavit of Cameron MacDonald sworn 31 August 2009, CM-1.

[10] (2000) 200 CLR 591 at 628; see also *Batemans's Bay Local Aboriginal land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247 at 260-266

[11] (2000) 200 CLR 591 at 628

[12] (2000) 200 CLR 591 at 628

from concepts of "special damage"[13] to the modern concept of special interest in the subject matter of the litigation. That process in Australia was also informed by the difficulty in obtaining a fiat from the Attorney general when in most cases it will be the Government that would be the subject of a relator proceeding[14].

16. Given the importance of standing as an element of enforcement of the public law it is important that in applying the criteria as to sufficiency of interest to support equitable relief regard is had to the exigencies of modern life[15] and that the availability of equitable remedies to support the public interest in due administration not be unduly restricted. Otherwise, to deny standing may be to:

> "deny to an important category of modern political statutory duties an effective procedure for curial enforcement"[16]

17. Those principles are essential to the approach taken to standing and require a flexible and generous approach. Whether a party has sufficient interest is governed by all of the facts and not a rigid comparison with decided cases. In the case of EEG it is clear that its long term commitment to the environment of East Gippsland, its participation in the development of important regional aspects of the regulatory framework, its persistent campaigning about Brown Mountain and in particular its on the ground survey work – doing something which should be the responsibility of VicForests and DSE – gives it a special interest.

THE STATUTORY SCHEME

Interpretative principles

18. One of the difficulties in determining the applicable interpretative principles is identifying what legislation should be considered to be the lead or dominant legislation in the circumstances of this proceeding. Until

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[13] *Batemans's Bay Local Aboriginal land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247 at 265

[14] 194 CLR 247 at 262

[15] 194 CLR 247 at 265 [46]

[16] *Onus v Alcoa* (1981) 149 CLR 27 at 73 per Brennan J

such a determination is made, it is not possible to decide which provisions control the interpretation of other provisions:

> *"Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme"*[17]

19. Further, where a legislative scheme deals with a range of potentially conflicting interests, the scheme taken as a whole should be construed as disclosing a compromise between those interests, and as representing a balance struck by the legislature. [18]

20. This approach is all the more important where the scheme, as here, is embodied in a number of statutes and legislative instruments.[19]

21. This is a proceeding about the impact of timber harvesting on threatened species. The plaintiff submits the dominant legislation is the FFG Act because:

(a) It is the piece of Victorian legislation which specifically deals with identification and protection of threatened species.

(b) Its subject matter (Australian native flora and fauna, especially those at risk of likely extinction in the wild) is affected by exploitation of a variety of resources and land uses and unless its objectives are pursued across this range, the purpose of the scheme will be frustrated.

(c) It binds the Crown in right of the State of Victoria, and every public authority must be administered so as to have regard to the its objectives.

(d) The FMP (although authorised by the *Forests Act*) specifically provides[20] that the FMP is to meet a number of conservation and resource use requirements, including the FFG Act.

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[17] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70]

[18] *Minister for Immigration v Teo* (1995) 57 FCR 194 at 206

[19] *Commissioner of Stamp Duties v Permanent Trustee* (1987) 9 NSWLR 719 at 723-4 per Kirby P.

(e) The Code of Practice[21] identifies the FFG Act as one of the legal requirements underpinning the conservation of biodiversity.

22. Construction of the legislation and the instruments must be purposive and accordingly it is the purpose and objects of the FFG Act (as set out in a s4(1) of the FFG Act) which should be used to determine, and should control, the meaning of provisions in each instrument and piece of legislation.

State forests

23. State forests, and the products (whether timber or otherwise) they produce are the property of the Crown in right of the State of Victoria.[22] They are a community resource, part of the "common property"[23] of the people of the State of Victoria, just as are the State's fisheries and water[24]. Thus, they are to be managed and exploited in a way which recognises the variety of values they represent, but must be managed on behalf of future generations and for the common good. The legislative scheme does not contemplate that their exploitation will have substantial negative impacts on any of the conservation values those forests represent.

24. The exploitation by logging of state forests in Victoria is regulated by a complex of Acts and legislative instruments. A fundamental feature of the scheme is that ownership in the timber resources held by the State of Victoria is passed to VicForests and with this ownership comes a range of obligations previously falling only on the State - as to conservation, biodiversity protection and other matters. The vesting of ownership in timber resources in VicForests precludes the Secretary from exercising powers to exploit those timber resources which otherwise vested in the Secretary: see s 21 (1AA) of the *Forests Act*.

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[20] p. v, AD 375

[21] Code p 21, AD 130

[22] Section 4 of the *Forests Act* 1958 (Cth); s 36 *Sustainable Forests Timber Act.*

[23] *Harper v Minister for Sea Fisheries & Others* (1989) 168 CLR 314

[24] *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51 (9 December 2009) at [55] per Gummow and Crennan J; [109] per Hayne, Kiefel and Bell JJ.

25. In summary, VicForests' legal obligations are to be found in:

(a) Section 4 of the FFG Act (an obligation not contingent on the passing of title under the Sustainable Forests Act);

(b) Section 46 of the Sustainable Forests Act;

(c) The Allocation Order, which in turn requires compliance with a number of statutes and legislative instruments; and

(d) The Timber Release Plan, which in turn requires compliance with a number of statutes and legislative instruments.

***Flora and Fauna Guarantee Act* 1988 (Vic): Threatened species:**

26. The object of the FFG Act is to establish a legal and administrative structure to enable and promote the conservation of Victoria's native flora and fauna and to provide for a choice of procedures which can be used for the conservation, management or control of flora and fauna and the management of potentially threatening processes (s 1).

27. The FFG Act is relevant to the issues in this proceeding in three principal ways:

(a) First, because VicForests is a public authority,[25] s 4(2) requires that it be administered so as to have regard to the flora and fauna conservation and management objectives set out in s 4(1). These objectives require, inter alia, a "*guarantee that all taxa of Victoria's flora and fauna...can survive, flourish and retain their potential for evolutionary development in the wild*", the management of '*potentially threatening processes*',[26] and '*ensuring that the genetic diversity of fauna is maintained*'. [emphasis added]

(b) Secondly, the FFG Act provides for listing of threatened species;

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[25] Defined in s 3 to mean a body established for a public purpose by or under any Act. The Defendant has admitted it is a public authority for the purposes of s 4 of the FFG Act: para 2 Amended Defence.

[26] Defined in s 3 to mean " a process which may have the capability to threaten the survival, abundance or evolutionary development of any taxon or community of flora or fauna". The loss of hollow bearing trees has been declared to be such a process.

(c) Thirdly, the FFG Act provides for the promulgation of Action Statements for listed threatened species[27] and threatening processes under s 19 of the FFG Act. These are made binding on VicForests through the Code of Practice.[28]

28. The requirement "to have regard to" the conservation objectives means that the public authority must take them into account as a fundamental element in its decision making bringing to bear an active intellectual process: *Reg. v. Hunt; Ex parte Sean Investments Pty. Ltd* (1979) 180 CLR at 329 per Mason J, Gibbs J agreeing; *Tobacco Institute of Australia v National Health & Medical Research Council* (1996) 71 FCR 265 at 277G per Finn J.

29. Further, where a decision-maker must consider matters prescribed by law, generally, he or she cannot jettison or ignore some of those factors or give them cursory consideration only in order to put them to one side: *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission*[29].

30. The requirement to have regard to certain matters is not a duty of imperfect obligation: in a proceeding for prerogative writs, it could be enforced by mandamus and a failure to have regard to such matters in making a specific decision could invalidate that decision.

Threatened Species listing and critical habitat

31. The FFG Act provides for listing of species[30]. It involves a rigorous scientific process based on stipulated criteria.

32. Section 11 provides the eligibility for listing if the species is in a demonstrable state of decline, which is likely to result in extinction or if it is significantly prone to future threats, which are likely to result in extinction. Similarly, a threatening process is eligible for listing if, in the

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[27] See s 10-16 of the FFG Act.

[28] Code, AD, 106 at 130.

[29] (2007) 233 CLR 229 at 244 [52] per Gleeson CJ, Heydon and Crennan JJ; Gummow and Hayne JJ at [102]

[30] s 10

absence of appropriate management, it poses or has the potential to pose a significant threat to the survival or evolutionary development of a range of flora or fauna.

33. In addition to listing under the FFG, the DSE also maintains an Advisory List and the procedure used to assess which taxa are eligible for listing is that recommended by the IUCN Species Survival Commission (Species Survival Commission 2001).

34. The status of the species in this proceeding as threatened is often repeated but what that status under the FFG Act really conveys appears to be overlooked in practice. Extinction (completely, locally, functionally) is the quintessential kind of irreversible damage. Moving from one IUCN category to another (vulnerable to endangered for example) is quintessentially serious damage. Protecting species is not about making lists and incanting their dire situation, nor is it only about doing more research (although research is clearly an important component) – rather, it is about taking action.

35. The FFG Act also provides protection for threatened species by provision for the making of 'critical habitat' determinations under s 20. The evidence shows this power has only been exercised once, for an area no longer the subject of any determination. That evidence demonstrates the Victorian Government, and the Secretary to DSE, do not use this method for threatened species protection. Another mechanism is the making of interim conservation orders under s 26 of the FFG Act. Again, that mechanism is not used. The plaintiff sought the exercise of both powers in relation to Brown Mountain well before re-commencement of logging was announced in August 2009. At the time this proceeding was commenced, at the time this trial started and as of the date of these submissions, the plaintiff's request remains for a critical habitat declaration 'under consideration'.[31] Of course, but for the interlocutory injunction granted by this Court at the suit of the Plaintiff, coupes 15 and 19 would now have been logged and burned.

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[31] AD 1112 and 1115

Action Statements

36. By s 19 of the FFG Act:

(a) The Secretary must prepare an Action Statement for each listed taxon, community or threatening process "as soon as possible" after the listing;

(b) an Action Statement:

(i) must set out "*what has been done*" to conserve and manage the taxon, community or process, and "*what is intended to be done*";

(ii) may set out "*what needs to be done*".

37. Again, like s 39 of the Sustainable Forests Act, the scheme confers a choice (this time on the Secretary) about the level of legal obligation to be imposed: s 19 (2) of the FFG Act empowers the Secretary to increase the prescriptive nature of the Action Statement by setting out "*what needs to be done*", rather than just "*what is intended to be done*" [emphasis added].

38. Action Statements are consequent upon a taxon, community of flora or fauna, or a 'potentially threatening process'[32] being listed by the Secretary under the FFG Act. They set out conduct to be undertaken, and standards and prescriptions to be met, which relate to the taxon, community or process with which they deal. Although by reason of those matters they bear some similarity to Management Plans, their purpose is not 'management'. Their purpose, consistently with the objectives of the FFG Act, is to recover the taxon or community to a situation where it is no longer threatened, thus enabling the objectives in s 4 to be fulfilled. Action Statements are intended to be a 'blueprint' for the conservation of the taxon or community so that the s 4 objectives can be achieved. For this reason, the scope of action statements ranges far beyond timber harvesting, for example, they often address other threatening processes that may be associated with or independent from timber harvesting such

[32] Defined in s 3 of the FFG Act to mean "*a process which may have the capability to threaten the abundance or evolutionary development of any taxon or community of flora or fauna*".

as predation and fire. To achieve their purposes, no glosses should be placed on what they say, nor should they be construed so narrowly as to deprive them of function in the real world of timber harvesting.

39. Three general points can be made:

(a) First, some of the Action Statements require measures to be taken on the basis of a detection of the threatened species or a detection site[33]. However, in none of the Action Statements are the measures confined to those circumstances where there is a detection. Measure requiring monitoring, research, review, and other steps are also prescribed. Such steps are as critical to protection and recovery of the species as a response to a particular detection site;

(b) Secondly, the concept of a "detection" where it is employed is not a term of art but is to be understood as an ordinary word, read in its context. The form of detection is not prescribed. Different kinds of detection will be likely for different species. It applies where an animal is detected whether by observation, aural detection or by discovering evidence such as digs or a den site. There is nothing in the Action Statements that justify erecting validation or verification procedures and certainly nothing to justify requiring duplication or repetition of a detection. Such hurdles are unjustified and constitute a barrier to protection.

(c) Thirdly, compliance with an Action Statement does not of itself constitute compliance with the precautionary principle.

40. As to the third point, it should not be assumed that Action Statements necessarily involve an application of the precautionary principle. That is because of the choice available under s 19(2) between what is intended to be done (eg research) and what needs to be done (eg research and habitat protection from threatening processes including timber harvesting). Two pertinent examples suffice.

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[33] Eg Long Footed Potoroo AD 549; Sooty Owl AD 579 and Giant Burrowing Frog AD 602

41. First, an Action Statement like the Victorian one for the Spot Tailed Quoll requires detailed survey and research work to be undertaken in order to better understand the quoll's habitat needs and devise future management arrangements. That is because there is a lack of scientific certainty about the current effectiveness of the areas identified as reserved quoll habitat. While this research is being undertaken (which it is not, in fact) logging of high quality quoll habitat is not expressly precluded by the Action Statement. In other words, measures preventing further population decline are postponed because of imperfect scientific knowledge, which the research is designed to overcome. Meanwhile, high quality habitat likely to be used by the quoll continues to be logged. This is the opposite of the application of the precautionary principle.

42. Second, an Action Statement like that for the Giant Burrowing Frog, Large Brown Tree Frog, Long Footed Potoroo or Square Tailed Kite which revolves around actual detection (or, for the Kite, detection of a nest) requires at least some level of scientific certainty that the species is present in the coupe (and, indeed, using the coupe for a particular purpose in the case of the Kite). The lack of such certainty (and thus no detection) enables logging to occur consistently with the Action Statement, even if the logging may cause serious or irreversible damage if the species are present and using the area (and where VicForests are on notice this may be the case), or may use the area in the future. Again, this is the opposite of the application of the precautionary principle.

Sustainable Forests (Timber) Act 2004

43. This Act is important because it gives rise to two key subordinate instruments: the Allocation Order (Part 3); Timber Release Plan (part 5) and makes enforceable a third instrument, the Code of Practice made under s 31 of the *Conservation, Forests and Lands Act.*

44. Critically, VicForests is expressly required to act in accordance with the Allocation Order and Timber Release Plan (ss 16 and 44) and to comply with the Code of Practice.

45. Section 5 requires regard to be had to the principles of ecologically sustainable development. Contrary to the defendant's submissions, those principles are not synonymous with the precautionary principle, and only s 5(4) deals with it. Section 5 as a whole is dealing with a much broader concept than the precautionary principle.

THE SUBORDINATE INSTRUMENTS

The Allocation Order

46. Section 13 authorises the Minister, by order[34], allocate timber in State forests to VicForests for the purposes of harvesting and/or selling timber resources and to undertake associated management activities (covering a 15 year period). The Allocation Order allocates timber resources by species and by geographic region so that VicForests can select, from that allocation, the particular resources it seeks permission to harvest.

47. Section 15(1)(c) provides that an allocation order may include conditions to which VicForests is subject in carrying out its functions under the allocation order (namely carrying on harvesting, selling and associated activities) including any applicable performance measures and standards. The conditions attach to the performance of activities.

48. VicForests is required by s 16 of the Sustainable Forests Act to carry out its functions in accordance with the Allocation Order, which includes the conditions that VicForests must comply with.[35]

The Timber Release Plan

49. The Timber Release Plan[36] follows an allocation order. A Timber Release Plan is a plan (spanning several years) prescribing the parts of Victorian

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[34] The Allocation Order 2004 (as amended in 2007 to reflect the occurrence of large fires in parts of the State) is at AD 17, the relevant pages are pp 7-12.

[35] The specified conditions are found at AD 10 (as amended by AD 24), p 2 of the Government Gazette.

[36] The TRP is at AD 33. The TRP's list of coupes is at AD38 and the 4 coupes are found on pp 8 and 34 of those tables of the TRP. The system of "seed tree harvesting" ("seed tree system") is defined in the Code of Practice (AD 186) to mean that "*All merchantable trees are harvested apart from those specifically retained for regenerating the coupe by natural or induced seedfall and for habitat purposes*". Evidence given on the view was to the effect that after harvesting, a hot regeneration burn (with jelly petroleum slung from a torch beneath a helicopter) is carried out to

public forests (by coupe number) which can be logged, and when (expressed in years) they can be logged. VicForests must prepare, and the Secretary may approve, the Timber Release Plan in respect of an area and tree species to which an Allocation Order applies: see ss 37 and 40 SFTA.

50. The Timber Release plan must include certain matters and by s 38(3) may include any other matters necessary or convenient to be included in a timber release plan.

51. VicForests is also required by s 44 of the Sustainable Forests Act to carry out its functions and powers in accordance with any approved Timber Release Plan.[37]

52. It is critical to the scheme that the TRP transfers property in the timber resources to VicForests. With that transfer comes the legal responsibilities referred to.

The Conditions Imposed on the Allocation Order and TRP

53. Both the Timber Release Plan and the Allocation Order impose by way of conditions obligations on VicForests. By operation of s 16 and 44 compliance with those conditions is a condition of conducting lawful forest operations.

54. In undertaking harvesting, seeding and associated activities, VicForests is required to comply with the conditions and standards in the documents, as amended from time to time, that are referred to in the Allocation Order and TRP. The reference to both 'conditions' and 'standards' is important and suggests a broad rather than narrow obligations are imposed.

55. The conditions and standards that are incorporated and binding are found in 6 documents including in:-

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remove debris and clear the ground so that the eucalypt seeds can fall into the soil and germinate (Exh 10, paragraphs 26 and 28). Seed and habitat trees are retained with a buffer around them (previously 3m, now 20m) to prevent damage (Exh 10, paragraph 26). The coupe 840-502-0020 logged in October 2008 was also logged under this method and the photos in Exh 7 from the view, and in Dr Smith's report (Exh 14 and some of the agreed view photos are also Exh 7) show the results of that logging.

[37] The specified conditions are found at AD 10 p. 2.

(a) The **Code of Practice**. The Minister is empowered to promulgate Codes of Practice relating to timber harvesting under s 31 of the *Conservation, Forests and Lands Act* 1987 (the **CFL Act**). The Code of Practice for Timber Harvesting 2007[38] is a Code made under s 31.

(b) the Management Guidelines specified in the **Forest Management Plan**. By s 22 of the *Forests Act* the Secretary is required to prepare and cause to be put into operation 'working plans' with respect to the control, maintenance, improvement, protection from destruction or damage by fire or otherwise, and removal of forest products.[39] The East Gippsland Forest Management Plan,[40] promulgated in 1995, describes itself as a 'working plan' made under s 22. Management Plans of this kind are legislative instruments.[41] Compliance with the FMP is a condition of both the Allocation Order and the Timber Release Plan; and

(c) the **Management Procedures** for Timber harvesting, Roading and Regeneration in Victoria State Forests 2009 (**Management Procedures 2009**)

56. The Code of Practice is also binding by virtue of s 46 of the SFT Act. Section 39 of the CFL Act enables a choice to be made as to whether to make compliance with a Code a legal obligation or not. That choice has been made in relation to the Code of Practice for Timber Harvesting: VicForests is required to comply with the relevant Code of Practice relating to timber harvesting by s 46 of the SFT Act.

57. Action Statements made under s 19 of the FFG Act are not specifically incorporated in either the Allocation Order or the TRP. However, they are binding on VicForests in two ways:

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[38] AD 106

[39] The East Gippsland Forest Management Plan is Exh VEB 11.

[40] AD 195

[41] *Latitude Fisheries Pty Ltd v Minister for Primary Industry and Energy & Anor* (1992) 110 ALR 209 at 228-231; *Lamason v Australian Fisheries Management Authority* [2009] FCA 245 at [5].

(a) First, under the Code of Practice all forest management planning and all forestry operations must comply with measures specified in relevant FFG Action Statements. These are described by the Code as "mandatory actions". Compliance is ensured because VicForests must comply with the standards and conditions in the Code as a condition of the Allocation Order and TRP;

(b) Further the Code is also binding by virtue of s 46 of the SFT Act.

58. It is also submitted that the FMP is binding of its own force as a statutory instrument made under the Forests Act. This is explained in more detail below.

The obligations, standards, conditions and requirements the statutory scheme imposes

The East Gippsland Forest Management Plan

59. Unlike some of the other instruments considered below, this is the only instrument specifically designed and written for East Gippsland. That fact in and of itself affords it an important place in the regulatory scheme.

60. At times throughout this proceeding, it has been asserted that the FMP is "out of date" or has been "superseded". In some respects, this might be so as a colloquial observation. However, there is an express amendment power in s 22 of the Forests Act for working plans, and in relation to the East Gippsland FMA that power has only been exercised once, in 1997. [42] The only place where, relevantly, the FMP itself speaks of being superseded is in relation to the preparation and implementation of Action Statements under the FFG Act. In this respect, the FMP states that Action Statements "may supersede some guidelines".[43]

61. Otherwise, from a legal perspective the Plan is as much 'in force' as any other statutory instrument. There is, for example, no provision in the legislative scheme to the effect that a new Action Statement overrides the

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[42] AD 515. This amendment was required to reflect the signing of the East Gippsland Regional Forest Agreement (Exh S in this proceeding).

[43] FMP p 28, AD 408.

FMP to the extent of any inconsistency, nor that the FMP is "subject to" any Action Statement. Indeed the Code of Practice states that an FMP contains the "fundamental plans for the sustainable management of environmental, social, cultural and economic values within each area".[44] As the FMP itself states (at p 3, AD 383) management strategies under Action Statements are intended to 'complement' the FMP. [45]

62. It has independent force as a statutory instrument and the conditions and standards in the management Guidelines found in the FMP are picked up and made binding as a condition of the Allocation Order and TRP. The Plan was determined after lengthy consultation, was in performance of Victoria's obligations under the RFA, and it is inconsistent with these features for it to be characterised as purely aspirational.

63. The FMP is intended to:

(a) Specify minimum levels of planned protection for natural values in state forests;[46]

(b) Provide a systematic basis for zoning decisions in State forests and therefore introduce stability. This is the function of guidelines;[47]

(c) Establish SPZs to be managed for conservation, SMZs to be managed for specific features while catering to timber production under certain conditions, and GMZs to cater for a range of uses but with timber production as a high priority;[48]

(d) Establish conservation guidelines for key threatened and sensitive fauna species including Powerful and Sooty Owls, long footed potoroos, spot tailed quoll, high density populations of arboreal mammals and threatened frog species.[49]

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[44] Code at p 13, AD 122

[45] Although it is noted at FMP p 12 (AD 392) that the FMP "will be suitably amended as new Action Statements are prepared")

[46] FMP Summary AD 375

[47] ibid; also p 7 AD 387

[48] ibid; also p 8 AD 388

[49] FMP p vi, AD 376

64. The SPZ is generated by applying the conservation guidelines set out in Ch 3, Biodiversity Conservation;[50] [emphasis added]

65. Linear reserves, of up to 200m are separate components, and intended to link one SPZ with another;[51] [emphasis added]

66. The conservation strategy under the FMP has 3 components and concentrates on key species that are threatened or are sensitive to timber harvesting namely:[52]

(a) Guidelines for "featured threatened and sensitive fauna" which relate to reserving areas in the SPZ for them;

(b) A network of linear reserves to maintain sensitive fauna populations across the landscape;

(c) Modified timber harvesting arrangements to retain high fauna values in the SMZ.

67. As recorded at p7 of the FMP (AD 387) the Guidelines for the protection of conservation values or the management of uses have been developed based on the best information and expert opinion available to the Department and provide a systematic basis for management decisions.

68. The Guidelines are in put in place with the express acknowledged that the needs of these key species may not be fully met by other conservation strategies, most obviously those strategies would include general reserves. It would be inconsistent with the language of the Guidelines and the intent of their incorporation to treat them as unenforceable aspirations.

69. The express incorporation into the Allocation Order and TRP of the conditions and standards set out in the Guidelines is a recognition of their importance.

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[50] FMP p 10, AD 390; also made clear at p 28, 33-34 (AD 408, 413-414)

[51] ibid

[52] FMP p 27, AD 407

70. The guidelines for large forest owls (i.e including the Sooty and Powerful owls) indicate the minimum number of individuals or the minimum area of suitable habitat that will receive planned protection on public land. It is intended State forest will fill the gap where there is insufficient protection in conservation reserves. Additional resources for these species (eg protected areas around roosting sites) will also persist in State forest.[53]

71. Where it refers to a SPZ, the FMP is not necessarily referring to a Zone in a geographic location which existed in 1995 when the FMP was promulgated. Otherwise, guidelines such as the arboreal mammal guideline would make no sense. Rather, the 'SPZ' (just like the GMZ) is a status as well as geographic areas identified in 1995. The status exists, in accordance with the FMP, once the guideline or standard is met, unless the FMP itself imposes a cap, in which case the FMP states there is to be a review once the cap is met, for the purposes of examining if there should be an adjustment to the SPZ under Ch 8. Another good example of how the FMP operates on status is the rainforest provisions: see AD 400[54].

72. Relevantly in this case, SPZ status does on the evidence exists for the glider habitat, and under the same guideline as a rich mammal site. Contrary to the view apparently taken by DSE,[55] the FMP does not confer a discretion on DSE whether or not to 'declare'[56] an SPZ once the Glider Guideline applies. The requirement to create or update a map to show the SPZ is administrative, but that mapping does not constitute the protection – the protection is conferred by the FMP itself.

73. For example, the identification of a high density of arboreal mammals that exceed the Guideline threshold does not require any amendment to the Management Plan or to the zones. There is no occasion for recourse to Chapter 8 which deals with review and amendment. The identification of that high density means that the Guideline is implemented in that regard.

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[53] FMP p 28, AD 408

[54] see also *Hastings v Brennan (No 3)* [2005] VSC 228

[55] Lee Miezis, T 994.4-.9

[56] 'Declaration' of a SPZ itself being a concept foreign to the FMP.

It might call for some administrative response for it to be efficacious, but not for its legal effect. The express attribution in the Allocation Order to VicForests to ensure that its forestry operations are in accordance with the Guideline means that it cannot rely on any administrative issues or inaction to avoid responsibility.

74. Within an SMZ, the FMP provides for express limits on the kind of harvesting which is permissible. These include no 'hot' burns, and concentrating harvesting on areas of lower value to the featured species such as ridges), with progressively more selective harvesting in better habitat. Very specific post harvesting monitoring is required. [57]

The Code of Practice

75. The Code of Practice describes "mandatory actions" which are to be conducted in order to achieve each operational goal[58]. Failure to undertake a relevant mandatory action constitutes non-compliance with the Code.[59]

76. Part 2.2 of the Code sets out requirements that must be observed during planning, tending, roading and harvesting of public forests[60]. Under cl 2.2.2, the Code descries the operational goal as requiring operations to "*specifically address the conservation of biodiversity, in accordance with relevant legislation, and regulations and considering relevant scientific knowledge.*"

77. Most particularly, under Part 2.2 of the Code, in forest management planning and in all its forestry operations the following mandatory actions must be undertaken:[61]

    (a) complying with measures specified in relevant Flora and Fauna Guarantee Action Statements;[62] and

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[57] FMP p 34 (AD 414).

[58] Code of Practice AD 106; at p 7

[59] Code of Practice AD 106, at p 7

[60] Code of Practice AD 106, at p 18

[61] Code of Practice AD 106 at p 21 (AD 130)

(b) applying 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; and

(c) considering the advice of relevant experts and relevant research in conservation biology and flora and fauna management at all stages of planning and operations.

(d) providing appropriate undisturbed buffer areas around significant habitat.

78. In the "Guidance" section of Conservation of Biodiversity, the Code states[63]:

(a) that the *"object of habitat retention measures is to facilitate the continued occupation or recolonisation by all species that are likely to have occurred in the area prior to timber harvesting through protection of the ecosystem that supports them. Thus, no part of the harvested area will become permanently unsuitable for any species likely to have been resident or a regular visitor to the area before it was harvested"*; and

(b) *"Opportunities to improve the protection of threatened species or habitat values may include reserving further strategic areas from harvesting"*; and

(c) *"Streamside buffers may both protect water quality and act as a wildlife corridor."*

79. The Code states that "Guidance" provides *"possible means for achieving operational Goals or Mandatory Actions"*, that forest managers are *"not obliged to conduct any of the actions covered under Guidance"*, and that *"failure to undertake any Guidance action does not itself constitute non*

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[62] There is also a reference to compliance with "Flora and Fauna Guarantee Orders", which the plaintiff understands to mean Interim Conservation Orders. Presently there are no such orders in relation to the area this proceeding concerns.

[63] Code at p 22, AD 131.

compliance with the Code, however it should be noted that Guidance generally supports or expands upon Mandatory Actions".

80. In the present situation, the Guidance at p 22 clearly points towards ways in which harvesting the coupes would achieve the Operational Goal in 2.2.2 and achieve compliance with the Mandatory Actions in that section. Clearly, the Operational Goal could not be achieved, and compliance with the Mandatory Actions would not exist, if planning for harvesting and actual harvesting of the coupes produced a result opposite to this Guidance: ie preventing the continued occupation or recolonisation by all species that are likely to have occurred in the area prior to timber harvesting and making the area permanently unsuitable for any species likely to have been resident or a regular visitor to the area before it was harvested.

Management Procedures 2009

81. The Management Procedures do not have any statutory source or authority. They are in the nature of an administrative policy such as was considered by Brennan J in *Drake v The Minister for Immigration*[64]. For example, in para 2.1.2 under that part of the document titled "VicForests Procedures" it purports to set down procedure for the notification of a proposed new TRP or to change an approved TRP. Such a procedure might be lawful provided it is not inconsistent with relevant legislation, in this case the SFT Act and is not slavishly followed.

82. To the extent that it purports to identify a regulatory hierarchy[65] including of statutes and statutory instruments it has no legal force and simply represents a Departmental view as to how those Acts and instruments sit together. It is certainly incapable of operating as an authoritative prescription of any hierarchy between subordinate instruments, as it purports to do.

83. Similarly, it cannot govern or prescribe an the amendment process or powers of subordinate instruments such as a Management Plan made

[64] (1979) 24 ALR 577; (1979) 2 ALD 60
[65] AD 858

under s 22 of the Forests Act or the Code of Practice made under s 31 of the CFI Act. Those matters are to be dealt with according to each Act.

84. Specifically:

(a) Cl 1.4.9, and 3.2.4 which deals with "Threatened Species Protection" and "Amendments to the Forest Management Zoning Scheme" respectively, cannot regulate in a binding way how an Action Statement or FMP might be implemented. In other words, it cannot dictate that an FMZ made under an FMP can only be amended in a particular way or by a particular person;

(b) The incorporation of standards and conditions from the Management Procedures as a condition of the Allocation Order does not alter the status of the procedures as a policy, although non-compliance with those standards may have consequences for VicForests' compliance with its obligations.

85. In any event, amendments to the FMP and the zones made under it are not relevant to the proceeding and are not required on the Plaintiff's case. The Plaintiff submits that where for example Guidelines are met, they conditions and standards embodied become binding on VicForests. They do not require any amendment to the zone scheme of the FMP nor any amendment to the Action Statement.

The Precautionary Principle

86. VicForests is bound to apply the precautionary principle by reason of:

(a) the Code of Practice;[66]

(b) s 5 (4)(b) of the *Sustainable Forests Act*; and

(c) The East Gippsland FMP.[67]

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[66] Code at p 21, AD 130

[67] FMP p 28, AD 408, and in relation to the spot tailed quoll expressly at p 29, AD 409.

87. Insofar as VicForests, by the Code, must apply the precautionary principle during planning and harvesting the precautionary principle is defined at p 78 of the Code[68]. The plaintiff submits this definition incorporates the usual conception of the principle, as set out below at [91], and focuses primarily on avoiding serious or irreversible damage. Contrary to the defendant's submissions, the two matters (threat of damage and scientific uncertainty) are not "preconditions" to the application of the principle, rather they are integral components of it.

88. The primary obligation to avoid serious or irreversible damage requires "careful evaluation of management options" before any action is taken. Necessarily that involves a prediction of whether serious or irreversible damage might occur under any of the options. This prediction will be informed by scientific evidence about the risks of damage.[69]

89. When the Code speaks of assessing the 'risk weighted consequences' of various options, it is (relevantly to this case) speaking of a way to decide which option to take in order to avoid serious or irreversible damage, by assessing the consequence of each option for each species, given the state of the species. The proponent of the action needs to establish there is no threat of serious or irreversible damage, and cannot rely on scientific uncertainty about the likelihood of damage to discharge that burden. Noting in its language or context directions attention to social and economic matters: cf s 5 of the SFT Act. It is focused on an operational level of activity.

90. The other places in which the precautionary principle is found (ie the FMP and the Sustainable Forests Act) also refer to the usual conception of that principle.

91. In *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270 Stein J said of it:

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[68] Code at p 78, AD 185.

[69] *Western Water v Rozen & Anor* [2008] VSC 382 at [97] per Osborn J

> The precautionary principle is a statement of common sense and has already been applied by decision-makers in 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.[70]

92. The difficulty is not so much in determining what the precautionary principle means or involves, as in how it is to be applied in a given circumstance. In the present circumstances, there is:

(a) a threat of serious or irreversible environmental damage because each of the species is already in a demonstrable state of decline which is likely to result in extinction and any actions which may further contribute to that decline or fail to arrest it will cause 'serious damage' to the species – and even damage to individuals of a threatened species (especially breeding females)[71] is always important; and

(b) a lack of scientific certainty as to the nature and scope of the threat, in that for some species the precise effects of timber harvesting are not known (eg Long Footed Potoroos), for others the extent to which they depend on or use the coupes is not known although the habitat is said to be high quality habitat for them and they are known to occur in, or in reasonable proximity to, the coupes (eg owls and giant burrowing frogs). For others there is a lack of scientific certainty about how much more old growth habitat can be logged before such habitat loss will cause the population to cease to be ecologically functional (ie spot tailed quolls).

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[70] See also *Telstra Corporation Ltd V Hornsby Shire Council* (2006) 67 NSWLR 256

[71] Dr Belcher, T 616.21-.29 and 625.12-30.

93. Further, based on the report of Dr Meredith that there is a case to be made that the coupes constitute critical habitat[72] for four listed species[73], it follows that the destruction of that habitat would clearly cause serious or irreversible environmental damage. The damage is serious because it will destroy both habitat and possibly individuals of the species. The damage is for all intents and purposes irreversible because of the time it takes for the habitat to re-establish, especially tree hollows (150-200 years) and understorey, and the land is then removed from functioning as an ecosystem and becomes a tree plantation.

94. Applying the precautionary principle in this context means refraining from logging the area unless and until three things are positively established and appropriate management regimes created:

(a) The presence or absence of any of the listed species in all or any of the coupes, and reliable information about how they are using the coupes. [74] This requires pre logging surveys to be carried out, which on the evidence neither VicForests nor DSE do.[75]

(b) What protection measures are required by the regulatory scheme because of species' presence, together with the implementation of those measures and an assessment of what if any land remains available for harvesting; and

(c) Whether the coupes are critical habitat for any of the species (which is not limited to whether the species are in fact present in the coupes). The latter fact may affect whether any harvesting should be permitted at all.

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[72] See the meaning of "critical habitat" described by Dr Meredith at JR 39 at p 10-16

[73] Namely, the long footed potoroo, the spot tailed quoll, the sooty owl and the large brown tree frog. , The plaintiff accepts the same argument cannot be put in relation to the orbost spiny crayfish, and not yet put in relation to the new taxon because it is not listed under the FFG Act.

[74] E.g are they traversing the coupes, using them forgaing, using them for breeding.

[75] The minutes of the 7 April 2009 and 7 May meetings (Exh 52) demonstrate that VicForests' position on pre logging surveys was that they were likely to identify more threatened species, contrary to VicForests' interest in logging, would be costly and time consuming and therefore should be avoided.

95. The precautionary principle of its nature cannot be applied in logging operations after logging. VicForests has precluded itself from applying the precautionary principle by ignoring and not acting on the evidence it had, and by attempting to hand pass all its responsibilities to DSE, relying on DSE's inaction or inability to impose any regulation on VicForests, despite the species being threatened species and ample evidence establishing the risk of serious harm to them. It has simply decided not to engage with this evidence, nor to take seriously the fact that these species have been identified as facing extinction.

General Submissions on the Defendant's Approach to the Precautionary Principle

96. VicForests has pleaded two specific defences to the allegation that it has breached the precautionary princple. First, that it is a duty of imperfect obligation. That submission should be rejected, and no authority is cited to support it. Secondly and alternatively, for each species it pleads compliance with the precautionary principle as follows:

(a) Large Brown Tree Frog: stream side buffer;

(b) Potoroo: stream side buffer and 40,000ha core protected area;

(c) Quoll: stream side buffer and target of 75 Quoll sites met;

(d) Sooty Owl: stream side buffer, modified tree prescriptions and 131 SOMAs;

(e) Powerful Owl: stream side buffer, modified tree prescriptions and 120 POMAs;

(f) Orbost Spiny Crayfish: stream side buffer;

(g) Square Tailed Kite: stream side buffer, and modified tree prescriptions;

(h) Giant Burrowing Frog: stream side buffer; and

(i) New Cray taxon: stream side buffer.

Reserves Are irrelevant

97. It is noted that VicForests has not pleaded that the availability of the reserves (apart from the 40,000ha core protected area) is relevant to its discharge of the precautionary principle. Further, it has not adduced any evidence about the extent, nature and quality of that habitat for any of the species. For a number of witnesses it asked that the witness assume that it be so, but there is no evidence about that habitat that would support VicForests case even if it were properly raised on the pleading.

Once Size Fits All is not precautionary

98. The 'one size fits all' approach of the 100 metre buffer (originally designed because of a detection by EEG said to be a OSC, but then continued for some new detections, no matter what the species) illustrates VicForests' determination to ensure that harvesting occurs in these coupes and its failure to examine its obligations through the prism of what is best (or even, what is legally required) for the protection each species.

99. The habitat tree retention is also a 'one size fits all' approach, but on the evidence known by VicForests to be susceptible in practice to failure, as evidenced by how VicForests performed its obligations in coupe 20, and what the habitat tree retention rates in fact were. [76]

Downplaying Scientific Information

100. It is a consistent theme, and inconsistent with the precautionary princple, that scientific evidence about presence of threatened species in these coupes and how that should be managed was marginalised and ignored during 2009. Specifically:

(a) In relation to the surveys conducted by DSE, Mr Vaughan insisted on attending to ensure the methodology was "sound" yet he appears to have no relevant expertise and when the results showed a high level of arboreal mammals he sought to criticise the methodology and attack the outcome for timber harvesting of acting on the results;

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[76] Dr Smith's report, Exh 14, page 13.

(b) VicForests was hostile and resistant to surveying in the meetings on 7 April and 9 May 2009, appearing to reject Mr Miezis' insistence that it had legal responsibility for how to manage the detections in the coupes;

(c) BES were not involved in the drawing of the LFP SMZ and retained habitat until after Mr Miezes and Mr MacDonald had worked out what suited VicForests, and suggestions from people like Natasha McLean appeared to have been ignored;

(d) BES were not involved in the decision to reject the validity of the Lincoln footage, and no potoroo experts appear to have been consulted.

101. VicForests has steadfastly sought to play down or misinterpret the DSE surveys, reports and opinions by Steve Henry, ignore EEG detections and surveys, and now proposes to ignore the scientific evidence adduced in this case. It is also relevant that the Ministerial briefing did not fairly represent the results of the survey, so that any Ministerial 'endorsement' of VicForests' course of action was misinformed.

It relies on desktop Analysis and out of date Data

102. Mr Spencer gave detailed evidence about the sophisticated spatial datasets that VicForests uses to conduct its forestry operations. Where that data is important to its business, it is detailed and up to date. By contrast threatened species records are out of date and unreliable. For example, what happened to the two potoroo records to the west of Legges Road between 2001 and 2009 is completely unexplained. They should have generated a SPZ, possibly one which came down over Legges Rd. Some of Mr Spencer's maps appear to show such a possible outcome, but then this issue just disappears.

103. VicForests appears to invest no resources into that data set and leaves it to DSE. The information is unreliable. The coupe data for the four coupes reveals the system relies on records from as far back as 1999 and 2000 which have no relevance to its current harvesting schedule.

104. Further, to the extent that there is any field assessment, it is directed to resource issues such as access and yield. Notwithstanding the breadth of information about species in these coupes, Mr Spencer testified that no further field assessment was required since the last one was undertaken in 2006[77].

Lack of Resources at VicForests no excuse

105. VicForests is a substantial operation with a turnover of around $125 million in 2009. It employs substantial numbers of people, with a payroll over $10m and many of those are highly skilled professional and technical staff. None of its employees have ecological and zoological expertise.

106. Of course, the choice it makes about the mix of its staff is irrelevant to the proper construction of the regulatory scheme. Nor can it (any more than BHP) rely on the fact that it is a "commercial entity" as being relevant to the performance of its conservation obgliations.

107. It is bound to apply the precautionary princple and to implement Action Statements and the FMP. That requires knowledge and expertise about the ecological, biological and zoological of its operations. It chooses not to have any trained staff, nor is there evidence of it retaining consultants to provide that knowledge. Indeed, during 2009, it elected not to use the Arthur Rylah Institute in the surveys of potoroos.

DSE Says it is VicForests Responsibility

108. A central pillar to VicForests defence is that responsibility for biodiversity and conservation rests with DSE. That approach does not accord with the statutory and regulatory scheme nor is it how DSE conceives the situation.

109. According to Mr Miezes, vesting of the timber resource in VicForests under the TRP is a critical juncture at which time responsibility for conservation and biodiversity at an operational level shifts to

[77] TS 774 line 29

VicForests[78]. Mr Miezes described the role of DSE from that point at being at the "strategic land management level"[79].

110. By contrast he said that whatever issues that might build up after vesting of the timber about threatened species it is up to VicForests to deal with them at an operational level[80].

No Risk Weighted analysis

111. In cross examination of many of the Plaintiff's experts, it was suggested that the precautionary princple required an assessment of the economic consequences of action and a risk weighted assessment taking those economic consequences into account. It is submitted:-

(a) First, that matter is not pleaded,

(b) Second, there is no material to suggest that VicForests ever undertook such an analysis; and

(c) Third, for the reasons already set out, it is not required by the precautionary principle. Application of the principle is not, as Dr Meredith observed, the same as conducting a general environmental impact assessment.

DATED 24 MARCH 2010

D S MORTIMER
RM NIALL
P KNOWLES

[78] TS 979-984 Ex 64.
[79] TS 984
[80] TS 984