SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCI 2022 0111
S EAPCI 2022 0112
S EAPCI 2023 0007
S EAPCI 2023 0008

VICFORESTS — Applicant/ Cross-respondent

v

ENVIRONMENT EAST GIPPSLAND INC & ANOR (according to the attached Schedule) — Respondents/ Cross-applicants

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JUDGES:	EMERTON P, MACAULAY JA and KAYE JA
WHERE HELD:	Melbourne
DATE OF HEARING:	23 and 24 March 2023
DATE OF JUDGMENT:	27 June 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 159
JUDGMENT APPEALED FROM:	[2022] VSC 668 (Richards J)

ENVIRONMENTAL LAW – Application for leave to appeal – Applicant harvested timber in Victoria's State forests in East Gippsland and Central Highlands region – Primary judge found that applicant's timber harvesting operations did not comply with regulatory requirements and threatened survival of native fauna – Judge granted prohibitory injunctions and declaratory relief – Whether applicant denied procedural fairness – Whether judge erred in construing ss 2.2.2.2 and 2.2.2.4 of the *Code of Practice for Timber Production 2014 (as amended)* – Precautionary principle – Whether necessary equity to attract injunctive relief established – Whether injunctions limited to what was necessary to avoid unlawfulness – Whether declarations and injunctions impermissibly imprecise and uncertain – Whether judge failed to give adequate reasons – Leave to appeal granted – Appeal dismissed.

ENVIRONMENTAL LAW – Application for leave to cross-appeal – Injunctions required applicant to conduct surveys and identify and address risks to gliders present in coupe at time of survey – Whether judge failed to consider risks affecting gliders proximate to but outside coupe at time of survey – Leave to cross-appeal refused.

Code of Practice for Timber Production 2014 (as amended), ss 2.2.2.2, 2.2.2.4 – *Sustainable Forests (Timber) Act 2004*, s 45.

Environment East Gippsland Inc v VicForests (2010) 30 VR 1 – *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704.

Counsel

Applicant/ Cross-respondent:	Ms RM Doyle SC with Mr OM Ciolek and Ms H Douglas
Respondents/ Cross-applicants:	Mr J Korman with Dr K Weston-Scheuber

Solicitors

Applicant/ Cross-respondent:	Johnson Winter & Slattery
Respondents/ Cross-applicants:	Oakwood Legal

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EMERTON P
MACAULAY JA
KAYE JA:

Introduction

1 Victoria's forest estate comprises large tracts of public land reserved as State forest under the *Forests Act 1958*. Much of this State forest is found in eastern and north-eastern Victoria, in East Gippsland and in the Central Highlands region.

2 These areas are inhabited by two species of gliding mammals, the southern greater glider or *petauroides volans*, and the yellow-bellied glider or *petaurus australis*.

3 The southern greater glider is one of three species of greater glider and the only one found in Victoria.[1] The southern greater glider glides between tree canopies and uses hollow-bearing trees for shelter and nesting. It has a relatively small 'home range'.

4 The southern greater glider is thought to be the most threatened species of greater glider and to have suffered the sharpest population declines. It is highly vulnerable to the impacts of logging.[2] At the time of the trial of this proceeding, the southern greater glider was classified as 'vulnerable' on the list of threatened species made under s 178 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'). On 5 July 2022, it was re-classified as 'endangered'.[3]

5 The yellow-bellied glider is found in native eucalypt forests in eastern Australia. The range of movement of this species is more extensive than that of the greater glider. The main threats to its survival include loss and fragmentation of habitat, and loss of hollow-bearing and feed trees.[4] At all relevant times, the yellow-bellied glider was classified as 'vulnerable' under the EPBC Act.[5]

6 The applicant, VicForests, is a business owned by the Victorian Government established by an Order in Council made under s 14 of the *State Owned Enterprises Act 1992*. Its function is the management and sale of timber resources from Victorian State forests on a commercial basis. It conducts timber harvesting operations in State forests in East Gippsland and the Central Highlands of Victoria.

7 Environment East Gippsland Inc ('EEG') and Kinglake Friends of the Forest Inc ('KFF') (collectively, the respondents) are incorporated associations which have been held to have a special interest in the preservation of forests in East Gippsland and the Central Highlands respectively.[6] They became concerned that VicForests' timber harvesting operations in East Gippsland and the Central Highlands were threatening the

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1 *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668, [78] ('Liability Reasons').
2 Liability Reasons, [81].
3 Liability Reasons, [84].
4 Liability Reasons, [87]–[88].
5 Liability Reasons, [89].
6 There is no dispute that EEG and KFF have standing in these proceedings: *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1; *VicForests v Kinglake Friends of the Forest Inc* (2021) 66 VR 143.

survival of the greater glider and the yellow-bellied glider in those areas and have taken legal action to secure the protection of glider mammals in those areas.

8 By writ filed on 11 May 2021, EEG commenced a proceeding against VicForests in the Supreme Court ('East Gippsland proceeding') seeking:

(a) declarations that VicForests is required to:

(i) identify gliders inhabiting coupes in the East Gippsland Forest Management Area ('FMA')[7] by conducting enhanced pre-harvest surveys;

(ii) address risks to identified gliders by taking certain management actions (such as implementing 'exclusion areas' and 'appropriate buffers'); and

(b) injunctions restraining VicForests' timber harvesting operations to prevent it from failing to comply with its obligations under the regulatory framework as those obligations apply to the conservation of the greater glider and the yellow-bellied glider in the East Gippsland FMA.

9 By writ filed on 9 November 2021, KFF commenced a proceeding seeking similar declaratory and injunctive relief in relation to the preservation of gliders in the Central Highlands ('Kinglake proceeding').

10 The East Gippsland and Kinglake proceedings were heard together by a judge in the Trial Division over seven days in May and June 2022.

11 At trial, VicForests adduced evidence about its timber harvesting operations from various witnesses.[8] The witnesses gave evidence that in a typical year, VicForests harvests approximately 2,500 hectares of State forest, 70 per cent of which is in the Central Highlands and 10 to 15 per cent in East Gippsland.[9] They explained the requirement for a 'summary and retention plan' to be prepared before harvesting in a coupe[10] can commence, and gave details about the harvesting systems used by VicForests. This includes 'variable retention harvesting', which means that a particular proportion of seed or habitat trees are retained depending upon the density of the forest.[11]

12 In relation to protecting gliders, a baseline protective measure taken by VicForests is to observe the prescribed 'habitat tree retention rates'.[12] VicForests' practice is to retain 40 per cent of the basal area of eucalypts across a coupe if three or more greater gliders

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7 FMA means a territorial unit for planning and managing State forests in Victoria.

8 VicForests' witnesses included Monique Dawson (its Chief Executive Officer), James Gunn (its Manager of Forest Practices) and William Paul (its Director of Environmental Performance): Liability Reasons, [41].

9 Liability Reasons, [43].

10 Coupe means a specific area of State forest identified for the purposes of timber harvesting and regeneration in a timber release plan.

11 Liability Reasons, [58]–[71].

12 Liability Reasons, [165]. Table 12 of the Standards sets out, among other things, habitat tree retention rates for various types of forest. The Standards also provide guidance about the selection of habitat trees to be retained.

are detected per spotlight kilometre.[13] Additionally, in East Gippsland, where more than 10 greater gliders or five yellow-bellied gliders are detected in a spotlight kilometre, VicForests establishes protection areas as required by the relevant management standards.

13 VicForests adduced evidence about the measures that it takes for the detection of gliders.[14] To detect gliders, VicForests relies on pre-harvest spotlight surveys conducted by the Department of Environment, Land, Water and Planning ('DELWP') as well as spotlight and thermal imaging surveys carried out by its own staff and contractors. Spotlight surveying involves walking through a marked transect of suitable habitat looking for certain species with a spotlight and listening for aural detections. It is not the practice of either the DELWP or VicForests to survey an entire coupe.[15] VicForests adduced evidence about the feasibility of pre-harvest surveys having regard to operational costs, labour requirements and safety to risks to VicForests' staff and contractors (which included poor visibility, falling limbs and fatigue).[16]

14 Both the respondents and VicForests adduced expert ecological evidence about the impact of timber harvesting on gliders and the measures required when planning for and harvesting timber in order to comply with the relevant regulatory requirements. The respondents adduced expert evidence from Associate Professor Grant Wardell-Johnson, and VicForests from Dr Benjamin Wagner. The experts provided separate reports and prepared a joint report. They gave their oral evidence concurrently, answering a series of questions formulated by the judge and agreed by the parties, and were cross-examined by counsel. That evidence is discussed in detail below. Suffice to say that neither expert considered that VicForests, in conducting its timber harvesting operations, was complying with the relevant statutory requirements for the detection and conservation of the gliders.

15 On 4 November 2022, the judge delivered her reasons for judgment.[17] In summary, the judge found that the timber harvesting operations conducted by VicForests in both East Gippsland and the Central Highlands did not comply with the regulatory requirements and threatened the survival of the gliders. Her Honour proposed to make declarations reflecting her conclusions and to grant injunctions restraining VicForests from conducting timber harvesting operations in those areas unless certain measures were taken.

16 Following the delivery of the Liability Reasons, the judge invited the parties to submit a final form of orders, preferably by consent, based on those reasons.[18] The parties each submitted proposed orders together with written submissions. On 11 November 2022, her Honour heard argument on the proposed orders and subsequently made a set of final orders in each of the East Gippsland and Kinglake proceedings (together, the 'Final Orders'). The Final Orders largely, but not exactly, give effect to the orders sought by

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13 Liability Reasons, [172].
14 Liability Reasons, [154].
15 Liability Reasons, [7(3)], [156], [158], [160], [163].
16 Liability Reasons, [272].
17 See above n 1.
18 Liability Reasons, [377]–[378], [393], [396].

the respondents in each proceeding.[19]

17 Her Honour gave separate reasons for the form of the Final Orders.[20]

18 The judge made declarations and injunctions which in substance restrained VicForests from conducting timber harvesting operations in any coupe in any of the relevant areas unless the coupe had first been surveyed using a reasonably practical method to detect any gliders that might be present in the coupe and identify their feed trees and hollow-bearing trees. The conduct of timber harvesting operations in any coupe in which gliders were detected was restrained unless specified areas and riparian strips along all waterways in the coupe were excluded from harvesting and at least 60 per cent of the basal area of eucalypts in the harvested area of the coupe was retained.[21]

19 VicForests now seeks leave to appeal the decision and orders of the primary judge. The respondents also apply for leave to cross-appeal seeking additional injunctive relief.

20 For the reasons that follow, we would grant leave to appeal but dismiss the appeal. We would further refuse leave to the respondents to cross-appeal.

Regulatory framework

21 The regulation of timber harvesting in State forests occurs within a national policy framework that includes the EPBC Act and the *Regional Forest Agreements Act 2002* (Cth). Victoria and the Commonwealth have entered into five Regional Forest Agreements ('RFAs'), including the East Gippsland RFA and the Central Highlands RFA. In conducting timber harvesting operations under the RFAs, VicForests must comply with the provisions of the *Sustainable Forests (Timber) Act 2004* ('Timber Act') and any relevant Code of Practice made under Pt 5 of the *Conservation, Forests and Lands Act 1987* ('CFL Act').

22 The primary purpose of the Timber Act is to provide a framework for sustainable forest management and sustainable timber harvesting in State forests.[22] It provides that all timber resources in State forests are the property of the Crown and that that property may only pass from the Crown in accordance with the provisions of the Timber Act. Under s 13, the Minister for Agriculture may allocate timber to VicForests for the purposes of harvesting and selling timber resources.

23 On 1 October 2013, the Minister made an order published in the Government Gazette by which property in timber was allocated and vested in VicForests ('allocation order'). The allocation order has been amended from time to time, including on 24 April 2019. It specifies a number of conditions with which VicForests must comply, including compliance with any Code of Practice.

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19 The Final Orders were subsequently varied pursuant to reasons published on 17 February 2023: *Environment East Gippsland Inc v VicForests (No 6)* [2023] VSC 60. The varied orders and related reasons are not the subject of the proceedings now before us.

20 *Environment East Gippsland Inc v VicForests (No 5)* [2022] VSC 707 ('Reasons for Final Orders').

21 The restraints imposed were subject to certain exclusions and VicForests was given liberty to apply to further expand the exclusions, if necessary, by reopening its case.

22 Timber Act s 1(a).

24 The Code of Practice with which this proceeding is concerned is the *Code of Practice for Timber Production 2014 (as amended 2022)* ('Code'), which was made pursuant to Pt 5 of the CFL Act and incorporates the *Management Standards and Procedures for timber harvesting operations in Victoria's State forests* ('Standards').

25 The Code and the Standards impose various obligations on VicForests that are directed to maintaining the biological diversity and ecological characteristics of native flora and fauna in the State forests in which it operates, which includes species listed under the EPBC Act (such as the greater glider and the yellow-bellied glider).

26 Section 1.2.1 of the Code explains the need for a code of practice for timber harvesting:

> Maintaining the benefits to society provided by forest ecosystems depends on balancing community needs and concerns with careful stewardship and responsible management. The effective implementation of the Code helps to ensure that timber production is 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.

27 The purpose of the Code is set out in s 1.2.2:

> The purpose of the Code is to provide direction to the managing authority, harvesting entities and operators to deliver sound environmental performance when planning for and conducting commercial timber harvesting operations in 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 forests;
> - provides for the ecologically sustainable management of timber harvesting operations in native forests within State forests until 2030 when timber harvesting operations in native forests will cease;[23] and
> - enhances public confidence in the management of timber production in Victoria's forests and plantations.

28 The Glossary to the Code defines 'timber harvesting operation' to mean:[24]

> [A]ny of the following kinds of activities carried out by any person or body for the purposes of sale or processing and sale—
>
> (a) felling or cutting of trees or parts of trees;
>
> (b) taking or removing timber;
>
> (c) delivering timber to a buyer or transporting timber to a place for

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23 On 23 May 2023, between the hearing of the appeal and publication of these reasons, the Treasurer for Victoria, the Honourable Tim Pallas, announced that the Victorian State Government will bring forward the end of logging in native forests within State forests from 2030 to 1 January 2024.

24 This definition is similar but not identical to the definition of 'timber harvesting operations' in s 3 of the Timber Act.

collection by a buyer or sale to a buyer;

(d) any works, including road works, site preparation, planting and regeneration, ancillary to any of the activities referred to in paragraphs (a) to (c)—

but does not include—

(e) the collection or production of firewood for domestic use.

29 The Code applies to all timber harvesting operations unless expressly excluded. It is designed to cover 'the planning and conducting of all commercial timber production and timber harvesting operations on both public land and private land in Victoria'.[25]

30 The Code has three tiers:

(a) Code Principles: six broad outcomes that express the intent of the Code for each aspect of sustainable forest management;

(b) Operational Goals: the stated desired outcome or goal for each specific area of timber harvesting operations to meet the Code Principles; and

(c) Mandatory Actions: the actions to be conducted in order to achieve Operational Goals (which are supplemented by the Standards).[26]

31 The Operational Goals and Code Principles are set out in s 1.3. Table 1 in this section describes the relationship between the relevant Code Principle and Operational Goals, for the purpose of these proceedings, as follows:

Code Principles	**Operational Goals**	**Section**
Biological diversity and ecological characteristics of native flora and fauna within forests is maintained.	Timber harvesting operations in State forests specifically address biodiversity conservation risks and consider relevant scientific knowledge at all stages of planning and implementation. …	2.2.2 and 3.2.2 Conservation of Biodiversity …
	Harvested native forest is managed to ensure that the forest is regenerated and the biodiversity of the native forest is perpetuated. …	2.2.2 and 3.2.2 Conservation of Biodiversity …

[25] The Code s 1.2.4.
[26] Standards cl 1.3.

32 Section 1.3 also states:

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

33 Chapter 2 of the Code governs timber harvesting operations in State forests.

34 Section 2.2 is concerned with environmental values in State forests, including native forests. The introduction to that section explains that timber harvesting in native forests 'may have local impacts on environmental values such as water quality and biodiversity' which can be minimised by 'planning and management throughout the lifecycle of the timber harvesting operation'.

35 Environmental values include the conservation of biodiversity.[27] 'Biodiversity' is defined as follows:[28]

> ***biodiversity*** means the variability among living organisms from all sources (including terrestrial, marine and other aquatic ecosystems) and includes—
>
> (a) diversity within species and between species; and
>
> (b) diversity of ecosystems.[29]

36 Section 2.2 is titled 'Conservation of Biodiversity'. This part of the Code is at the heart of these proceedings and begins by setting out several Operational Goals, the most relevant of which is this:

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

37 Section 2.2 then prescribes various 'mandatory actions' which are directed to achieving that Operational Goal:

> **Addressing biodiversity conservation risks considering scientific knowledge**
>
> 2.2.2.1 Planning and management of timber harvesting operations must comply with relevant biodiversity conservation measures specified within the [Standards].
>
> 2.2.2.2 The precautionary principle must be applied to the conservation of biodiversity values. The application of the precautionary principle will be consistent with relevant monitoring and research that has improved

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27 The Code s 2.2.2.

28 The Glossary to the Code states that 'biodiversity' has the same meaning as in the *Flora and Fauna Guarantee Act 1988*.

29 *Flora and Fauna Guarantee Act 1988* s 3(1) (definition of 'biodiversity').

the understanding of the effects of forest management on forest ecology and conservation values.

Note: It is intended by the definition of the precautionary principle and section 2.2.2.2 that the precautionary principle and its application in section 2.2.2.2 be understood as it was by Osborn J in *Environment East Gippsland Inc v VicForests* [2010] VSC 335 (in relation to the precautionary principle as it appeared in the *Code of Practice for Timber Production 2007*).

2.2.2.3 The advice of relevant experts and relevant research in conservation biology and flora and fauna management must be considered when planning and conducting timber harvesting operations.

2.2.2.4 During planning identify biodiversity values listed in the [Standards] prior to roading, harvesting, tending and regeneration. Address risks to these values through management actions consistent with the [Standards] such as appropriate location of coupe infrastructure, buffers, exclusion areas, protection areas, management areas, modified harvest timing, modified silvicultural techniques or retention of specific structural attributes.

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

…

38 The 'precautionary principle' is defined in the Glossary to the Code as follows:

'**precautionary principle**' means that 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 application of the precautionary principle, decisions by managing authorities, harvesting entities and operators must 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.

Note: It is intended by the definition of the precautionary principle and section 2.2.2.2 that the precautionary principle and its application in section 2.2.2.2 be understood as it was by Osborn J in *Environment East Gippsland Inc v VicForests* [2010] VSC 335 (in relation to the precautionary principle as it appeared in the *Code of Practice for Timber Production 2007*).

39 Section 1.2.4 explains the role of the Standards and their relationship with the Code. It confirms that the Standards form part of the Code.[30] It states that the Standards are informed by policy documents and that they are consistent with the Operational Goals

[30] All references to the Code include references to the Standards. To the extent of any inconsistency between the two, the Code will prevail: The Code s 1.2.4A.

and Mandatory Actions set out in the Code. In particular, the Standards 'provide detailed mandatory operational instructions, including region specific instructions for timber harvesting operations in Victoria's State forests'.

40 For the purpose of s 2.2.2.1 of the Code, the biodiversity conservation measures specified in the Standards include cl 4.2.1, which provides for 'detection-based management' of fauna and flora in any area that may be affected by current or planned timber harvesting operations. If, in that area, the presence of a 'value' listed in Table 13 of the Standards is identified, the managing authority must (among other things):

(a) notify the Secretary of the evidence and the location of the value; and

(b) 'apply and undertake any associated management action specified in the Table' prior to commencing timber harvesting operations (or as soon as possible if operations have already commenced).

41 Table 13 prescribes specific management actions for rare or threatened fauna and invertebrates, including the greater glider and yellow-bellied glider. In the East Gippsland FMA (but not in the Central Highlands FMAs), certain management actions are prescribed for both species:

Species Name	**Value**	**Applicable FMAs**	**Management Actions**
Greater glider *Petauroides volans*	Relative abundance (More than 10 per Spotlight Kilometre)	East Gippsland FMA	Apply a protection area of approximately 100 ha of suitable habitat where records report a relative abundance of more than 10 individuals per spotlight kilometre (equivalent to more than 2 individuals per hectare or more than 15 individuals per hour of spotlighting), or where substantial populations are located in isolated or unusual habitat. **Note**: Assumed rate of spotlighting per kilometre is 100 mins per 1 km and visible range either side of transect for this species is 25 m, equating to assumed minimum survey area of 5 hectares.
Yellow-bellied glider *Petaurus australis*	Relative abundance (More than 5 per Spotlight Kilometre)	East Gippsland FMA Otways FMA	Apply a protection area of approximately 100 ha of suitable habitat where records report a relative abundance of more than 5 individuals per spotlight kilometre (equivalent to more than 0.2 individuals per hectare or more than 7 individuals per hour of spotlighting), or where substantial populations are located in isolated or unusual habitat. **Note**: Assumed rate of spotlighting per kilometre is 10 mins per 100 m and visible range either side of transect is 150 m, equating to assumed minimum survey area of

			30 hectares.

Reasons

42 The judge recorded the parties' submissions at trial. The respondents (as plaintiffs) submitted that that ss 2.2.2.2 and 2.2.2.4 of the Code require comprehensive pre-harvest surveys of a coupe scheduled for harvesting, in order to identify whether greater gliders and yellow-bellied gliders are present within the coupe and, if so, the location of the gliders' home ranges. They further contended that ss 2.2.2.2 and 2.2.2.4 require VicForests to exclude an area of forest from harvesting around the location of each sighting of greater glider or yellow-bellied glider. In addition, EEG submitted that VicForests was not meeting its obligations under cl 4.2.1.3 of the Standards to apply a protection area of approximately 100 hectares of suitable habitat around certain populations of greater gliders and yellow-bellied gliders.

43 In response, VicForests denied that ss 2.2.2.2 and 2.2.2.4 of the Code had the meanings contended for by the respondents. VicForests argued that the precautionary principle in s 2.2.2.2 was not engaged in relation to greater gliders or yellow-bellied gliders, and that the measures it takes for the detection and protection of both were adequate. VicForests submitted that it correctly applied s 2.2.2.4 when planning timber harvesting operations in East Gippsland, and that s 2.2.2.4 had no application in the Central Highlands in relation to greater gliders or yellow-bellied gliders. In the East Gippsland proceeding, VicForests maintained that it met the obligations under cl 4.2.1.3 of the Standards. It further submitted that neither respondent had made out a case for relief, and that, in any event, relief should be refused on discretionary grounds.

44 Having regard to the arguments advanced and the evidence adduced at trial, the judge identified 15 issues for determination:

(1) What is the proper interpretation of s 2.2.2.2 of the Code?

(2) What is the proper interpretation of s 2.2.2.4 of the Code?

(3) What measures does VicForests take in its timber harvesting operations for the conservation of greater gliders?

(4) Is the precautionary principle engaged in relation to greater gliders?

(5) If so, is VicForests applying the precautionary principle to the protection of greater gliders?

(6) What measures does VicForests take in its timber harvesting operations for the conservation of yellow-bellied gliders?

(7) Is the precautionary principle engaged in relation to yellow-bellied gliders?

(8) If so, is VicForests applying the precautionary principle to the protection of yellow-bellied gliders?

(9) Is VicForests applying the precautionary principle to the detection of gliders?

(10) Is VicForests applying s 2.2.2.4 of the Code in East Gippsland?

(11) Is VicForests applying s 2.2.2.4 of the Code in the Central Highlands?

(12) In East Gippsland, is VicForests correctly applying cl 4.2.1.3 of the Standards?

(13) Is VicForests likely, absent an order of the Court, to apply cl 4.2.1.3 of the Standards incorrectly in future?

(14) Should injunctions be granted in the form sought by the respondents, or in some other form?

(15) Should declarations be made in the form sought by the respondents, or in some other form?

45 As to the proper construction of s 2.2.2.2 of the Code, the judge held that the precautionary principle involves two inquiries: (a) are there threats of serious or irreversible environmental damage; (b) about which there is a lack of scientific certainty? If the answer to both of those inquiries is 'yes', proportionate measures to prevent environmental degradation should not be postponed.[31]

46 As to s 2.2.2.4 of the Code, the judge held this to be a mandatory action requiring VicForests, during planning, to identify whether and where the biodiversity values listed in the first column of Table 13 of the Standards are present in a coupe before undertaking timber operations. The phrase 'biodiversity values' refers to things, including species of fauna and flora, that have value to biodiversity. Greater gliders and yellow-bellied gliders are biodiversity values for this purpose and where they are present in a coupe, VicForests must address risks to them by taking management actions consistent with the Standards. These actions may be in addition to the management actions prescribed in Table 13, where that is necessary to address risks to the species.[32]

47 The judge described the measures undertaken by VicForests in relation to the conservation of greater gliders. These measures included pre-harvest spotlight surveys conducted by the DELWP, in addition to spotlight surveys carried out by its own staff and contractors. Her Honour recorded that it was not the practice of either the DELWP or VicForests to survey an entire coupe; instead, transects approximately one kilometre in length are surveyed within a coupe and, where possible, VicForests conducts the surveys along an existing road or track. VicForests retains habitat trees, as required by cl 4.1.1.1 and Table 12 of the Standards, giving priority to hollow-bearing trees and to trees most likely to develop hollows in the short-term, and uses 'variable retention harvesting' as its preferred method of timber harvesting. In both East Gippsland the Central Highlands, VicForests retains 40 per cent of the basal area of eucalypts across each harvested coupe in which three or more greater gliders are detected per spotlight kilometre.[33]

48 Her Honour recorded that in East Gippsland, VicForests applies a protection area of approximately 100 hectares where a 'relative abundance' of greater gliders is detected,

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31 Liability Reasons, [7(1)].
32 Liability Reasons, [7(2)].
33 Liability Reasons, [7(3)].

as required by cl 4.2.1.3 and Table 13 of the Standards. It does not do this in the Central Highlands, where there is no equivalent prescription.

49 The judge held that the precautionary principle was engaged in relation to greater gliders. The greater glider is at risk of extinction as a species and VicForests' timber harvesting operations in East Gippsland and the Central Highlands present a threat of serious or irreversible harm to the greater glider as a species. Her Honour found that there is a lack of scientific certainty about the nature and extent of the threats to the species, including as to the effect of timber harvesting operations on the species.[34]

50 The judge concluded that VicForests did not apply the precautionary principle to the protection of greater gliders. The expert ecologists had recommended two alternative measures for providing the necessary protection:

(a) the retention of a circular area of approximately 18 hectares of suitable habitat centred on a confirmed glider sighting, but allowing for intensive timber harvesting outside of the exclusion area; or

(b) the retention of a smaller area of habitat of around three hectares corresponding to the home range of any greater glider detected within the coupe, along with the retention of at least 60 per cent of the basal area of the remainder of the coupe, protecting suitable habitat features such as hollow-bearing trees and feed trees.

51 Both approaches depended on maintaining connectivity between areas of suitable glider habitat, including by retaining riparian strips along waterways.

52 The judge found that VicForests does not currently take either of these approaches and that the actions taken by VicForests to conserve greater gliders detected within a coupe scheduled for harvest were inadequate and in many cases unlikely to be effective. The measures taken by VicForests were not consistent with relevant scientific research. In particular, variable retention harvesting was shown not to be effective to conserve greater glider populations in harvested coupes. Its impact is similar to clearfell harvesting. Her Honour concluded:

> VicForests' current approach falls well short of what the precautionary principle requires for the conservation of greater gliders. The ecological evidence was clear — greater gliders that live in coupes that are harvested in accordance with VicForests current practices will probably die as a result of the harvesting operations.[35]

53 Her Honour found that VicForests detects yellow-bellied gliders in East Gippsland in the same way that it detects greater gliders. It does not specifically survey for yellow-bellied gliders in the Central Highlands. It retains habitat trees, giving priority to hollow-bearing trees and trees most likely to develop hollows in the short-term. Again, it uses variable retention harvesting as its preferred method of timber harvesting. In East Gippsland, but not in the Central Highlands, VicForests applies a protection area of approximately 100 hectares where a 'relative abundance' of yellow-bellied gliders is

34 Liability Reasons, [7(4)].
35 Liability Reasons, [7(5)].

detected, as required by cl 4.2.1.3 and Table 13 of the Standards.[36]

54 The judge held that the precautionary principle was engaged in relation to yellow-bellied gliders for the same reasons that it was engaged for greater gliders. She also found that VicForests was not currently applying the precautionary principle to the protection of yellow-bellied gliders. The ecologists had recommended two alternative measures for protecting yellow-bellied gliders from the effects of timber harvesting operations in their habitat:

(a) the retention of a circular area of approximately 38 hectares of suitable habitat around a family group of three or more yellow-bellied gliders, allowing for intensive harvesting outside the retained area of habitat; or

(b) the identification and retention of the feed trees of yellow-bellied gliders as well as recruitment trees around each feed tree and hollow-bearing trees within a coupe and the retention of at least 60 per cent of the basal area in the harvested areas.

55 Again, both approaches depended on maintaining connectivity between areas of suitable glider habitat, including by retaining riparian strips along waterways.

56 The judge found that VicForests' existing timber harvesting practices did not take either of these measures for the protection of yellow-bellied gliders and that the actions that VicForests does take, such as variable retention harvesting, were unlikely to be effective and were not supported by the relevant monitoring and research. Variable retention harvesting was not shown to be effective to conserve yellow-bellied gliders in harvested coupes and its impact was comparable to clearfell harvesting. Her Honour concluded:

> The ecological evidence was that yellow-bellied gliders that live in coupes that are harvested in accordance with VicForests current practices will probably die as a result of the harvesting operation.[37]

57 Furthermore, the judge found that VicForests was not applying the precautionary principle in relation to the detection of gliders.[38] VicForests' approach to detecting greater gliders and yellow-bellied gliders was considerably less than s 2.2.2.2 of the Code requires. In order to comply with the precautionary principle, VicForests had to survey the whole of any coupe proposed for harvest which might contain glider habitat and had do so using a survey method that was likely to detect any gliders that may be present in the coupe, so as to locate the gliders' home range wherever practicable. Her Honour said:

> This is necessary in order that their essential habitat can be excluded from timber harvesting operations, as the precautionary principle requires — in the case of greater gliders their home ranges and in the case of yellow-bellied gliders, their feed trees and hollow-bearing den-trees within the coupe.[39]

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36 Liability Reasons, [7(6)].
37 Liability Reasons, [7(8)].
38 Liability Reasons, [7(7)].
39 Liability Reasons, [7(9)].

58 As to whether VicForests was applying s 2.2.2.4 of the Code in East Gippsland, her Honour concluded that VicForests did not meet its obligation to identify whether and where greater gliders and yellow-bellied gliders are present in the coupe when planning to harvest. The spotlight surveys upon which it relies leave most of the coupe unsurveyed and provide incomplete information about whether gliders are present and where their home range is located. Without knowing where the gliders are within the coupe, it is not possible for VicForests to take management actions to address risks to them.[40]

59 The judge reached the same conclusions in relation to VicForests' application of s 2.2.2.4 of the Code in the Central Highlands.[41]

60 Finally, the judge concluded that VicForests was not correctly applying cl 4.2.1.3 of the Standards in East Gippsland, as required.[42] According to her Honour, the location, composition and shape of a protection area of approximately 100 hectares of 'suitable habitat' for a relative abundance of greater gliders or yellow-bellied gliders should be guided by the 10 principles agreed by the expert ecologists. VicForests had no criteria for determining whether a population of gliders detected was a 'substantial population' in 'isolated habitat' for the purposes of Table 13. The ecological evidence provided criteria for identifying a substantial population of gliders in isolated habitat, namely, at least 20 greater gliders within 100 hectares and at least two family groups of at least three yellow-bellied gliders within 100 hectares. Her Honour also found that based on the evidence of VicForests' regional manager in East Gippsland, VicForests was likely to misapply cl 4.2.1.3 of the Standards in future, absent an order of the Court.

61 In the East Gippsland proceeding, the Final Orders took the form of both declarations and injunctions.

62 The declarations concerned the application of cl 4.1.2.3 of the Standards to substantial populations of gliders in isolated habitat. The declarations first required the designation of a protection area of 100 hectares of suitable habitat having regard to the Suitable Habitat principles (declaration 1).[43] The Suitable Habitat principles are environmental attributes to take into consideration when selecting and defining a protection area. Then, in relation to the greater glider, 'a substantial population' in 'isolated habitat' was declared to be (declaration 2):

> at least 20 greater gliders located within 100 hectares of suitable habitat that is surrounded by at least 100 metres' width of Hostile Habitat where any corridors of suitable habitat traversing the Hostile Habitat are less than 100 metres wide.

63 In relation to the yellow-bellied glider, 'a substantial population' in 'isolated habitat' was declared to be (declaration 3):

> at least two family groups of at least three yellow-bellied gliders located within 100 hectares of suitable habitat that is surrounded by at least 100 metres width of Hostile Habitat where any corridors of suitable habitat traversing the Hostile

40 Liability Reasons, [7(10)].
41 Liability Reasons, [7(11)].
42 Liability Reasons, [7(12)].
43 The Suitable Habitat principles are detailed below at [247].

Habitat are less than 100 metres wide.

64 The injunctions deal first with survey requirements (order 1) and then separately with greater gliders (order 2) and yellow bellied gliders (order 3). They are as follows:

> 1. VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA unless the coupe has been surveyed using a reasonably practicable survey method that is likely to:
>
> (a) detect any greater gliders that may be present in the coupe and, so far as is reasonably practicable, locate their home ranges; and
>
> (b) detect any yellow-bellied gliders that may be present in the coupe and identify their feed trees and hollow-bearing trees in the coupe.
>
> This Order does not apply to a coupe that has been clear-felled since 1939.
>
> 2. VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA in which greater gliders have been detected unless:
>
> (a) it excludes the greater gliders' located home ranges from timber harvesting operations; and
>
> (b) it excludes from timber harvesting riparian strips at least 100 metres wide located along all waterways in the coupe, with an exclusion area at least 50 metres wide on each side of those waterways; and
>
> (c) it retains at least 60% of the basal area of eucalypts in the harvested area of the coupe.
>
> 3. VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA in which yellow-bellied gliders have been detected unless:
>
> (a) it excludes from timber harvesting riparian strips at least 100 metres wide located along all waterways in the coupe, with an exclusion area at least 50 metres wide on each side of those waterways; and
>
> (b) it retains at least 60% of the basal area of eucalypts in the harvested area of the coupe, including all identified feed trees and hollow-bearing trees within the coupe.

65 Further orders were made excluding certain activities from these restraints.

66 In the Kinglake proceeding, the Final Orders took the form of injunctions only. They were in the same form as the injunctions in the East Gippsland proceeding.

Proposed grounds of appeal

67 VicForests advances seven proposed grounds of appeal,[44] which contend that:

(a) the judge granted different relief to that which had been sought and argued about at trial, thereby denying VicForests procedural fairness (ground 1);

(b) in any event, the respondents had failed to establish the necessary equity to attract the injunctive relief granted (ground 2);

(c) the judge failed to properly construe the relevant provisions of the Code, resulting in a failure to limit the injunctions to what was necessary to secure compliance with the law (grounds 3, 4 and 5);

(d) in any event, the declarations made and injunctions granted were imprecise, uncertain, vague and evaluative (ground 6); and

(e) the judge failed to give adequate reasons (ground 7).

68 In oral argument, ground 2 was addressed as an aspect or consequence of the submissions advanced by VicForests in support of grounds 1 and 5. Accordingly, we shall defer considering ground 2 until we have determined ground 5.

Ground 1: Was there a breach of procedural fairness?

VicForests' submissions

69 The submissions by VicForests, under ground 1, were directed to the three injunctive orders made by the trial judge. It was submitted that the injunctions went 'far beyond' the scope of the issues that were defined by the parties, and that, in making those orders, the judge determined issues which the parties had not identified before or during the trial.

70 In support of that submission, counsel noted that the respondents, at the trial, had claimed that ss 2.2.2.2 and/or 2.2.2.4 of the Code required VicForests, in every coupe in East Gippsland and the Central Highlands, first, to undertake specific kinds of surveys for greater gliders and yellow-bellied gliders, and, secondly, to apply specific timber harvesting exclusion areas around each point at which a member of those species had been detected. Counsel submitted that the respondents' case was not that VicForests' operations had fallen short of what was required by the Code generally, that is, measured against any other prescriptions which the Code may be held to require. Rather, it was submitted, the respondents had specified, in their respective prayers for final relief, and in the forms of orders provided to the judge, the specific injunctive relief sought by them.

71 Counsel for VicForests submitted that the trial focused on the issue whether the Code, properly construed, required those specific measures that were set out in the respondents' prayer for relief. Counsel noted that in the course of the trial, counsel then

[44] For convenience, proposed grounds are referred to as 'grounds' throughout these reasons.

acting for VicForests had specifically requested that the respondents provide minutes of the orders that they sought in the proceeding. During the trial, counsel for VicForests had made it clear that VicForests' evidence and submissions were directed to meeting the case put by the respondents in support of their prayer for relief, and no other case.

72 It was further submitted that, ultimately, the evidence adduced at the trial did not support the relief that was sought by the respondents in their prayers for relief and in the forms of orders on which they relied in final address. Accordingly, the judge rejected the respondents' claim for the injunctive relief sought by them, but her Honour nevertheless proceeded, impermissibly, to grant the respondents relief on a different basis. Counsel submitted that the judge proceeded in that manner, notwithstanding that counsel at the trial had contended that it would be unfair to do so. In that way, it was submitted, the judge erred by using the expert evidence in a manner which was wholly different to the way in which VicForests had understood that the evidence would be used against it. Consequently, VicForests did not have a proper opportunity to meet the case which was determined by the judge.

73 Counsel for VicForests further submitted that if VicForests had been aware that the judge intended to use the expert evidence in that way, VicForests could have conducted a different defence. In particular, the recommendations made by the experts would have been challenged, and evidence could have been adduced about the viability and proportionality of those recommendations. In addition, submissions could have been made as to whether the recommendations of the experts constituted measures required under the relevant provisions of the Code.

Respondents' submissions

74 In response, counsel for the respondents submitted that VicForests was not denied procedural fairness in the formulation by the judge of the specific orders by which her Honour granted injunctive relief to the respondent. In particular, counsel noted that the relief that was granted by the first order had been sought by the respondents in their pleaded case, namely, that surveys be conducted that were no less effective than the protocol set out in the respondents' pleadings. Further, it was submitted that the injunctive relief granted by the second and third orders was based on, and implemented, the approach that was recommended by Dr Wagner, the expert witness called on behalf of VicForests. In that respect, VicForests adduced a significant amount of evidence from Dr Wagner. In final address, counsel for VicForests had submitted that the judge should adopt the evidence given by Dr Wagner, in preference to the evidence given by the respondents' expert, Associate Professor Wardell-Johnson, as to the appropriate steps which were required to be taken by VicForests under the provisions of the Code, to protect the greater glider and the yellow-bellied glider in conducting timber harvesting of native forests in East Gippsland and in the Central Highlands.

75 Counsel for the respondents further submitted that the primary case, made on behalf of the respondents (as plaintiffs) at the trial, was that VicForests should not conduct timber harvesting operations in those two areas in a manner that would be a breach of ss 2.2.2.2 and 2.2.2.4 of the Code. The evidence that was adduced in relation to those issues included the evidence of the two experts, Associate Professor Wardell-Johnson and Dr Wagner. That evidence was directed to the claim made by VicForests in its

pleadings. It was submitted that the prayers for relief in the respective statements of claim do not strictly form part of the pleadings, and the Court is always entitled to mould the requisite equitable relief in a form other than that sought by a plaintiff. In that respect, it was submitted that at the trial, the respondents, in their final address, had specifically referred to the principle that, in a proceeding for injunctive relief, the Court should fashion the equitable relief in a manner which properly balances the interests of the parties, notwithstanding that the specific form of relief decided by the Court may not be that contended for by either party.

76 Counsel further submitted that, at the trial, VicForests made a specific strategic decision not to address the possibility that the judge might make an order in a form which is different to that sought by the respondents. In that respect, VicForests adopted an 'all or nothing' position, and accordingly, it was not denied procedural fairness. Instead, the judge, having determined the correct construction of ss 2.2.2.2 and 2.2.2.4 of the Code, applied the expert evidence adduced by the parties to the allegations that were pleaded in the respondents' statements of claim, and concluded that VicForests' existing detection methods failed, and would fail, to determine where the gliders were located, and its timber harvesting practices failed, and would fail, to take effective measures to address the risks that affected the gliders. On that basis, it was appropriate for the judge to order injunctive relief based on the evidence of Dr Wagner which had been adduced by and on behalf of VicForests.

The issues

77 The submissions by VicForests, under ground 1, in essence, contained three propositions, namely:

(1) By their pleadings, and in the forms of orders relied on in final address, the respondents sought specific forms of injunctive relief for the protection of the greater glider and the yellow-bellied glider.

(2) In the course of the proceeding, and in particular in final address, counsel for VicForests took the position that VicForests' case was directed solely to the relief sought by the respondents, and not to any other form for such relief.

(3) The form of each of the three injunctions granted by the judge was significantly different to that sought by the respondents in their pleading and in the draft orders relied on, so that, by making such orders, the judge failed to accord VicForests procedural fairness in each of the two proceedings.

78 In order to analyse and determine the issues raised by those propositions, it is first necessary to set out, in a little detail, the relief sought by the respondents at the trial, the position adopted by VicForests at trial concerning the relief sought by the respondents, and the judge's conclusions as to the form of the injunctive relief to be granted to the respondents.

The relief sought by the respondents in pleadings and at trial

79 In each proceeding, the statement of claim relied on by the respective respondent underwent a number of successive amendments. For the present purpose, it is not necessary to set out in detail the content of the pleading. In essence, the respondents pleaded that on the true construction of ss 2.2.2.2 and 2.2.2.4 of the Code, the management actions which were required to address glider risks were:

(a) For each sighting of a greater glider, an exclusion area with a circular radius of 240 metres centred on the location of the sighting (that is, 18 hectares), such area to be protected by appropriate buffers.

(b) For each sighting of at least three yellow-bellied gliders, an exclusion area of 38 hectares of suitable habitat for those gliders centred on them, such area to be protected by appropriate buffers.

80 In each proceeding, it was pleaded that VicForests had failed to take, or threatened not to take, management actions to address glider risks, by failing to apply those exclusion areas in respect of sightings of greater glider and yellow-bellied gliders respectively.

81 By way of relief in the East Gippsland proceeding, EEG sought (*inter alia*):

(a) An injunction restraining VicForests from carrying out timber harvesting operations in the affected coupes until VicForests had applied a protection area of 100 hectares of suitable habitat in respect of the arboreal mammals whose records or population in the coupe satisfied the 2021 detection criteria.[45]

(b) A permanent injunction restraining VicForests from carrying out timber harvesting operations in any coupe in East Gippsland without a pre-harvest survey being conducted in accordance with that specified in the pleading.

(c) A permanent injunction restraining VicForests from carrying out timber harvesting operations within a circular area of radius 240 metres from any greater glider sighting in East Gippsland.

(d) A permanent injunction restraining VicForests from carrying out timber harvesting operations in any coupe located in East Gippsland within a circular area of radius 350 metres from the approximate centre of any sighting of at least three yellow-bellied gliders within a 20 hectare area in East Gippsland.

82 By its prayer for relief in the pleading in the Kinglake proceeding, KFF sought the following injunctive relief:

(a) A permanent injunction restraining VicForests from carrying out timber harvesting operations in any coupe located in the Central Highlands without a

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45 '2021' is a reference to the current Standards. The detection criteria for the greater glider and the yellow-bellied glider is specified in Table 13 of the Standards. For the greater glider, the assumed rate of spotlighting per kilometre is 100 minutes per 1 kilometre and visible range either side of the transect is 25 metres, equating to an assumed minimum survey area of 5 hectares. For the yellow-bellied glider, the assumed rate of spotlighting per kilometre is 10 minutes per 100 metres and visible range either side of the transect is 150 metres, equating to an assumed minimum survey area of 30 hectares.

pre-harvest survey being conducted in accordance with that specified in the pleading.

(b) A permanent injunction restraining VicForests from carrying out timber harvesting operations within a circular area of radius 240 metres from any greater glider sighting in the Central Highlands.

(c) A permanent injunction restraining VicForests from carrying out timber harvesting operations in any coupe in the Central Highlands within a circular area of radius 350 metres from the approximate centre of any sightings of at least three yellow-bellied gliders within a 20 hectare area.

83 In a document entitled 'Proposed orders' relied on by the respondents as part of their written closing submissions, they sought injunctions in similar terms to those specified in the prayer for relief in each proceeding. Specifically, the respondents sought orders as follows:

(1) VicForests must not conduct timber harvesting operations in any coupe unless surveys have been conducted to identify greater gliders and yellow-bellied gliders in the coupe (or in the coupe and the area 75 metres beyond the boundary of the coupe) in accordance with a 'survey protocol' that was annexure A to the draft orders.

(2) VicForests must not conduct timber harvesting operations within a circular area of radius 240 metres from any greater glider.

(3) VicForests must not conduct timber harvesting operations within a circular area of radius 360 metres from the approximate centre of any sighting of at least three yellow-bellied gliders within a 20 hectare area.

VicForests' position on the pleadings at trial

84 As we have noted, VicForests has submitted that, in the course of the trial, its counsel 'repeatedly' requested to be provided with a minute of the order for the relief which the respondents sought in order that it be able to properly meet the case made by the respondents.

85 On 4 May 2022, at a pre-trial hearing before the judge, senior counsel for VicForests stated that VicForests would be assisted by the respondents providing a draft of the final orders sought by them in order to assist VicForests to understand more fully the case that it was required to meet. On 9 May, the first day of the trial, counsel for VicForests requested that the respondents, in the course of the trial, provide a proposed final minute of the orders sought by them in the event that the case which they were conducting was, in any relevant respect, different from the prayer for relief sought by them. On the following day, 10 May, senior counsel made the same point, stating that it would be valuable if, during the trial, the respondents were to provide a draft minute of the orders which they sought. Counsel noted that he had opened the case by submitting that it would not be possible for the judge to craft a final order for injunctive relief in respect of the pre-harvest surveys which should be conducted. Counsel further submitted that VicForests would be prejudiced if the final orders for relief sought by the respondents

materially differed from the prayer for relief contained in the respective statements of claim.

86 The evidence in the proceeding closed on 16 May, and the trial was then adjourned to enable the parties and the judge to attend a view and the parties to exchange written closing submissions. Those submissions, which were detailed and lengthy, were exchanged between the parties in June, and the trial resumed for final addresses on 23 June.

87 On that date, counsel for the respondents commenced by presenting his final address, followed by senior counsel for VicForests.

88 At an early stage in his oral submissions, senior counsel for VicForests noted the manner in which the respondents' case, in respect of surveys, had developed during the trial, and that the relief sought by the respondents in their pleading was that VicForests should be restrained (from undertaking timber harvesting) unless it first undertook surveys in accordance with a 'survey protocol' that was an appendix to the respondents' pleading. Counsel for VicForests then noted that, in final address, counsel for the respondents had submitted that the judge should first make findings about the requisite surveys, and then invite the parties to be heard on relief. Senior counsel for VicForests stated:

> It's not the case they've run. It's not the pleaded case they've run. It's not the prayer for relief they've run. It's not the way in which they asked questions of their experts and which we responsibly asked questions of ours …

89 In response, the judge noted that the respondents had specified a 'highly prescriptive protocol' in their draft orders, and that VicForests had expressed concern about the safety and practicability issues in complying with such a protocol. Her Honour then stated:

> Now, it's possible that I might agree with your client's case on that second aspect but still hold a concern about the adequacy of the survey effort, that guides this decision-making about the protection areas that are applied in coupes that it is to harvest. Then, the question is, why would I not mould relief to meet the concern or the findings that I, in fact, make.

90 In response, senior counsel for VicForests submitted that the judge should only make findings that 'speak to' the relief sought by the respondents, and the judge should not have concerns if there are issues that are 'unconnected' with the relief sought by the respondents. Counsel further submitted that, 'We're not conducting an auction on the adequacies of surveys, we are coming to answer a case'.

91 The judge then responded that she considered that there are two aspects of the case, namely, what is to be achieved, and how it is to be achieved. Senior counsel for VicForests disagreed with that proposition and submitted that it would be unfair for the judge to do other than address the question whether to make the orders which were the subject of the prayer for relief sought by the respondents.

92 After further discussion to the same effect, the judge noted that the purpose of the proceedings was to protect the greater glider and the yellow-bellied glider in the areas which VicForests proposed to harvest. Her Honour asked, rhetorically, that if she

considered that the orders proposed by the respondents were too prescriptive, why should she not make orders that were 'more outcome focused and focused on the way in which the outcome is to be achieved'. In response, counsel for VicForests again submitted that such an approach by the judge would be unfair.

The judge's conclusions as to the terms of the injunctions

93 In her reasons for judgment, the judge, having concluded that VicForests was not applying ss 2.2.2.2 and 2.2.2.4 of the Code in the Central Highlands and in East Gippsland, turned to the question of the relief that should be ordered. Her Honour said:

> 377. I propose to grant injunctions to the following effect, to reflect the conclusions I have reached in relation to Issues 5, 8, 9, 10 and 11:[46]
>
> (a) VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA/Central Highlands FMAs that may contain habitat for gliders, unless the coupe has been surveyed using a reasonably practicable survey method that is likely to:
>
> (i) detect any greater gliders that may be present in the coupe and locate their home ranges; and
>
> (ii) detect any yellow-bellied gliders that may be present in the coupe and identify their feed trees and hollow-bearing trees in the coupe.
>
> (b) VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA/Central Highlands FMAs in which greater gliders have been detected unless:
>
> (i) it excludes the greater gliders' home ranges from timber harvesting operations; and
>
> (ii) it retains at least 60% of the basal area of eucalypts in the harvested area of the coupe.
>
> (c) VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA/Central Highlands FMAs in which yellow-bellied gliders have been detected unless it retains at least 60% of the basal area of eucalypts in the harvested area of the coupe, including all identified feed trees and hollow-bearing trees within the coupe.[47]

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46 The issues to which her Honour referred are extracted above at [44] and a summary of her Honour's conclusions appear between [54]–[59].

47 Liability Reasons, [377].

94 In reaching that conclusion, the judge noted that VicForests had taken an 'all or nothing' position in relation to the injunction sought by the respondents, maintaining that no injunction should be ordered unless the respondents had made out their case for injunctions in the form sought by them in the pleadings.[48] Her Honour rejected that position as a matter of law, noting that equitable remedies such as injunctions are 'inherently flexible and can be fashioned to do practical justice between the parties'.[49] The judge also rejected the proposition that it would be unfair to VicForests to grant injunctions in a different form from those sought by the respondents. In that respect, she stated:

> The plaintiffs' pleaded case has never been primarily about the method by which VicForests should conduct spotlight surveys or the exact location and dimensions of areas it should exclude from harvesting for the protection of gliders. Their central claim is that VicForests should not log State forests in East Gippsland and the Central Highlands without complying with ss 2.2.2.2 and 2.2.2.4 of the Code in relation to greater gliders and yellow-bellied gliders. Their case throughout has been about the measures that VicForests is obliged by those provisions to take for the conservation of those two species in planning and conducting timber harvesting operations.
>
> VicForests has had a full opportunity to meet that case. It presented detailed evidence about its surveying and timber harvesting practices, from witnesses including its Chief Executive Officer, Ms Dawson, its Manager Forest Practices, Mr Gunn, its Director Environmental Performance, Mr Paul, its Manager, Forest Conservation and Research, Mr Fitzpatrick, and its Regional Manager East Gippsland, Mr Lewis. It also presented expert evidence from Dr Wagner, a qualified and experienced ecologist of its own choosing. It made comprehensive written and oral submissions based on that evidence. The conclusions I have reached have taken all of that into account, and the injunctions I propose to grant are in large part based on Dr Wagner's opinions.
>
> I have given anxious consideration to the need for injunctive relief to be formulated in terms that give rise to ascertainable obligations. Both sides referred to a great deal of authority on this question, some of which emphasises the desirability of clarity and certainty in an injunction, and some of which reinforces the need for the remedy to be applied practically and with good sense, leaving room for some evaluative judgment. Ultimately, an injunction is a discretionary remedy that is to be shaped to the particular facts and circumstances of the case, and the extent to which the judgment has resolved the issues to which the injunction relates.[50]

95 Having delivered the Liability Reasons, the judge then adjourned the matter to enable the parties to confer and attempt to agree on draft orders in each proceeding, and, in the absence of any such agreement, to file short submissions on the appropriate form of the orders to be made.

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48 Liability Reasons, [380].
49 Liability Reasons, [381].
50 Liability Reasons, [383]–[385].

The forms of orders proposed by the parties

96 In accordance with that direction, the respondents in each proceeding formulated proposed orders that included proposed injunctions (*inter alia*) in the following form:

(a) VicForests not conduct timber harvesting operations in the East Gippsland and Central Highlands forestry management areas unless the coupe, together with an area extending 114 metres beyond the coupe boundaries, and any other coupe located wholly or partially within the area that extends 114 metres beyond the coupe boundaries, be surveyed using a reasonably practicable survey method that would be likely to detect any greater gliders, and any yellow-bellied gliders, and that would identify all yellow-bellied glider feed trees and all hollow-bearing trees, and an appropriate number of recruitment trees.

(b) VicForests not conduct timber harvesting operations in those forestry management areas if any greater gliders had been detected in the survey area unless for each greater glider detection, it excludes a circular area with a radius of 228 metres from the location of the detection, and it retains at least 60 per cent of the basal area of eucalypts in the harvested area of the coupe, evenly disbursed across the harvested area and including all identified hollow-bearing and appropriate number of recruitment trees.

(c) VicForests excludes from timber harvesting operations corridors of at least 100 metres wide connecting all protected areas within the coupe, at least one corridor at least 100 metres wide connecting a protected area to suitable glider habitats outside the harvested area of the coupe, and riparian strips at least 100 metres wide located along all waterways in the coupe.

(d) VicForests not conduct timber harvesting operations in any coupe in the forestry management areas if any yellow-bellied gliders have been detected in the coupe survey area unless it retains:

(i) at least 60 per cent of the basal area of eucalypts in the harvested area evenly disbursed across that area, including all identified yellow-bellied glider feed trees within the coupe, all identified hollow-bearing trees within the coupe, and an appropriate number of recruitment trees around the feed trees and hollow-bearing trees;

(ii) riparian strips of at least 100 metres wide located along all waterways in the coupe.

97 In response, VicForests, in its written submissions, commenced by formally opposing the grant of any relief in favour of the respondents. Under cover of that objection, it filed a proposed form of final orders which were relevantly similar (but not identical) to those ultimately ordered by the judge, and which also contained an additional order containing ‘carve-outs’, that provided that the orders do not restrain VicForests from a number of different specified activities within the affected coupes.

98 Following receipt of the written submissions, the judge pronounced the Final Orders,[51] and provided reasons explaining her reasons for those orders. Her Honour's reasons, and the content of some of those orders, are the subject of the cross-application made on behalf of the respondents.

Analysis and conclusions

99 The question which is raised by ground 1 is whether, by making final orders that were in a different form to those sought by the respondents, the judge failed to accord VicForests procedural fairness.

100 It is well accepted that, in order to afford a party its rights in respect of procedural fairness, that party must have had a reasonable opportunity to address the issues on which the court ultimately determines a case. Thus, where a court or tribunal is minded to make a decision against a party on a basis entirely different to that relied on by that party, it must give that party notice that it is considering whether to make such a determination, and a reasonable opportunity to address the issues raised by it.

101 In *Seltsam Pty Ltd v Ghaleb*,[52] Ipp JA (with whom Mason P agreed), having referred to a number of relevant authorities, stated the principle as follows:

> These cases illustrate the general principle that although the basis on which the parties conduct a trial does not bind the judge, if the judge contemplates determining the case on a different basis, he or she must inform the parties of this prospect so that they have an opportunity to address any new or changed issues that may arise.
>
> A failure so to inform the parties will ordinarily result in a denial of procedural fairness. A new trial will be ordered if a party is not afforded a fair trial in circumstances where a properly conducted trial might have produced a different result.[53]

102 In addressing ground 1, it is important to keep in mind the central issues that were agitated in the trial, and the relationship between those issues and the injunctive orders made by the judge. For the reasons that follow, it is quite clear, both from an analysis of the principal issues in the case, and the manner in which they were addressed by the parties, that the key matters that were the subject of evidence and argument at the trial had a necessary and inextricable interconnection with the form of the injunctive relief granted by the judge. In short, the injunctive orders made by the judge were the consequence of her Honour's examination of, and conclusions concerning, the evidence called by the parties, and the submissions made them, in respect of those issues.

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51 See above [61]–[64].

52 [2005] NSWCA 208, [78].

53 Ibid [78]–[79]. See also *The Queen v Lewis* (1988) 165 CLR 12, 17; [1988] HCA 24; *Patorno v The Queen* (1989) 166 CLR 466, 474 (Mason CJ, Brennan J); [1989] HCA 18; *BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* [2006] WASCA 49, [33]–[38] (Le Miere J, Wheeler and Pullin JJ agreeing).

103 In order to explain that conclusion, it is necessary to examine in some detail aspects of the evidence called in the trial, and the addresses that were made by the respective parties relating to them.

104 In essence, the fundamental issue in the trial was whether VicForests, in conducting its forestry harvesting operations in East Gippsland and the Central Highlands, would comply with the applicable statutory provisions, and in particular with ss 2.2.2.2 and 2.2.2.4 of the Code, concerning the preservation of the greater glider and the yellow-bellied glider in each of those two areas. That question, in turn, involved an examination and analysis, first, of the steps and procedures taken by VicForests for the protection of the greater gliders and the yellow-bellied gliders in those areas, and, secondly, whether those steps were, and would be, sufficient to comply with the two provisions of the Code referred to.

105 In addressing the second question, the focus of the evidence, and submissions, at trial was on the steps which it would be necessary for VicForests to take in order to sufficiently comply with ss 2.2.2.2 and 2.2.2.4 of the Code. That issue was the subject of the evidence adduced by the respective parties from Associate Professor Wardell-Johnson and Dr Wagner. A number of the questions that were addressed to those two expert witnesses, and the terms in which they were framed, were specifically directed to the question of what particular steps or processes were required to be undertaken to satisfy the precautionary principle, prescribed by s 2.2.2.2 of the Code, in relation to the conservation of the two species of gliders. The questions were similarly also directed to the steps that are necessary to address risks to the relevant biodiversity value listed in the Standards, as required by s 2.2.2.4 of the Code.

106 Associate Professor Wardell-Johnson and Dr Wagner were respectively briefed to address a number of questions formulated by the legal practitioners for each side. A number of those questions concerned matters, which were fundamental to the issues that the judge was required to address in determining the central issue in the case, namely, the appropriate steps which were required to be taken by VicForests in order to comply with ss 2.2.2.2 and 2.2.2.4 of the Code.[54]

107 In particular, Associate Professor Wardell-Johnson was briefed to express an opinion about, and in turn, Dr Wagner was briefed to respond to the opinions so expressed by Associate Professor Wardell-Johnson, on the following questions:

- The appropriate survey methods to be applied in order to identify greater gliders and/or yellow-bellied gliders in coupes in the Central Highlands and East Gippsland.
- The actions that are required to be taken to address risks to yellow-bellied gliders identified in coupes in the Central Highlands or East Gippsland prior to commencement of timber harvesting operations in those coupes.

[54] Our identification of 'the central issue' insofar as it concerns compliance with s 2.2.2.2 of the Code is a consequence of our conclusion, discussed in respect of ground 3 below, concerning the correct construction of that provision.

- The actions which are required to be taken to address risks to greater gliders identified in coupes in the Central Highlands or East Gippsland prior to commencement of timber harvesting operations in those coupes.
- Whether the conduct of timber harvesting in the Central Highlands and East Gippsland without surveys of the kind recommended (by the respective expert) for greater gliders, and/or without exclusion of timber harvesting operations from a circular area of radius 240 metres centred on any greater glider sighting, constituted a real threat of serious or irreversible damage to the environment.
- Whether VicForests' proposed timber harvesting plan provides an effective method of preventing serious or irreversible damage to the environment as a result of its timber harvesting operations in the Rookery coupe[55] and addressing risks to greater gliders in the coupe.
- Whether the answer to that question would apply to all coupes in East Gippsland and the Central Highlands where Variable Retention No 1 ('VR1') methods and/or Variable Retention No 2 ('VR2') methods[56] and/or retention of 40 per cent of the basal area of the coupe were applied.

108 It was as a consequence of the differing views expressed by each of the two experts and their responses to those questions that the judge directed that they confer and provide a joint report. With the assistance of counsel, her Honour formulated some ten questions to be addressed by the two experts in their joint report, in the following terms:

> In relation to each of the questions set out below, the ecologists are asked to indicate whether their answer is attended by a lack of full scientific certainty.
>
> **Threat of damage**
>
> 1. Do VicForests' timber harvesting operations pose a threat of serious or irreversible environmental damage in respect of:
>
> a. greater gliders; or
>
> b. yellow-bellied gliders,
>
> at a landscape scale?
>
> 2. If so, what is the nature and extent of that threat?

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55 A 'coupe' is a small area of forest that is harvested within a single operation. The experts were asked at trial about the likely effect of VicForests' proposed harvesting plan on the glider population within a particular coupe known as the 'Rookery' coupe.

56 Variable retention harvesting is the silvicultural method of retaining a certain percentage of trees which are categorised based on their particular attributes, including location and types of hollows. VR1 harvesting is usually used where the density of Type 1 habitat trees is between three and six per hectare. VR1 harvesting sees the retention of existing habitat trees and recruitment trees, with 10 or more trees per hectare retained across the harvest area. VR2 harvesting is typically used where the density of Type 1 habitat trees is between seven and nine per hectare. It involves higher levels of aggregated and dispersed retention across the coupe, indicatively retaining 20 or more trees per hectare across the harvest area. See Liability Reasons, [65]–[66].

Survey methods

3. How should coupes be surveyed to reveal the locations of:

    a. greater gliders; and

    b. yellow-bellied gliders,

    in order to address risks posed to each species by timber harvesting operations through the appropriate location of protection areas or other retained habitat?

Exclusion areas

4. What area of retained habitat should surround an observation of:

    a. an individual greater glider;

    b. a cluster of yellow-bellied gliders,

    in order to address risks posed to each species by timber harvesting operations?

5. What, if any, area of habitat should be retained as a buffer to prevent edge effects?

6. What is the appropriate method for harvesting timber around areas of retained habitat? Please address variable retention harvesting and basal area retention in your answer.

Application of Table 13 prescriptions

7. What is a substantial population of greater gliders located in isolated habitat?'

8. What is a substantial population of yellow-bellied gliders located in isolated habitat?

9. For the purposes of applying a protection area of 'suitable habitat', how sensitive are:

    a. greater gliders;

    b. yellow-bellied gliders,

    to edge effects and fragmentation of retained habitat?

10. For the purposes of applying a protection area of 100 hectares of 'suitable habitat' for a population of:

    a. greater gliders; or

    b. yellow-bellied gliders,

> what proportion of hostile or unsuitable habitat can be included in the protection area?

109 In response to those questions, Associate Professor Wardell-Johnson and Dr Wagner provided a joint report in which they addressed some four issues identified by them. In the report, they recorded their areas of agreement and disagreement in respect of the issues, which included the following: the importance of riparian areas within the protection areas; the appropriate methods for surveying the yellow-bellied gliders and greater gliders in coupes proposed for logging; threats to the habitat of those species and when those threats are serious or irreversible with respect to yellow-bellied gliders and the greater gliders in their habitats; and the appropriate silvicultural methods in areas that include yellow-bellied gliders or greater gliders in coupes proposed for logging.

110 Following the provision of that report, the judge convened a conclave in which the two experts jointly gave evidence, and were questioned by her Honour, and counsel for each side, relating to the issues addressed by them in their joint report.

111 In the joint session, the judge directed four specific questions to the two experts. The first question was whether VicForests' timber harvesting operations posed a threat of serious or irreversible environmental damage in respect of greater gliders and yellow-bellied gliders at the landscape level, as distinct from the local or the coupe level, and, if so, what is the nature and extent of that threat.

112 In response to that question, Associate Professor Wardell-Johnson confirmed that the respondent's harvesting operations posed such a threat. Dr Wagner considered that the damage that could be done at the landscape level depended on the intensity of the harvesting or the silvicultural system that was applied. In cross-examination, Associate Professor Wardell-Johnson, when asked by VicForests' senior counsel about the necessary exclusion area, stated that if the basal area retention was at the 60 per cent level, then the 'buffer' was less necessary. Dr Wagner, when cross-examined by counsel for the respondents, was asked whether 60 per cent retention was a form of 'selective harvesting.' He responded that it depended on how the 60 per cent (that was to be retained) is spread out.

113 The second issue formulated by the judge was as follows:

> How should coupes be surveyed to reveal the locations of greater gliders and yellow-bellied gliders … in order to address risks posed to each species by timber harvesting operations through the appropriate location of protection areas or other retained habitat.

114 Each of the two experts addressed that issue, and each of them, in turn, answered questions put by the judge, and counsel for each side.

115 The third issue formulated by the judge was:

> What area of retained habitat should surround an observation of an individual greater glider or a cluster of yellow-bellied gliders in order to address risks posed to each species by timber harvesting operations, and as an aspect of that, what if any area of habitat should be retained as a buffer to prevent edge effects.

116 In respect of that question, Associate Professor Wardell-Johnson referred to an analysis by another expert which had found that with a 40 per cent retention there was a 'drift loss' over time. He considered that 60 per cent retention would be sufficient, and observed that in 'higher quality' areas 50 per cent 'could' suffice. He considered that the key was retaining significant basal area. In cross-examination, senior counsel for VicForests put to Associate Professor Wardell-Johnson that a higher basal percentage retention meant that a lesser exclusion area might be required. Associate Professor Wardell-Johnson agreed with that proposition. Senior counsel further questioned Associate Professor Wardell-Johnson concerning the percentage of basal area retention that was necessary. In response, Associate Professor Wardell-Johnson expressed the view that research demonstrated that retention of 60 per cent was necessary. He agreed that it was 'quite possible' that there may be some coupes with characteristics where 50 per cent was suitable, but he thought it was 'very unlikely' that 40 per cent would be sufficient.

117 On the same issue, Dr Wagner confirmed his opinion that, in the case of greater gliders, an exclusion area of 2.6 hectares should be retained, together with a 60 per cent basal area of retention. In turn, Dr Wagner was cross-examined, in some detail, by counsel for the respondents concerning that proposition.

118 The fourth issue, formulated by the judge, concerned the requirement under Table 13 of the Standards that there be a 100 hectare protection area for yellow-bellied gliders in the East Gippsland area. That issue was the subject of the third declaration made by the judge, but is not relevant to ground 1 of the application before the Court.

119 Pausing there, it is quite clear that, in the course of the proceeding, each party addressed not only the question whether VicForests' forest harvesting procedures complied with ss 2.2.2.2 and 2.2.2.4 of the Code, but also the question as to the steps which VicForests was required to undertake in order to sufficiently comply with those provisions. The parties addressed both those questions because they were, necessarily, closely interrelated. Importantly, VicForests relied on the evidence of Dr Wagner in response to the opinions expressed by Associate Professor Wardell-Johnson. That evidence included the kind of surveys which were required to be undertaken in the coupes that were to be the subject of VicForests' forest harvesting operations. It also included the steps which were necessary in order to comply with the precautionary principle, stipulated by s 2.2.2.2, to address the threat of serious or irreversible environmental damage affecting greater gliders and yellow-bellied gliders in East Gippsland and the Central Highlands.

120 It is for that reason that both parties, similarly, addressed those two issues in their final addresses. Those addresses were principally made by detailed and comprehensive written closing submissions provided by the parties, and were supplemented by relatively brief oral submissions on a subsequent date.

121 In their written final submissions, counsel for the respondents contended that the two experts had agreed that VicForests' operations constituted a threat of serious or irreversible environmental damage to the yellow-bellied gliders and greater gliders. In that respect, counsel relied on a number of aspects of the opinions stated by Dr Wagner in his report and in the joint conclave. Counsel further referred to, and relied on,

evidence given by both experts in support of the proposition that VicForests' policy of 40 per cent retention and 'variable retention silviculture systems' had not altered VicForests' procedures and that VicForests, in effect, continued to clearfell forests containing threatened gliders. In that respect, counsel referred to the evidence of Dr Wagner that the proposed VR1 and VR2 silviculture systems would lead to 'severe decreases in population size'.

122 Counsel for the respondents then made submissions in support of the exclusion areas which the respondents had sought in respect of each of the two species, namely, an exclusion area with a radius of 240 metres from the location of a greater glider sighting, and an exclusion area of 38 hectares of habitat for each sighting of at least three yellow-bellied gliders within a 20 hectare area. In that respect, counsel discussed the competing opinions expressed by Associate Professor Wardell-Johnson and Dr Wagner as to the dimensions and locations of the required protection areas. Finally, counsel addressed the issue whether ss 2.2.2.2 and 2.2.2.4 required VicForests to conduct surveys in accordance with the survey protocol contended for on behalf of the respondents. Those submissions canvassed not only the evidence given by Associate Professor Wardell-Johnson and Dr Wagner, but also evidence of witnesses called on behalf of VicForests as to the practicability of the surveys contended for on behalf of the respondents.

123 In response, the submissions by counsel for VicForests addressed the expert evidence led by each side about the threat posed to gliders by timber harvesting operations, and as to what is required to protect them. In that respect, counsel for VicForests acknowledged that the two experts had agreed that the cumulative effect of timber harvesting operations can pose a landscape scale threat to gliders if coupes are intensively harvested. Counsel noted that the experts had agreed that the question whether timber harvesting poses an existential threat to gliders at the landscape scale depends on the intensity of the harvesting at the coupe scale.

124 Counsel for VicForests then addressed the question as to the steps that were required to protect gliders from the effects of timber harvesting operations. In that respect, counsel noted that both experts had agreed that, for that purpose, VicForests should retain a glider habitat, as well as a significant proportion of the basal area of the harvested area of the coupe. Counsel noted the evidence given by Associate Professor Wardell-Johnson as to the exclusion areas which he recommended should be maintained in respect of each sighting. Counsel also noted that the experts agreed that those requirements would be different if the surrounding silvicultural system were not clearfelled, so that a significant proportion of the basal area of the harvested area was retained. In particular, it was noted that, while it may not be possible to be prescriptive about a single percentage figure for all coupes, each of the two experts recommended that at least 60 per cent basal area retention was appropriate for retaining a local glider population. Counsel for VicForests further noted that the experts had considered what was necessary was significant basal area retention across the harvested area, around any patches retained for habitat preservation. Specifically, it was noted that if there was significant basal area retention of around 60 per cent in the harvested area, '… little divided the experts in terms of what would be required to protect the gliders'.

125 Counsel for VicForests then addressed in some detail the evidence concerning the surveys which were required to be undertaken in order to identify gliders for protection. In doing so, counsel referred to and examined the views expressed respectively by Associate Professor Wardell-Johnson and Dr Wagner. Counsel also referred to the evidence adduced by VicForests as to what would be required in a practical sense to conduct pre-harvest surveys in every coupe in East Gippsland and the Central Highlands. In that respect, counsel referred to the evidence which VicForests had adduced as to the impracticability of conducting surveys that were as extensive as those contended for on behalf of the respondents.

126 Counsel for VicForests then submitted that the respondents had failed to establish that its current forestry harvesting operations posed a threat of serious or irreversible damage to the environment. Having advanced a number of submissions in that respect, counsel submitted that the precautionary principle did not require application of the measures contended for on behalf of the respondents. In that respect, counsel referred to the evidence of Dr Wagner concerning the conduct of surveys, and the competing views expressed by the experts as to the exclusion area that was required in respect of sightings of the gliders. In particular, counsel noted that the experts had agreed that where a significant proportion of the basal area of the harvested part of a coupe was to be retained — around 60 per cent or more — then it would be sufficient to retain the home range of the greater glider, which is some 3 hectares. Similarly, in response to the exclusion area recommended by Associate Professor Wardell-Johnson in respect of sightings of yellow-bellied gliders, it was noted by counsel that the experts had agreed that where a significant proportion of the basal area of the harvested part of a coupe is retained — 60 per cent or more — then it would be more appropriate to retain habitat features, rather than to try to approximate the species' uncertain home range. In short, it was submitted on behalf of VicForests that the respondents had failed to establish, on the evidence, that the precautionary principle was engaged, and, in any event, the respondents had failed to establish on the evidence that pre-harvest surveys and specific exclusion areas are uniformly required.

127 Having undertaken that review of the proceedings before the judge, we can now return to consider whether VicForests was afforded an appropriate opportunity to address the form of relief granted by the judge in the three injunctions that are the subject of ground 1.

128 In short, the foregoing review of the proceedings before the primary judge reveals the following important points. First, the three injunctions, which are the subject of ground 1, were based on the evidence called in the trial, and, most particularly, predominantly on the evidence of VicForests' own expert witness, Dr Wagner. Secondly, as we have noted, the question, whether VicForests was, or would be, complying with ss 2.2.2.2 and 2.2.2.4 of the Code, was necessarily interrelated with the question as to what steps VicForests was required to undertake in order to fulfil its minimum obligations under those two provisions. Thirdly, it is clear that the evidence adduced by the parties, and particularly the expert evidence, was directed to those two interrelated issues. Fourthly, counsel had an appropriate opportunity, and took that opportunity, to address the issues raised by the experts, both in cross-examination and in final address. Those issues included the questions, first, as to the minimum steps that were required to be undertaken by VicForests to comply with the two statutory

provisions in question, and secondly, as to the practicability and appropriateness of the steps recommended by the experts.

129 Further, the judge, having had the advantage of weighing the evidence of the two experts, concluded that the approach proposed by Dr Wagner was 'the more proportionate' of the approaches of the two experts in question. In that respect, her Honour also noted that no evidence or submission had been directed to the proportionality of the measures proposed by Dr Wagner, and, in particular, retention of 60 per cent of the basal area of the harvested areas, and that no suggestion had been made that it would not be viable to harvest the areas in that way.[57] VicForests has not sought to impugn either of those two factual conclusions made by the judge. However, as noted in respect of our analysis of ground 3 below, VicForests contended that the judge was wrong to construe s 2.2.2.2 as enabling her to select the 'more proportionate' measure.

130 In support of ground 1, VicForests has placed significant emphasis on the fact that the relief ultimately granted by the judge was quite different to that sought by the respondents. In broad terms, it may be said that the injunctive relief which was sought, and that which was the subject of the orders by the judge, was directed to the retention of sufficient vegetation in the harvested areas to enable the continued survival of the two species of glider in question. The form, and detail, of the injunctions ordered by the judge were different to those sought by the respondents in their respective prayers for relief, and in the draft orders submitted by them. Nevertheless, at the risk of repetition, the form of relief which was decided by the judge, while not the same as that which had been sought by the respondents, was less onerous than the relief contended for by the respondents, and, most importantly, was based on the evidence called by VicForests. That evidence had been the subject of significant examination and analysis in the course of the witnesses' evidence and in counsels' final addresses.

131 It is a basic principle that where a plaintiff has established an appropriate basis for the grant of equitable relief, a court exercising that jurisdiction should fashion the relief granted by it in a manner which is just, practical and appropriate, balancing the competing interests of the parties in question.[58] In *Warman International Ltd v Dwyer*,[59] the High Court expressed that fundamental principle as follows:

> It is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts.[60]

132 It is recognised that in undertaking that process, and in complying with that principle, the court may ultimately grant relief in a form which is relevantly different to that contended for by the plaintiff. In *Bridgewater v Leahy*,[61] Gaudron, Gummow and Kirby JJ stated:

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57 Liability Reasons, [221]–[222].

58 See, eg, *Erlanger v New Sombrero Phosphate Company* (1878) 3 App Cas 1218, 1278–9 (Lord Blackburn); *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 113–4 (Deane, Dawson, Toohey, Gaudron, McHugh JJ); [1995] HCA 14.

59 (1995) 182 CLR 544 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); [1995] HCA 18.

60 Ibid 559.

61 (1998) 194 CLR 457 (Gleeson CJ, Gaudron, Gummow, Kirby and Callinan JJ); [1998] HCA 66.

> 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.[62]

133 As we have noted, at an early stage in the proceeding, and before final address, senior counsel for VicForests requested to be provided with a draft of the final orders that were sought by the respondents. However, that circumstance did not preclude the judge, in accordance with those principles, formulating an appropriate form of injunction, that was different to that proffered by the respondents, but which was consistent with the evidence adduced in the trial, in circumstances in which the parties had had a full and proper opportunity to address that evidence and the issues relating to it. While senior counsel then acting for VicForests sought, in final address to the judge, to confine the respondents to the specific form of relief contained in their prayer for relief, the judge correctly responded that, if she concluded that the respondents were entitled to equitable relief, it was appropriate that the form of relief be moulded to conform with the findings that she made.

134 In those circumstances, contrary to the submissions advanced by VicForests in this application, we are not persuaded that the judge denied VicForests procedural fairness in granting the form of injunctive relief contained in the final orders. It follows that ground 1 of the application for leave to appeal must fail.

Ground 3: Did the primary judge err in construing section 2.2.2.2 of the Code?[63]

Submissions

135 Ground 3 is directed to the judge's construction of s 2.2.2.2 of the Code.

136 The judge's construction of s 2.2.2.2 and the related definition of the precautionary principle is most clearly set out in following passage of the Liability Reasons. Relevantly, her Honour said:

> 128. … The principle involves two inquiries:
>
> (a) are there threats of serious or irreversible environmental damage;
>
> (b) about which there is a lack of scientific certainty?
>
> If the answer to both of those inquiries is 'yes', measures to prevent environmental degradation should not be postponed.
>
> 129. The explanatory note to s 2.2.2.2 and the definition of the precautionary principle direct attention to Osborn J's understanding of the principle in *Brown Mountain*,[64] which went beyond the preconditions to the

62 Ibid 494 [127]. We return to the 'existence of [the] necessary equity' in our discussion of ground 2 below.

63 See above at [37]–[38] for the text of the section and the definition in the glossary.

64 *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1; [2010] VSC 335 which is commonly referred to as the '*Brown Mountain*' case.

operation of the principle. I gratefully adopt the following summary of his Honour's analysis from the judgment of the Full Court in Leadbeater's Possum Appeal:[65]

- if the conditions precedent are satisfied (a threat of serious or irreversible environmental damage and a lack of full scientific certainty), the burden of showing the threat of serious or irreversible environmental damage will not occur shifts to the proponent of the relevant action (*Brown Mountain* at [199]);

- the precautionary principle permits the taking of preventative measures without having to wait until the reality and seriousness of the threat have been fully known (*Brown Mountain* at [201]);

- the precautionary principle is not however directed to the avoidance of all risks (*Brown Mountain* at [203]);

- the degree of precaution appropriate will depend on the combined effect of the seriousness of the threat and the degree of uncertainty (*Brown Mountain* at [204]);

- the margin for error in respect of a particular proposal may be controlled by an adaptive management approach (*Brown Mountain* at [205]);

- the precautionary principle requires a proportionate response. Measures should not go beyond what is appropriate and necessary in order to achieve the objective in question. The principle requires the avoidance of serious or irreversible damage to the environment 'wherever practical'. It also requires the assessment of the risk-weighted consequences of optional courses of action (*Brown Mountain* at [207]);

- a reasonable balance must be struck between the cost burden of the measures and the benefit derived (*Brown Mountain* at [208]).

130. In summary, the proper construction of s 2.2.2.2 of the Code is that VicForests must always apply the precautionary principle to the conservation of biodiversity values, including when planning and conducting timber harvesting operations. This involves two inquiries — (a) are there threats of serious or irreversible harm of environmental damage, (b) about which there is a lack of scientific certainty? If the answer to both of these inquiries is 'yes', VicForests should not delay taking proportionate measures to prevent environmental degradation. The proportionality of a proposed measure is to be assessed in the way described in the preceding paragraph.

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65 Leadbeater's Possum Appeal, [180]. This is a reference to *VicForests v Friends of Leadbeater's Possum Inc* (2021) 285 FCR 70 (Jagot, Griffiths and SC Derrington JJ), a decision of the Full Federal Court on appeal from *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704 (Mortimer J).

137 Before coming to VicForests' argument on appeal, it is convenient first to rehearse how the judge applied this interpretation of s 2.2.2.2 and the precautionary principle in arriving at the outcome of the case. Doing so helps to understand the significance of the construction placed upon the section and the principle, why VicForests challenges particular elements of that construction, and how that construction of s 2.2.2.2 feeds into or integrates with other grounds of the appeal.

138 Having construed s 2.2.2.2 and the precautionary principle in the manner described, the judge:

(a) made findings concerning VicForests' current measures taken for the conservation of the greater gliders, both in relation to their detection and protection;[66]

(b) determined the answers to the two inquiries she had identified — that is, whether there are threats of serious or irreversible harm to the greater gliders, about which there is a lack of full scientific certainty, in short, finding both questions were answered in the affirmative;[67]

(c) accordingly, found that the precautionary principle was engaged in relation to the greater glider so that VicForests could not delay taking proportionate measures to prevent serious or irreversible damage to the species;[68]

(d) next, analysed the environmental expert evidence to determine whether VicForests had discharged its burden of showing that its timber harvesting operations would not cause the relevant damage; and

(e) finally, concluded that VicForests' current approach fell well short of meeting either of two alternative 'proportionate' measures for protecting greater gliders from destruction by timber harvesting operations as recommended by the expert witnesses who gave evidence.[69]

139 As already noted, the judge made a similar set of findings as to VicForests' current measures for the conservation of the yellow-bellied gliders (both for detection and protection), the engagement of the precautionary principle, and that VicForests' current measures fell short of what the principle required in respect of that species.[70]

140 In summary, therefore, the judge determined that the two preconditions for the engagement of the precautionary principle were satisfied in respect of both species of gliders so that VicForests could not delay taking (ie, should be taking) proportionate measures to prevent the destruction of the gliders' habitats. VicForests' current (and proposed) measures both for detection and protection of the gliders failed to measure up to the only two proportionate ways by which, on the evidence, the detection and protection of the gliders' habitats could be achieved. It followed that by adopting its

66 Liability Reasons, [154]–[175].
67 Liability Reasons, [176]–[204].
68 Liability Reasons, [203].
69 Liability Reasons, [216], [223], [227], [228].
70 Liability Reasons, [229]–[257].

current measures for the detection and protection of the gliders, VicForests, necessarily, breached the precautionary principle.

141 In response to that analysis, ground 3 was formulated in the following manner:

> The trial judge erred in construing s 2.2.2.2 of the Code, in holding that if there are threats of serious or irreversible harm of environmental damage about which there is a lack of scientific certainty, the Applicant 'should not delay taking proportionate measures to prevent environmental degradation' (Reasons at [130]), when in fact s 2.2.2.2 relevantly prohibits the Applicant from using a lack of full scientific certainty *as a reason* for postponing measures to prevent environmental degradation, if there are threats of serious or irreversible environmental damage [emphasis added].

142 VicForests' contentions concerning the construction of that provision and the precautionary principle evolved and changed through the life of the proceeding, from pleadings through to trial submissions and, ultimately, to the submissions in this Court, first, in its written case, and then orally. In their final form, in oral submissions, the key contention made on behalf of VicForests was that the precautionary principle, as formulated in s 2.2.2.2 and the glossary, is a direction to VicForests to adopt a certain reasoning, or decision-making process when it is planning and conducting its timber harvesting operations. However, it was submitted, that provision does not dictate the outcome of the process. It was submitted that, in accordance with the correct construction of s 2.2.2.2, a court could only conclude that the precautionary principle, constituted by that provision, must lead to a particular outcome, if the process of reasoning required by it could only lead to one possible reasonable outcome.

143 VicForests submitted that, rather than concluding, as the judge ought to have, that the respondents had failed to demonstrate that the only way that VicForests could comply with the precautionary principle was to apply the survey methods and exclusion areas for which the respondents contended, instead, the judge identified common aspects of the evidence between the experts about certain other alternative measures that were proportionate, and held that VicForests had breached s 2.2.2.2 by failing to apply those measures.

144 Thus, in essence, it was submitted on behalf of VicForests as follows:

> [T]he precautionary principle does no more than enjoin VicForests from adopting a certain reasoning or decision-making process when it is planning and conducting its timber harvesting operations … [It] demands a cautious approach, but does not dictate what the cautious outcome must be. In other words, the focus of the precautionary principle is on the decision-making process and does not empower the Court to dictate its own outcome based on … the commonality of views of experts in the area.

145 In support of that submission, senior counsel for VicForests referred to the various iterations of s 2.2.2.2 in the 2007 Code, the 2014 Code, and the 2021 Code respectively. Counsel submitted that the changes, in the wording of the precautionary principle in the latter two versions of the Code, had demonstrated a discernible shift from a focus on the intended outcome, to a focus on the prescribed process. Counsel then discussed the decisions, in which the precautionary principle had been considered, in

Bridgetown/Greenbushes Friends of the Forest v Department of Conservation and Land Management,[71] *Telstra Corporation Ltd v Hornsby Shire Council*,[72] and *Brown Mountain*.[73] Counsel submitted that, based on that examination, the current version of s 2.2.2.2 is relevantly different to the version considered by Osborn J in *Brown Mountain*, so that the principles, outlined by his Honour, are not applicable to the version of the provision that is under consideration.

146 Counsel submitted that the terms in which s 2.2.2.2 is currently drafted are directed essentially to the process of reasoning to be undertaken by VicForests in the application of the precautionary principle. In particular, the use of terminology in s 2.2.2.2 that the reasoning of VicForests must be 'guided by' the matters specified in the glossary, and that VicForests must undertake a 'careful evaluation', and 'an assessment', supports the construction that the provision is concerned with the decision-making process, and not the outcome of that process.

147 Accordingly, it was submitted, the role of the Court is confined to a determination of whether a decision of VicForests was guided by an evaluation and assessment of the requisite kind. It is not the role of the Court to determine, for itself (as Osborn J did in *Brown Mountain*) whether a particular proposed measure is a proportionate response to the identified threat to the environmental value.

148 Counsel for VicForests accepted that, in a particular case, the decision of the entity, undertaking the timber harvesting operations, might be so perverse that it would lead to the conclusion that that entity had not complied with the provisions of s 2.2.2.2. However, such a process would not entitle the Court to make its own decision about the outcome, which it considers ought to be achieved, in order to ensure compliance with s 2.2.2.2.

149 Counsel submitted that, contrary to the correct construction of the precautionary principle, the judge undertook an inquiry that was not directed to the decision-making process of VicForests, but, rather, to the outcome of that process — more particularly, to the specific measures that should be taken to achieve the outcome.

Analysis and conclusions

150 Section 2.2.2.2 essentially contains four interrelated propositions that collectively comprise the precautionary principle and prescribe its application to the prevention of environmental degradation.

151 First, the precautionary principle applies where there is a threat of serious or irreversible damage to the environment. Secondly, and both as an amplification and consequence of that first point, if there are threats of serious or irreversible environmental damage, a lack of full scientific certainty must not be used as a reason for postponing measures to prevent such environmental degradation. Thirdly, the principle must be applied in a manner which is consistent with relevant monitoring research that has improved the understanding of the effects of forest management on forest ecology and conservation

71 (1997) 18 WAR 102, 116–120 (Wheeler J).
72 (2006) 67 NSWLR 256.
73 (2010) 30 VR 1; [2010] VSC 335.

values. Fourthly, the application of the precautionary principle must be guided, first, by a careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and, secondly, by an assessment of the risk-weighted consequences of various options.

152 The fundamental submission made by VicForests was that the precautionary principle does no more than require VicForests to adopt a certain reasoning or decision-making process when it is planning and conducting its timber harvesting operations. However, it does not dictate what the outcome of that process must be. Accordingly, counsel submitted, the role of the Court is confined to a determination of whether a decision, made by VicForests, has been guided by the evaluation and assessments of the requisite kind, specified in s 2.2.2.2 of the Code. The Court is to consider whether it can be demonstrated that the decision-making processes undertaken involved balancing the prescribed risks and assessing the appropriate options. However, it was submitted, it is not the role of the Court to determine, for itself, whether a particular proposed measure is a proportionate response to the identified threat to the environmental value.

153 As we have noted, s 31(1) of the CFL Act empowers the Minister to make Codes of Practice, which specify standards of procedures for the carrying out of any of the objects or purposes of a 'relevant law', which, in this case, includes the Timber Act. Such Codes are prescribed to be legislative instruments, pursuant to ss 3 and 4A of the *Subordinate Legislation Act 1994* and s 4A of the *Subordinate Legislation (Legislative Instruments) Regulations 2021*. Accordingly, the Code was an instrument of a legislative character, and, as such, a 'subordinate instrument', as defined by s 38 of the *Interpretation of Legislation Act 1984*.

154 The starting point to the construction of s 2.2.2.2 is the terms in which that section is expressed.

155 In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,[74] a majority of the High Court expressed the principle in the following terms:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.[75]

156 However, that does not mean that the statutory provision is to be construed without reference to the context, purpose and policy of the provision in question. In *SZTAL v Minister for Immigration and Border Protection*,[76] Kiefel CJ and Nettle and Gordon JJ stated:

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74 (2009) 239 CLR 27.

75 Ibid 46–7 [47] (citations omitted) (Hayne, Heydon, Crennan and Kiefel JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

76 (2017) 262 CLR 362.

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[77]

157 In similar terms, in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*,[78] the High Court stated:

> 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.[79]

158 Consistently with those principles, s 35(a) of the *Interpretation of Legislation Act 1984* provides that a construction that would promote 'the purpose or object underlying the Act' is to be preferred to a construction that would not promote that purpose or object.[80] Pursuant to s 35(b), the object and purpose of the legislation may be ascertained with the assistance of the second reading speech or the explanatory memorandum. Nevertheless, in applying that provision, it has been emphasised that such extrinsic material may not be used to displace the plain meaning of the statutory text.[81]

159 Section 36(3A) of the *Interpretation of Legislation Act 1984* provides that the note to s 2.2.2.2 forms part of the text of that provision (the 'Note').[82] In *Director of Public Prosecutions (Vic) v Walters (a pseudonym)*,[83] this Court explained the function of such a note in the construction of a legislative provision in the following terms:

> Although a note such as this forms part of the Act, it is subordinate to the substantive provisions, of which it is merely explanatory or illustrative.
>
> In some circumstances, a note such as this may be used as an aid to the construction of the substantive provision to which it relates. Thus, if two interpretations are open on the text of the substantive provision, a note might assist in determining which of the two interpretations was to be preferred. As observed earlier, however, if there is conflict between the substantive provision

77 Ibid 368 [14] (citations omitted).
78 (2012) 250 CLR 503.
79 Ibid 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) quoting *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 [47].
80 Cf *Miller v Martin* [2020] VSCA 4, [120] (Niall, Hargrave and Ashley JJA).
81 *DPP v Woodford* [2017] VSCA 312, [76] (Weinberg, Osborn, Priest JJA).
82 That is, because it is a note appearing at the foot of a provision, rather than a marginal note, in a subordinate instrument made after 1 January 2001.
83 (2015) 49 VR 356; [2015] VSCA 303.

> and the note, the note must give way. And, if the substantive provision fails to deal with a particular matter, nothing in the note can make good the deficiency.[84]

160 Taking, as a starting point, the text of s 2.2.2.2 of the Code, the construction contended for by VicForests does derive some support from the terms in which it is expressed. The Glossary to the Code requires that, in applying the precautionary principle, decisions should be 'guided by' a 'careful evaluation' to avoid, where practicable, serious and irreversible damage to the environment, and by 'an assessment' of the risk-weighted consequences of various options. That terminology is consistent with the proposition that the focus of the precautionary principle is on the process adopted by the entity responsible for planning and managing the particular timber harvesting operation in question.

161 On the other hand, as contended for by the respondents, the focus of s 2.2.2.2 is directed to a specific goal or consequence, namely, the conservation of biodiversity values that are under threat and the circumstances in which measures to prevent environmental degradation should not be withheld. Thus, it was submitted, the dominant aspect of the precautionary principle, provided for in s 2.2.2.2, is directed to ensuring that proper measures be undertaken to prevent environmental degradation. In that way, it was submitted, the provision is directed, not just to process, but also to the achievement of a specific prescribed outcome.

162 In order to resolve the competing interpretations of s 2.2.2.2, it is necessary to consider the terminology that is adopted in the drafting of the provision in its statutory and historical context, taking into account the effect of the Note. As we will discuss, the statutory and historical context weigh significantly in favour of the proposition that the provision is not solely concerned with the process by which decision-making is undertaken, but it is also directed to the attainment of a specific goal, namely, the effective conservation of environmental values.

163 For this purpose, it is necessary to give emphasis to some aspects of the regulatory framework we have already outlined. The overarching statutory context to s 2.2.2.2, and to the related provisions of the Code, are the provisions of the CFL Act, under which the Code was made. Relevantly, s 4 of that Act provides that the object of the legislation was to set up a framework to enable the Minister to be 'an effective conserver of the State's lands, waters, flora and fauna', and to make provision for the productive educational and recreational use of the State's lands, waters, flora and fauna 'in ways which are environmentally sound, socially just and economically efficient'.

164 The substantive provisions of the Code commence with s 1.2.2, which defines its purpose in the terms which we have already quoted. Significantly, it provides that the entities that are involved in timber harvesting are to 'deliver sound environmental performance', when planning for and conducting commercial timber harvesting operations, in a way which (*inter alia*) is compatible with the conservation of the wide range of environmental, social and cultural values associated with forests, and which

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84 Ibid 369–70 [50]–[51] (Maxwell P, Redlich, Tate and Priest JJA).

provides for the ecologically sustainable management of timber harvesting operations within State forests until 2030.[85]

165 Section 1.2.10 (which is entitled 'Terminology') provides that an Operational Goal contained in the Code states the 'desirable outcome or goal' for each of the specific areas of timber harvesting operations to meet the Code principles. As we have previously explained, the section describes 'mandatory actions' as actions 'to be conducted in order to achieve each operational goal'.[86]

166 Section 1.3 specifies six Code Principles, which are 'broad outcomes' of the intent of the Code. The first two principles are the maintenance of biological diversity and ecological characteristics of native flora and fauna within forests, and the maintenance of the ecologically sustainable long term timber harvesting capacity of forests.

167 Section 1.3 contains a Table that specifies particular Operational Goals. Two such Operational Goals are that '[t]imber harvesting operations in State forests specifically address biodiversity conservation risks' and that those operations are 'planned and conducted to maintain a long term ecologically sustainable timber resource'.

168 Pausing there, it is apparent that the primary focus of the introductory provisions to the Code is not only on process, but also on the attaining of particular goals.

169 Section 2.2.2 (entitled 'Conservation of biodiversity') commences with the sub-heading 'Operational goals'. That part contains a requirement that timber harvesting operations in State forests 'specifically address biodiversity conservation risks and consider relevant scientific knowledge at all stages of planning and management'. It is to achieve those goals that the 'mandatory actions', of which the precautionary principle in s 2.2.2.2 is part, are directed.

170 It is in that context that the note to s 2.2.2.2 has particular relevance. In determining the intention and effect of the Note, it is necessary to consider, in a little detail, the decision of Osborn J in *Brown Mountain*.

171 In that case, the plaintiff sought to restrain the logging of four coupes of old growth forest that were located in the valley of Brown Mountain Creek, which is situated on the edge of the Errinundra Plateau in East Gippsland. The plaintiff claimed that the proposed logging would breach a number of conditions, including s 2.2.2.2 of the Code, pursuant to which the defendant (VicForests) was permitted to lawfully undertake timber harvesting in those coupes.

172 In the course of his judgment, Osborn J gave consideration to the content of the precautionary principle contained in s 2.2.2.2. In doing so, his Honour considered that there were two conditions precedent to the operation of the precautionary principle, namely, first, that there be a threat of serious or irreversible environmental damage, and, secondly, that there be scientific uncertainty as to that damage.[87] If those conditions precedent are satisfied, the burden of demonstrating that the threat of serious or

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85 See above n 23.

86 See above [30]–[31].

87 *Brown Mountain* (2010) 30 VR 1 [188] quoting *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 269 [168] (Preston CJ); [2006] NSWLEC 133.

irreversible damage will not occur shifts to the proponent of the forestry operations.[88] Osborn J considered that the precautionary principle is not directed to the avoidance of all risks, and that the degree of precaution will depend on the combined effect of the seriousness of the threat and the degree of uncertainty.[89] In particular, the precautionary principle requires a proportionate approach, involving a reasonable balance between the cost burden of the measures and the benefit to be derived from them.[90]

173 In the case before him, Osborn J considered that the precautionary principle raised five issues. The first four issues were: whether there was a real threat of serious or irreversible damage to the environment; whether that threat was attended by a lack of full scientific certainty; whether the defendant had demonstrated the threat to be negligible; and whether the threat was able to be addressed by adaptive management.

174 Relevantly, the fifth issue identified by his Honour was whether the measures, contended for by the plaintiff in that case, were proportionate to the threat to the environment that was in issue.[91]

175 In addressing that issue, Osborn J assessed evidence that was adduced in the trial before him as to the sufficiency or otherwise of the measures that were to be undertaken by the defendant to address the risk of damage to the environment. By reference to that evidence, his Honour determined whether the measures, which the defendant proposed to take, were proportionate to the environmental threat in issue. That approach, taken by Osborn J, was not confined to assessing the processes by which the defendant had determined upon the measures to be taken to avert the threat of serious or irreversible damage to the environment. Rather, consistent with the construction that he gave to s 2.2.2.2 (as it was then formulated), Osborn J determined whether the measures proposed by the defendant were a proportionate response to the identified threat to the environment.

176 It is informative to give brief consideration to how Osborn J, in the *Brown Mountain* case, addressed that particular issue. Without traversing the whole of his Honour's detailed judgment, it is convenient to consider how his Honour applied the precautionary principle to four of the threatened species that were the subject of evidence in the case.

177 The first such species were the giant burrowing frog and the large brown tree frog. In determining whether the steps to be taken by the defendant were adequate to address the threat to those species, Osborn J gave detailed consideration to the evidence of Dr Graeme Gillespie, an expert in that area. Based on that evidence, his Honour concluded that, in order to comply with the precautionary principle, it was necessary that the defendant undertake the survey work advocated by Dr Gillespie.[92]

178 The second species considered by Osborn J in the *Brown Mountain* case were the powerful owl and the sooty owl. Based on the evidence adduced in the trial, the judge

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88 Ibid [199].
89 Ibid [203]–[204].
90 Ibid [207]–[208].
91 Ibid [212].
92 Ibid [506].

accepted the submission made by the plaintiff that the precautionary principle required the defendant not to log the coupes in question until a re-evaluation of the management area for each of those two subspecies was undertaken.[93]

179 The third species was the spot-tailed quoll. Again, based on the evidence in the trial, the judge concluded that the precautionary principle required VicForests not to log the coupes until there was 'better certainty' that it was not the actual habitat of the quoll.[94]

180 The fourth species was the square-tailed kite. The question in respect of that species concerned whether there was any evidence of its existence in the coupe in question. The judge accepted the defendant's submission to that there was no such evidence.[95] Osborn J also accepted the defendant's submission that 'the evidence' did not establish that the proposed logging would constitute a threat to the survival of the species.[96]

181 In considering the threat to each of those four species, and the measures undertaken by the defendant in respect of them, it is clear that, consistent with his Honour's definition of the precautionary principle and based on the evidence led in the trial, Osborn J determined himself whether a particular proposed measure was a sufficient and proportionate response by the defendant to the identified threat to the environmental value in question. That is, his Honour did not confine his consideration to the question whether the defendant had engaged in a process that was consistent with the precautionary principle. Rather, in respect of each of the four species, he considered whether based on the evidence the measures proposed by the defendant were sufficient to achieve the requisite degree of protection against the threat of serious or irreversible damage to that species.

182 In conclusion, then, the text of s 2.2.2.2 of the Code, when considered in isolation, does provide some support to the construction contended for on behalf of VicForests, namely, that the precautionary principle is concerned with the process of decision-making, and not with the outcome of that process. However, that provision must be considered in its statutory and historical context. Section 2.2.2.2 is contained in a section of the Code that is directed to achieving particular explicit goals, the central one of which is the conduct of timber harvesting operations in a manner which does not result in the serious or irreversible damage to environmental values. The Note to s 2.2.2.2, and the statutory and historical context to the provision, cogently reinforce the proposition that the section is not confined to a direction as to process, but also is specifically directed to the achievement of the defined outcome.

183 The precautionary principle contained in the glossary to the Code was reformulated in November 2021, subsequent to the decision of Osborn J in *Brown Mountain*. However, contrary to the submissions advanced on behalf of VicForests, that reformulation did not materially alter the content or substance of the provision. Although it reversed the order in which the two sentences comprising the principle were placed, the reformulation made no material change to the wording of either sentence. The reordering of those two sentences did not effect any substantive change to their

93 Ibid [603].
94 Ibid [635].
95 Ibid [737]–[738].
96 Ibid [743].

meaning. Further it is clear from the Note to the provision that it was not intended that the changes to it should revoke or qualify the application of s 2.2.2.2 in the manner undertaken by Osborn J in *Brown Mountain*.

184 For those reasons, the primary judge was correct to conclude that the conservation of biodiversity values is not merely the means to which the application of the precautionary principle is to be applied, but rather, that it is a 'substantive, overarching obligation', imposed by the Code, which the defendant must meet when planning and conducting timber harvesting operations in State forests.[97]

185 Accordingly, contrary to the submission advanced by VicForests, the function of the Court in a case such as this is not confined to evaluating whether the processes undertaken by it involved balancing the prescribed risks and assessing the relevant options. The judge correctly undertook an assessment, based on the evidence, as to whether the proposed measures constituted a sufficient response to the threat to the environmental values in question, consistent with the requirements of s 2.2.2.2 of the Code.

186 It follows that ground 3 must fail.

Ground 4: Did the primary judge err in construing section 2.2.2.4 of the Code?[98]

Submissions

187 In the trial of the proceeding before the judge, VicForests submitted that the 'biodiversity values', referred to in s 2.2.2.4 of the Code, are the values listed in the second column of Tables 13 and 14 of the Standards — that is, the column headed 'Value' — and not the species listed in the first column of those Standards. VicForests also contended that the management actions, which s 2.2.2.4 required it to undertake, are limited to those prescribed in Tables 13 and 14. Accordingly, it was submitted that, as Tables 13 and 14 do not prescribe a value or a management action for the greater glider or the yellow bellied glider in the Central Highlands FMA, s 2.2.2.4 does not require that VicForests identify those species in that area or take any management action to address risks to them.

188 The respondents' submission (as plaintiffs at trial) was that biodiversity values are things that are valuable, within the context of biodiversity and the environment. Thus, it was submitted that s 2.2.2.4 requires VicForests to identify the biodiversity values that are present in a coupe before undertaking harvesting, and that VicForests address the risks to those biodiversity values by management actions 'consistent with' the Standards. The respondents submitted that s 2.2.2.4 imposes obligations on VicForests which are not confined to compliance with s 2.2.2.1 of the Code which, more particularly, requires the taking of relevant measures 'specified in' the Standards, being the management actions prescribed in Table 13 of the Standards.

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97 Liability Reasons, [115].

98 See the text of s 2.2.2.4 at [37] above.

189 The primary judge accepted the submissions advanced by the respondents. Her Honour summarised the effect of s 2.2.2.4 in the following terms:

> In summary, s 2.2.2.4 of the Code is a mandatory action that requires more of VicForests than compliance with the prescriptions in cl 4.2.1 and Table 13 of the Standards. It requires VicForests, during planning, to identify whether and where the biodiversity values — that is, the species — listed in the first column of Table 13 are present in a coupe, before undertaking timber operations such as roading and harvesting. These biodiversity values include the two species with which these proceedings are concerned — southern greater gliders and yellow-bellied gliders. Where either of those species is present, VicForests must address risks to them by taking management actions consistent with the Standards. In East Gippsland, these actions may be more than the management actions that are already prescribed in Table 13, where that is necessary to address risks to the species. In the Central Highlands, the fact that Table 13 does not prescribe management actions in relation to either species does not preclude VicForests from taking action to address risks to them in order to comply with s 2.2.2.4. VicForests' obligations under s 2.2.2.4 are in addition to its obligations, under s 2.2.2.1 of the Code and cl 4.3.1 of the Standards, to apply the Table 13 prescriptions.[99]

190 Ground 4 of the application for leave to appeal is directed to that conclusion by her Honour.

191 Although not reflected in the terms of ground 4 (set out below) or in its written submissions, initially, in oral submissions on appeal, VicForests appeared to repeat the argument it had put to the trial judge that the relevant biodiversity values referred to in s 2.2.2.4 of the Code were those features set out in the second column of Tables 13 and 14 of the Standards, headed 'Values'. Thus, it submitted, what was to be identified in any coupe was a 'relative abundance' of the particular species, not merely members of the species.[100] Ultimately, however, VicForests disavowed that argument and accepted, as the judge found, that the relevant biodiversity values were those listed in the first column of Tables 13 and 14 of the Standards.

192 The particular aspect of the judge's conclusion that VicForests challenged is set out in the text of ground 4, namely:

> 4. The trial judge erred in construing section 2.2.2.4 of the Code, in holding (Reasons at [**152**], [**377**]) that that provision requires the Applicant to identify "whether and where … the species … listed in the first column of Table 13" of the *Management Standards and Procedures for timber harvesting operations in Victoria's State forests 2021* (the **Management Standards**) are present in a coupe, when in fact section 2.2.2.4 does not require the Applicant, in the case of every coupe, to locate each member of a species relevantly listed in the first column of Table 13 of the Management Standards.

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99 Liability Reasons, [152]. See also [302], [310].

100 See the relevant extract from Table 13 at [41] above.

193 It was submitted by VicForests that, on its proper construction, s 2.2.2.4 does not require it to identify whether every biodiversity value is present, or where every biodiversity value is present, in a particular coupe. It was contended that, if the judge's construction is correct, it would be required, when planning, to identify the 510 species listed in the Standards, ascertain whether each of them was present or not, and ascertain where each instance of each such species was located. Rather, it was submitted that, consistent with the purpose of the Code, s 2.2.2.4 requires no more than that VicForests recognise or establish which biodiversity values are present in a coupe.

194 In response, counsel for the respondents submitted that the judge did not determine that s 2.2.2.4 requires VicForests to identify the location of each member of a particular species listed in the Standards. Rather, her Honour found that listed species needed to be identified, so that management actions could be taken to address risks to them. For that purpose, it would not be necessary to identify the location of each and every individual glider in a coupe.

Analysis and conclusion

195 As the judge concluded, it is clear that the 'biodiversity values', in both ss 2.2.2.2 and 2.2.2.4, consist of aspects of the environment, including species of fauna and flora, that have 'value to biodiversity'.[101] Further, and as correctly conceded by VicForests, in the context of the use of the term 'values' in a number of other provisions in the Code, the judge was correct in concluding that the expression, 'biodiversity values', in s 2.2.2.4 is not used in a numerical sense such that it is confined to the content of the second column of Table 13.

196 As the 'biodiversity values', referred to in s 2.2.2.4, are not confined to the numerical incidence of a particular species identified in the second column of Table 13, the correct construction of s 2.2.2.4, as the judge concluded, is that that provision requires VicForests, during planning, to identify whether and where the biodiversity values — including those which are listed in the first column of Table 13 — are present in a coupe, before it undertakes timber operations within the coupe. We accept the respondents' argument that the judge did not determine that s 2.2.2.4 required VicForests to identify the location of each and every individual glider in a coupe. It is not about counting the individual members of the species. Instead, the judge construed the provision as requiring the adoption of survey methods likely to detect any members of the relevant species in the coupe. That her Honour adopted such a construction is reflected in the terms of order 1, namely that VicForests use a reasonably practicable survey method that is likely to detect gliders that may be present in the coupe.

197 Further, it follows from the fact that Table 13 does not exhaustively prescribe management actions in relation to either of the two species of glider in respect of the Central Highlands, that VicForests is not exempted from taking proper action to address risks to those species in that area in order to comply with the requirements of s 2.2.2.4.

198 For those reasons, the judge was correct in her construction and application of s 2.2.2.4. Ground 4 must fail.

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101 Liability Reasons, [144].

Ground 5: Were the injunctions limited to what was necessary to avoid unlawfulness?

Submissions

199 VicForests submitted that the primary judge erred in failing to limit the injunctions in the Final Orders to what is necessary to secure its compliance with s 2.2.2.2 and/or s 2.2.2.4 of the Code. It argued that the Court cannot permanently enjoin lawful conduct.[102] In VicForests' submission, orders 1 to 3 of the Final Orders impermissibly intrude upon its lawful decisional freedom in two ways:

(a) first, the parties' experts presented the judge with multiple measures by which VicForests could comply with the Code. Although her Honour preferred the measures proposed by Dr Wagner because they were 'more proportionate', she did not find that there was no other way to secure compliance; and

(b) secondly, the injunctions in the Final Orders far exceed the experts' recommendations. The experts did not recommend a uniform approach for every coupe, but said that the appropriate measures will vary depending on the circumstances.

200 The respondents characterised ground 5 as a complaint that, although the judge accepted that VicForests could comply with the Code by implementing the measures proposed by either Dr Wagner or Associate Professor Wardell-Johnson, the Final Orders did not leave this option open. In response to this characterisation of VicForests' complaint, the respondents pointed out that the judge explained that Dr Wagner's measures were preferred because the alternative measures were likely to have a greater adverse impact on VicForests' operations. The parties were invited to make submissions as to the appropriate form of order. This would have been the opportunity to seek an order based on the evidence of Associate Professor Wardell-Johnson, but VicForests did not avail itself of this opportunity.

201 According to the respondents, the relief granted by the judge reflects the minimum necessary to achieve compliance with the relevant provisions of the Code. The Final Orders prevent VicForests from conducting timber harvesting operations in any coupe 'unless it retains 60 per cent of the basal area of eucalypts', among other things. This, they submitted, reflects the evidence of the experts which allowed for variables in the environment surrounding the surveyed coupes.

Analysis

202 We do not accept that VicForests' complaint is simply that the Final Orders did not reflect the recommendations of Associate Professor Wardell-Johnson. We understand the gravamen of ground 5 to be that there are many ways of complying with the Code and the Standards, and that it was not open to the judge to prescribe the method of

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102 Citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 393 [100] (McHugh, Gummow, Kirby and Hayne JJ); *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 395–6 [31] (Gaudron, McHugh, Gummow and Callinan JJ); *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 162 [47] (Gummow, Hayne, Heydon and Crennan JJ).

compliance based on her 'preference'. This is related to the second limb of ground 5, which alleges that the injunctions go beyond the experts' recommendations.

203 It will be recalled that the three injunctions prevented timber harvesting in the relevant areas unless the following measures are taken:

(a) the conduct of pre-harvest surveys using a 'reasonably practicable' survey method that is likely to identify any gliders;

(b) the exclusion from harvesting of the home ranges of any identified greater gliders;

(c) the exclusion from harvesting of riparian strips; and

(d) the retention of 60 per cent of the basal area in harvested parts of the coupe.

204 For the reasons given under ground 1, the injunctive relief ordered by the judge was the direct consequence of her Honour's examination of, and conclusions concerning, the submissions made and the evidence called by the parties in respect of the issues that were agitated at trial. The three injunctions made in each proceeding were based on the evidence adduced in the trial and predominantly on the evidence of VicForests' own expert witness, Dr Wagner.

205 As discussed, the fundamental issue in the trial was whether VicForests was complying with the applicable statutory requirements, and in particular with ss 2.2.2.2 and 2.2.2.4 of the Code, in conducting its timber harvesting operations in East Gippsland and the Central Highlands. This question involved an examination and analysis of the steps taken and procedures followed by VicForests for the protection of the greater gliders and the yellow-bellied gliders in those areas and whether those steps were, and would be, sufficient to comply with the statutory requirements. This question was necessarily bound up with the question of what measures were required by the two provisions. In determining whether the measures taken by VicForests were sufficient to comply with the statutory requirements, the judge considered what the minimum requirements would be, having regard to the evidence of the experts.

206 Thus, the evidence adduced by the parties, and particularly the expert evidence, was directed to the interrelated issues of whether there was compliance with the statutory requirements and, in the absence of compliance, what were the minimum steps that needed to be taken in order to achieve compliance. Although we have already canvassed some of the expert evidence and submissions made about it, it is necessary to refer again to some aspects of the evidence and submissions to address this particular ground.

207 While there may be many ways in which to comply with the requirements of ss 2.2.2.2 and 2.2.2.4, the judge was required to make findings as to the minimum requirements for compliance with the Code and the Standards.

208 Thus, it is clear that the judge, having found that VicForest's existing measures were not effective for the protection and conservation gliders and did not comply with ss 2.2.2.2 and 2.2.2.4, considered that three measures were required in respect of coupes where gliders had been identified: the exclusion from harvesting of areas referable to

the home ranges of greater gliders; the establishment of riparian corridors; and the retention of 60 per cent of the basal area in the harvested parts of the coupe. These were the minimum protections that needed to be taken in order to comply with the statutory requirements where gliders had been identified in a coupe designated for harvesting. Furthermore, in order to identify whether gliders were present, surveys had to be conducted using a method likely to detect the presence of any gliders.

209 We do not accept that the injunctions made by her Honour 'far exceed' the experts' recommendations. While the experts did not recommend a uniform approach for every coupe and said that the appropriate measures might vary depending on the circumstances, they were clear about the need to protect the home ranges of the greater gliders and the establishment of riparian strips. We consider that they were also clear about the level of basal retention required.

210 In VicForests' final submissions at trial, it outlined the evidence as to what was required to protect gliders from the effects of timber harvesting operations. The submission acknowledged that both experts agreed that where the intention is to address risks to gliders posed by timber harvesting operations — at the coupe level and, thereby, at the landscape level — VicForests should retain glider habitat, as well as a significant proportion of the basal area of the harvested parts of the coupe.

211 VicForests' submissions record that 'the experts agreed that the requirements for exclusion areas would be different if the surrounding silvicultural system were not clearfell[ed], but [involved] the retention of a significant proportion of the basal area of the harvested area'. The actual percentage of the basal area to be retained may vary with the quality of the habitat — the better the habitat, the less retention required (and vice versa), but each recommended at least 60 per cent basal area retention as appropriate for retaining a local glider population. In some cases, 40 per cent or 50 per cent might be sufficient, but it would depend on the particular coupe and its particular characteristics. For the yellow-bellied glider, owing to its larger home range, 70 per cent might be more appropriate.

212 VicForests' submissions posited that it was not possible to be prescriptive about a single percentage figure for all coupes. What the experts considered necessary was significant basal area retention in the harvested area, around any patches retained for habitat preservation. Ultimately, however, if there were to be significant basal area retention of around 60 per cent in the harvested area, little divided the experts in terms of what would be required to protect the gliders:

(a) For the greater glider, Dr Wagner's opinion was that a 2.6 hectare exclusion area would be adequate, based on its average home-range size in mature forests; Associate Professor Wardell-Johnson concluded that 'less than 3 hectares would be inadequate', but approximately three could be appropriate.

(b) For the yellow-bellied glider, which is a more mobile creature, there is far less certainty about its home range. The experts agreed that, rather than retaining a particular sized area for its habitat, it would be more appropriate to retain habitat features within a harvesting area.

213 The submissions concluded on this point:

> The effect of the foregoing is that the experts opined that, to protect local populations of gliders from the effects of timber harvesting, a significant percentage of the basal area of the harvested part of a coupe should be retained (where the percentage is determined by the characteristics present in that coupe), along with an exclusion area of approximately 3 hectares around the known location of a greater glider.

214 As to the need to identify gliders in order to protect them from the effects of timber harvesting, the submissions recorded that the experts agreed that to adequately plan for habitat retention and appropriate silvicultural methods, it was necessary to know where in a coupe gliders occurred and that single survey transepts might be insufficient to reveal the location of gliders throughout an entire coupe.

215 These submissions should be considered against the findings of the judge in relation to the manifest inadequacy of the measures applied by VicForests. In relation to the greater glider, her Honour noted the following matters:

> (a) VicForests only applies the 40 per cent retention prescription where three or more greater gliders are detected per spotlight kilometre. The evidence revealed no scientific basis for this detection threshold.
>
> (b) Similarly, in the East Gippsland FMA, VicForests only sets aside 100 hectares of suitable habitat where surveys have detected more than ten greater gliders per spotlight kilometre. Again, I could discern no scientific basis for this detection threshold in the evidence…
>
> (c) Where a greater glider has been detected, VicForests does not necessarily set aside any area of habitat centred on the location of the detection, in order to preserve the glider's home range. ...
>
> (d) The 40% retention prescription in the Greater Glider Action Statement is wholly inadequate for the protection of greater gliders within a coupe. The 2000 study by Dr Kavanagh, on which the prescription is apparently based, recommended at least 40% basal retention in addition to the retention of riparian buffers. The 40% retention prescription involves retention of 40% of the basal area of eucalypts across the entire coupe, including riparian buffers. In addition, the 40% retention prescription can be applied without reference to the location of a glider's home range, and so may not preserve this critical habitat.
>
> (e) VicForests' variable retention harvesting methods were not shown to be effective to conserve greater glider populations in harvested coupes. VicForests led no evidence that its variable retention systems were developed by reference to 'relevant monitoring and research' or the 'advice of relevant experts and relevant research in conservation biology and flora and fauna management'. The high point was a reference to a literature review of similar systems internationally and in Tasmania, conducted by a forest consulting firm. To date there has been only rudimentary evaluation of the impact of variable retention harvesting on greater gliders, in the form of VicForests' post-harvest survey program. As discussed, no reliance can be placed on a conclusion

drawn from that program that greater gliders persist in coupes logged using variable harvesting.

(f) Far from demonstrating that variable retention harvesting is effective to conserve greater gliders, the available evidence is that it is of no short or medium term benefit to them.

(g) The [respondents] sought to demonstrate that the retained basal area of eucalypts in the harvested area of four coupes harvested using the VR1 harvesting method was between 8 and 11%. Both ecologists considered a basal area retention of 10% to be in effect clearfall harvesting. Accepting that there is some margin for error in the [respondents'] calculations, the retained basal area that is planned in all four coupes is much lower than Dr Wagner considered necessary to conserve greater gliders — generally 60% or more.[103]

216 In relation to yellow-bellied gliders, her Honour noted the following:

(a) The detection of yellow-bellied gliders in a coupe scheduled for harvest in the Central Highlands FMAs does not result in VicForests retaining any area of habitat for those gliders.

(b) In the East Gippsland FMA, VicForests only sets aside 100 hectares of suitable habitat where surveys have detected a 'relative abundance' of yellow-bellied gliders — that is, more than five per spotlight kilometre. ... The basis for the detection threshold of five per spotlight kilometre was not explained by the ecologists, or by other evidence. It was Associate Professor Wardell-Johnson's opinion that an area of habitat should be retained where a family group of three or more yellow-bellied gliders is detected.

(c) Where the detection threshold is triggered in East Gippsland, the 100 hectares of suitable habitat that VicForests sets aside is not necessarily centred on where the yellow-bellied gliders have been detected ...

(d) While VicForests' Habitat Tree Survey Guidelines direct attention to hollow-bearing trees, its pre-harvest habitat tree surveys do not presently attempt to identify and plot the locations of sap-feed trees used by yellow-bellied gliders ...

(e) VicForests' variable retention harvesting methods were not shown to be effective to conserve yellow-bellied glider populations in harvested coupes. VicForests did not seek to demonstrate that its variable retention systems were developed by reference to 'relevant monitoring and research' or the 'advice of relevant experts and relevant research in conservation biology and flora and fauna management'. Nor was there any suggestion that VicForests had attempted to evaluate the impact of variable retention harvesting on yellow-bellied gliders.

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103 Liability Reasons, [224] (citations omitted).

(f) To the contrary, the available evidence is that variable retention harvesting is of no short or medium term benefit to gliders.

(g) As discussed in relation to greater gliders, variable retention harvesting as it is practised by VicForests may involve the retention of as little as 10% of the basal area in the harvested area of a coupe, the equivalent of clearfelling. Both VR1 and VR2 harvesting methods are much more intensive than the 60% basal area retention recommended by Dr Wagner for the conservation of yellow-bellied gliders. Associate Professor Wardell-Johnson considered that the use of VR1 and VR2 harvesting methods proposed in Wolpertinger coupe in East Gippsland would not effectively address risks from logging operations, and that gliders inhabiting the harvestable area of the coupe would almost certainly die as a direct result of the logging operation — from predation, starvation, or exposure.[104]

217 The judge's findings concerning VicForests' failure to take effective measures to preserve gliders at a coupe level (and at a landscape level) were not challenged. Much of the evidence supporting those findings came from VicForests' own expert. In these circumstances, it was well open to the judge, having found that the precautionary principle required the identification and preservation of gliders in coupes that were to be harvested, to grant injunctive relief requiring minimum standards to be met before any harvesting could take place.

218 Optimally, standards would be set on a coupe-by-coupe basis. But that was not how the case was presented to the judge. The respondents, who have a special interest in the preservation of the forests that are subject to harvesting, submitted that VicForests' harvesting methods overall were manifestly inadequate to protect and conserve the gliders. The expert evidence strongly supported that proposition. As her Honour said:

> The [respondents] seek injunctions to preserve the native forests of East Gippsland and the Central Highlands, in which they have a special interest. They specifically seek injunctions in order to secure VicForests' compliance with provisions of the Code that require it to apply the precautionary principle to the conservation of biodiversity values, to identify biodiversity values during planning, and to take management actions to address risks to those values. The [respondents] have made out their case that VicForests' current practices do not comply with these provisions in relation to greater gliders and yellow-bellied gliders, and that it intends to continue those practices in its future timber harvesting operations in East Gippsland and the Central Highlands. That is a sufficient basis to grant injunctive relief.[105]

219 We agree with her Honour's conclusion. Both experts gave their evidence as to what was required to protect the species in the context of timber production. They gave their evidence in relation to 'the logging regime currently in place' and agreed that in order to protect the gliders in the context of timber production, it was necessary to know where they were. Once gliders were identified, there then needed to be measures to ensure their survival in the context of the harvesting of the coupe. We consider that it was well open to the judge to find on their evidence that surveys had to be conducted

104 Liability Reasons, [255] (citations omitted).
105 Liability Reasons, [373].

using a method (unprescribed) likely to identify the presence of any gliders. We also consider the evidence to support her Honour's finding that 60 per cent basal retention and the exclusion of greater gliders' home ranges and riparian strips was necessary in order to comply with ss 2.2.2.2 and 2.2.2.4 of the Code, having regard to the threats to the species and the lack of scientific certainty identified.

220 For completeness, in its written case to this Court, when submitting that the injunctions exceeded the experts' recommendations, VicForests added that, in relation to the retention of riparian strips, 'they never considered the definition of "waterways" in the Code, which includes "drainage lines"'. No further explanation was given of that submission, nor was it raised in VicForests' oral submissions. In their oral submissions, the respondents drew attention to the fact that VicForests appeared to have withdrawn its submission in relation to drainage lines. VicForests made no attempt to revive it in reply. Accordingly, we will not discuss it further.

Conclusion

221 Ground 5 is not made out.

Ground 2: Was the necessary equity to attract injunctive relief established?

222 Ground 2 was substantially argued as a corollary of grounds 1 and 5.

223 The principal submission, in support of ground 2, was that relied on in support of ground 1. VicForests submitted that in order to be entitled to injunctive relief, the respondents were required to make out their claim. It was submitted that the respondents' claim was not, as the judge had characterised it, that VicForests' current surveying and harvesting practices did not comply with its obligations under ss 2.2.2.2 and 2.2.2.4 of the Code. Rather, the claim by the respondents was that VicForests was acting unlawfully, by not taking the measures specified in the respondents' pleadings and in the specific relief sought in those pleadings. For the reasons we have stated in considering ground 1, that submission is not made out.

224 As an additional submission, VicForests' counsel contended that, in a case involving an asserted breach of public law, the principles relating to the grant of injunctive relief, as expressed by the High Court in *Bridgewater v Leahy*,[106] do not apply with the same degree of flexibility as in a case in which a plaintiff claims equitable relief in respect of a private wrong. In particular, it was submitted, those principles do not establish that equity will intervene to mould relief for a plaintiff who has failed to make out a case for the relief that is specifically claimed by it. Rather, it was submitted, a public law injunction will only issue to prevent the particular threatened wrong that is asserted by the plaintiff.

225 Counsel for VicForests did not refer to any authority in support of that contention, namely, that, in a case in which relief is sought for a contravention of 'public law', a court of equity is constrained to granting relief that is confined to the precise form of

106 (1998) 194 CLR 457, 494 [127] (Gaudron, Gummow and Kirby JJ).

relief that is sought by the applicant. Nor did counsel rely on any recognised principle in support of such a proposition.[107]

226 Both at the trial and on this application for leave to appeal, it was accepted that the respondents had the requisite standing to seek equitable relief in respect of the threatened contravention by the applicant of the relevant provisions of the Code. Accordingly, it was accepted that the respondents each had a 'special interest' in the subject matter of the litigation, that is, an interest that was over and above that enjoyed by the public generally.[108] It follows that the respondents had an interest, recognised at law, that entitled them to obtain relief which was directed to securing compliance by VicForests with the provisions of the Code, and the statutory framework that governed logging in the East Gippsland and Central Highlands regions.[109]

227 For the reasons which we have discussed in considering ground 1,[110] the judge, based on the evidence, concluded that the measures proposed to be taken by VicForests did not comply with its statutory obligations, and, in particular, with ss 2.2.2.2 and 2.2.2.4 of the Code. Further, as we have concluded in respect of ground 5,[111] based on the judge's conclusions as to the evidence, the injunctions ultimately granted by her Honour were not in any way in excess of the minimum relief necessary to ensure compliance by the applicant with the statutory provisions in question.

228 It follows that, contrary to the submissions advanced on behalf of VicForests, the judge was correct to hold that the respondents had established the necessary equity to attract the injunctive relief that was granted by her Honour.

229 Accordingly, VicForests has failed to establish ground 2.

Ground 6: Were the declarations and injunctions impermissibly imprecise and uncertain?

230 This ground alleges both impermissible imprecision and uncertainty in both the declarations that were made and the injunctions that were granted.

Submissions

231 In relation to the declarations, VicForests relied on the following statement of principle in *Warramunda Village Inc v Pryde*:

> The remedy of a declaration of right is ordinarily granted as final relief in a proceeding. It is intended to state the rights of the parties with respect to a

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107 Cf *Sydney City Council v Building Owners and Managers Association of Australia Ltd* (1985) 2 NSWLR 383, 388 (Mahoney JA, Hope JA agreeing at 385, Priestley JA agreeing at 388); *Peek v NSW Egg Corporation* (1986) 6 NSWLR 1, 8 (Glass JA).

108 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 526–7, 530–1 (Gibbs J); *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36–7 (Gibbs CJ), 41–2 (Stephen J), 52–3 (Aickin J), 77–8 (Brennan J); *Day v Pinglen Pty Ltd* (1981) 148 CLR 289, 299 (Mason, Murphy, Aickin, Wilson and Brennan JJ).

109 *Brown Mountain* (2010) 30 VR 1, [88] (Osborn J).

110 See [99]–[134] above.

111 See [199]–[221] above.

> particular matter with precision, and in a binding way. The remedy of a declaration is not an appropriate way of recording in a summary form, conclusions reached by the Court in reasons for judgment.[112]

232 In VicForests' submission, the declarations do not comply with that principle. It pointed in particular to the first declaration, which is as follows:

> For the purposes of both the management action for the greater glider and the management action for the yellow-bellied glider in the East Gippsland [FMA] in Table 13 of the Standards, a protection area of 100 hectares of suitable habitat should be designed having regard to the Suitable Habitat principles.

233 As noted earlier, the Suitable Habitat principles are defined to mean the ten principles set out in Annexure A to the Final Orders. They are principles drafted by Associate Professor Wardell-Johnson.

234 VicForests contended that the first declaration, by its terms, is in the nature of guidance, which is not the proper role for declaratory relief. It pointed out that the declaration was intended to give effect to the judge's conclusion that the Suitable Habitat principles provide a sound scientific basis informed by relevant research to 'guide' decisions about what constitutes a suitable protection area.[113]

235 Counsel for the respondents submitted that in making the declarations, the primary judge sought to balance the need for certainty and clarity and the need for flexibility. That was an appropriate exercise of her discretion. All that is required is that 'the terms of a declaration are *sufficiently certain* as to resolve the question in issue … [a]nd the grant of the declaration must serve some purpose'.[114] Here, it was submitted, the impugned declaration provided VicForests with the criteria needed to ensure that the management actions required by Table 13 of the Standards could be taken. This was necessary because the description of the management actions in Table 13 employed terms, such as 'suitable habitat', which it failed to define.

236 As for the injunctions in both proceedings, VicForests submitted that in moulding the appropriate form of relief, a court must ensure that the terms of the injunction are 'very precise' and capable of being clearly understood so that those who must comply (on pain of contempt) know what is required of them. In the present case, however, the injunctions contain standards that are 'vague and evaluative' despite the fact that the injunctions are prescriptive and expressed in mandatory terms.

237 VicForests referred to the injunction requiring surveying for gliders. It will be recalled that it is in the following form:

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112 (2001) 105 FCR 437, 440 [8] (Gray, Branson and North JJ).

113 Citing Reasons for Final Orders, [47].

114 Quoting *NSW Trains v Australian Rail, Tram and Bus Industry Union* [2021] FCA 883, 63 [145] (Flick J) (emphasis added).

> VicForests must not … conduct timber harvesting operations in any coupe in the [relevant FMA] unless the coupe has been surveyed using a reasonably practicable survey method that is likely to:
>
> (a) detect any greater gliders that may be present in the coupe, and so far as is reasonably practicable, located their home ranges; and
>
> (b) detect any yellow-bellied gliders that may be present in the coupe and identify their feed trees and hollow-bearing trees in the coupe.

238 VicForests submitted that it is not clear how it is to determine whether a survey is 'a reasonably practicable survey method' that is 'likely to detect' any gliders.

239 Although the respondents accepted that the terms of an injunction ought to be certain, they argued that the discretion to formulate the terms of a final injunction is wide.[115] It was open to the primary judge to 'leave room for evaluative judgment' on the part of VicForests. In this respect, it is the duty of the party bound by the injunction to 'loyally comply' with it and if that party seeks to 'skirt around the edge of it', it must bear the consequences.

240 Finally, VicForests submitted that the judge erred in failing to accept its submission that the injunction in question impermissibly seeks to restrain the commission of a criminal offence and in concluding that, in any event, there were 'exceptional circumstances' justifying the grant of such injunctive relief.

241 The additional proposition on which VicForests relied to resist the injunctive relief sought is that, other than in exceptional circumstances, the Court should refuse to grant relief restraining the breach by a public authority of a statutory prescription or proscription, where the breach attracts criminal liability. It relied on the authority of *Commonwealth v John Fairfax & Sons Ltd*.[116] In that case, the plaintiff sought to restrain the publication of certain matters on the basis of, among other things, a threatened breach of an offence in the *Crimes Act 1914* (Cth) concerning the disclosure of confidential government information. Mason J stated that '[t]he issue of an injunction to restrain an actual or threatened breach of criminal law is exceptional'.[117] His Honour approved statements in *Gouriet v Union of Post Office Workers* to the effect that such exceptional circumstances were 'confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty … or to cases of emergency'.[118] Mason J went on to observe that, in some cases, a statute which prohibits and penalises some conduct may be enforceable by injunction, and that this is more likely to be the case where the statute, in addition to creating a criminal offence, is designed to provide a civil remedy to protect the interest relevantly sought to be protected by way of injunctive relief — in that case, the government's right to confidential information.[119]

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115 Citing *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337, 349; *Pacific National* (2020) 277 FCR 49, [345]–[346].

116 (1980) 147 CLR 39.

117 Ibid 49.

118 [1978] AC 435, 481 (Lord Wilberforce).

119 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50.

242 In regard to the actual or threatened breach of the criminal law, VicForests pointed to s 45 of the Timber Act, which prohibits any person from undertaking timber harvesting operations other than in accordance with (amongst other things) an allocation order. VicForests pointed out that it is a condition of the allocation order pursuant to which it harvests timber that it comply with the Code. It submitted that, as a consequence, any person who, in undertaking timber harvesting operations, fails to comply with the Code thereby fails to act in accordance with the allocation order and will commit an offence against s 45(1). It follows that, in substance, the injunctions seek to restrain conduct which is in any event the subject of a statutory proscription attended by criminal sanctions.

243 According to VicForests, the judge failed to give any adequate consideration to the argument and simply said that s 45 of the Timber Act did not 'feature' in the respondents' case.[120] Furthermore, the judge's findings in relation to whether there were exceptional circumstances were unfair.

244 The respondents contended that there is no general requirement that the exceptional circumstances relied upon to grant an injunction restraining the commission of a criminal offence must be relevant to the issue of criminality. Moreover, the Supreme Court of Western Australia in *Cohen v City of Perth* stated that the requirement of exceptional circumstances was confined to statute that is primarily concerned with creating criminal offences but does not extend to legislation that is 'essentially regulatory'.[121] In any event, the present case is extraordinary in the sense that, at trial, VicForests led evidence regarding what measures were required to comply with the Code but also asserted that it would not take those measures and preferred its own approach, the adequacy of which was the very subject of the proceedings.

Analysis

245 It is convenient to begin with the declaration impugned by VicForests as providing only 'guidance' and being imprecise. The declaration in question seeks to deal with VicForests' non-compliance with the Standards as they pertain to the establishment of protection areas in East Gippsland where substantial populations of gliders are located in isolated habitat.

246 It will be recalled that cl 4.2.1.3 and Table 13 of the Standards requires protection areas to be established where there are 'substantial populations' of gliders in 'isolated habitat'. The judge found that when selecting and defining these protection areas, VicForests ought to have regard to the 'Suitable Habitat principles' developed by Associate Professor Wardell-Johnson.[122]

247 The Suitable Habitat principles are as follows:

> In these principles, gliders means greater gliders (Petauroides volans) and/or yellow-bellied gliders (Petaurus australis).

120 Reasons for Final Orders, [373].
121 (2000) 112 LGERA 234, 269 [172]–[173] (Roberts-Smith J).
122 Liability Reasons, [393(a)].

Principle 1 (Precaution, prevention and future proofing). Choice of location, composition, boundaries and management of the protection area should always be guided by the location of populations of the glider to provide greatest opportunity for persistence.

Principle 2 (Presence of gliders). A protection area should include all recent verifiable records of gliders in the immediate vicinity.

Principle 3 (Habitat components). A protection area should include structurally diverse forest, evidenced by (for example) large, mature trees and records of other mature forest dependent species, with few or no signs of previous intensive logging activity.

Principle 4 (Vegetation type). A protection area should include suitable mature forest of appropriate overstorey tree species composition for gliders.

Principle 5 (Size and shape considerations). A protection area should have minimum edge effect (i.e., be round or square, rather than linear) wherever edges are hostile, and maximum distance from edges to glider records.

Principle 6 (protection areas in fragmented landscapes). In extensively and intensively modified zones (i.e., > 50% modified or proposed to be modified to hostile habitat within 1 km of a coupe centre), any remnant of mature forest within 1 km of this point connected to habitat including a threshold number of gliders, regardless of fire history, is to be designated as a protection area.

Principle 7 (Logging history). A protection area should be mature forest and include no hostile habitat and a minimum area (<15% as a continuous block) of immature (50-100 years-old) regrowth.

Principle 8 (Fire history). A protection area can include up to 15% of mature forest impacted by recent intense wildfire where other conditions are met. Once gliders have again established, the entire protection area can be habitat of a single age-since-fire.

Principle 9 (Boundary context). The boundaries of a protection area should be suitable habitat. Therefore, secure reserved mature forest should be prioritised as protection area boundaries.

Principle 10 (Boundary conditions). The boundaries of a protection area should not act as a passageway or be likely to act as conduits for weed invasion, erosion, pest animals or pathogens, and be of mild slope and distant from streams.

248 These are, we consider, relatively clear guidelines. They contain language and concepts of a kind that would be familiar to persons working in the forestry industry and are plainly directed to ensuring that the protection areas achieve the objective of providing sustainable habitat for gliders.

249 The judge found, on the basis of the evidence given by VicForests' Regional Manager for East Gippsland, Rodney Lewis, as follows:

> (a) VicForests currently has no criteria for determining whether a population of gliders detected in East Gippsland is a 'substantial population' in 'isolated habitat' for the purposes of Table 13.
>
> (b) VicForests is not guided by the ten principles for determining suitable habitat when designing a protection area of suitable habitat for a threshold population of gliders. In particular, VicForests is not guided by Principle 1 — Precaution, prevention and future-proofing, and it does not seek to include all recent verifiable records of gliders in the immediate vicinity within the protection area, as required by Principle 2. The shapes of all of the proposed SPZs (now called protection areas) that Mr Lewis provided by way of example were unsuitable, being linear rather than round or square, and not designed to minimise edge effects.
>
> (c) VicForests does not at present intend to apply the ten principles for determining suitable habitat, in its application of the Table 13 prescriptions.[123]

250 In making these findings, the judge heard evidence about the way in which protection areas were established in East Gippsland. Her Honour recorded the following evidence and her concerns about it:

> According to Mr Lewis, in preparing a draft SPZ or protection area plan, an internal VicForests consultation process takes place across the Operations and Biodiversity teams to ensure the plan is suitably designed. The factors that may be considered and incorporated in the plan include: suitable habitat for the target species; eucalypt species; other flora and fauna present and other protection measures that need to be considered for those species; past disturbance and harvest history; bushfire history; and relevant research or scientific papers. Mr Lewis did not explain how these factors had been taken into account in designing the proposed [protection areas] for Tiger, Lior and Power coupes. Nor is the way in which the factors identified by Mr Lewis influenced the design of the proposed [protection areas] apparent from the documentation that was submitted by VicForests to DELWP.[124]

251 Her Honour concluded:

> The overall impression is that the design was guided by the recovery of merchantable timber, and not by Principle 1 — Precaution, prevention and future-proofing. Two features of the proposed [protection areas] stand out.[125]

252 The two features in question were the 'odd shape' of the proposed protection area and the number of yellow-bellied glider detections outside the protection area and within the area that VicForests proposed to harvest.[126]

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123 Liability Reasons, [353].
124 Liability Reasons, [343].
125 Liability Reasons, [344].
126 Liability Reasons, [345]–[346].

253 In relation to proposed protection areas in three coupes, her Honour found as follows:

> I find that VicForests' proposed [protection area] for the yellow-bellied gliders detected in and around Tiger, Lior and Power coupes is not 'suitable habitat' for those gliders, as required by cl 4.2.1.3 and Table 13 of the Standards.[127]

254 And in respect of three further coupes:

> … the proposed [protection areas] are linear, rather than round or square, and their shape does not minimise edge effects. In the cases of Shake Up and Haggis coupes and Van Halen coupe, the glider detections plotted on the map of the proposed reserve are not the maximum distance from the edge — in fact, some are in the area that VicForests proposes to harvest. In all three cases, the proposed [protection area] does not appear to be suitable habitat for the detected population of yellow-bellied gliders.[128]

255 This is the context in which the judge made the impugned declaration. In the face of ongoing and systematic non-compliance with the requirement in the Standards to avoid or minimise impacts on biodiversity by establishing protection areas when certain criteria are met, the declaration does no more than to require VicForests to design the protection areas 'having regard to' the Suitable Habitat principles.

256 The declaration itself is not 'guidance'. Rather, it contains a clear requirement: that the protection areas be designed 'having regard to' these guidelines in order to secure compliance with cl 4.2.1.3 and Table 13 of the Standards. The declaration was made, and was necessary, in order to prevent the ongoing creation of 'protection areas' that were ineffective to conserve the gliders.

257 As to the use of the terms 'suitable habitat' and 'hostile habitat', we disagree that these terms, used in relation to glider habitat, are 'vague and evaluative' terms in the specialist framework in which the proceeding sits and to a forestry management company owned by the Victorian government. What is suitable habitat for gliders is no great mystery.

258 VicForests also attacks the injunction requiring surveying using a method that is 'reasonably practicable' and 'likely to detect' any gliders in a coupe, their home ranges (in the case of greater gliders) or their feed trees (in the case of yellow-bellied gliders). We do not consider this language to make the injunction insufficiently certain. What the injunction does is give VicForests appropriate latitude in the surveying method it uses, so long as the method gives rise to a likelihood that any gliders in the coupe will be found.

259 Once again, this requirement is to be understood in the context of the judge's findings about the survey method used by VicForests:

> In order to apply the precautionary principle to the conservation of greater gliders and yellow-bellied gliders, VicForests must survey the whole of any coupe proposed for harvest which may contain glider habitat. It must do so using a survey method that is likely to detect any gliders that may be present in the coupe, so as to locate the gliders' home ranges wherever practicable. This is

127 Liability Reasons, [348].
128 Liability Reasons, [350].

> necessary in order that their home ranges can be excluded from timber harvesting operations, as the precautionary principle requires.
>
> At present VicForests does not survey all of a coupe before harvesting, and so it plans and undertakes timber harvesting operations without knowing where gliders live within the coupe and which parts of the coupe should be retained for their habitat. In order to comply with s 2.2.2.2 of the Code, VicForests needs to undertake much more thorough pre-harvest surveys for greater gliders and yellow-bellied gliders.[129]

260 In considering whether or not to grant the injunctions, the judge compared VicForests' approach to pre-harvest surveys and harvesting methods with those in issue in *Friends of Leadbeater's Possum Inc v VicForests (No 4)*.[130] There, Mortimer J found that VicForests was not applying the precautionary principle to the conservation of greater gliders and was not likely to do so in the future.[131] The judge stated that she too had found that VicForests' current survey practices and its 'almost universal' use of variable retention harvesting fell 'well short' of what was required for the conservation of greater gliders. Her Honour continued:

> In particular, VicForests still does not thoroughly survey coupes for greater gliders when planning timber harvesting operations. It still plans to harvest areas of forest that greater gliders are known to inhabit, in the face of scientific opinion that this is likely to cause the destruction of those gliders.[132]

261 More specifically, her Honour said:

> In these proceedings, VicForests has continued to resist the idea that its responsibility to apply the precautionary principle to the conservation of biodiversity values means — in the case of greater gliders and yellow-bellied gliders — that it should take care that its timber harvesting operations do not kill them by making their habitat unliveable. It does so despite the expert ecological evidence — including that of its own expert, Dr Wagner — that the conservation of these species requires more intensive pre-harvest surveys and less intensive methods of harvesting timber.[133]

262 The judge determined not to impose the survey protocol advanced by the respondents and to make an order that was more flexible, taking into account, among other things, the evidence about the practicalities of surveying in dense forest and difficult terrain, and at night. However, her Honour received no assistance from VicForests about the terms of the injunctions:

> VicForests took an 'all or nothing' position in relation to injunctions sought by the [respondents]. It has maintained throughout the litigation that it would not engage in an 'auction' about the adequacy of its survey methods, and that no

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129 Liability Reasons, [295]–[296].
130 (2020) 244 LGERA 92; [2020] FCA 704.
131 Ibid 101 [6].
132 Liability Reasons, [374(c)].
133 Liability Reasons, [374(e)].

> injunction should be ordered unless the [respondents] made out their case for injunctions in the form sought in their pleadings.[134]

263 In the circumstances, it was well open to the judge to make the injunction that she did.

264 Finally, we reject the argument that the judge acted on a wrong principle in not accepting VicForests' submission that the injunctions seek to restrain the commission of a criminal offence.

265 It is the case that the measures required by the injunctions are directed to ensuring that VicForests complies with the Code. But that is not to enjoin criminal conduct. Yes, it is an offence to take timber from State forests other than in than in accordance with an allocation order. And, yes, the allocation order requires compliance with the Code. But that does not mean that a particular failure to comply with the Code is an offence.

266 The Code includes principles and operational goals, as well as 'mandatory actions'. Some of it is expressed in the language of policy, and some of the mandatory actions are expressed so as to permit flexibility in the method of compliance. The dispute before the primary judge about what the precautionary principle requires is a case in point. Whether or not non-compliance with the precautionary principle is an offence under the Timber Act, it is plainly something capable of being challenged by persons with a special interest in its application. It is contrary to fundamental principle to suggest that non-compliance with the precautionary principle can only be addressed by the prosecution of an offence and remedied by the imposition of criminal sanctions.

267 Nor are we persuaded that the fact that the Secretary of DELWP is expressly empowered under s 89 of the CFL Act to seek an injunction restraining a contravention of the Timber Act precludes persons with a special interest, such as the respondents, from seeking orders from the Court restraining the contravention of the Code.

Conclusion

268 Ground 6 is not made out.

Ground 7: Did the primary judge fail to give adequate reasons?

Submissions

269 In support of ground 7, VicForests submitted that the primary judge's reasons are inadequate because they do not explain how the judge concluded that the measures that are the subject of the injunctions are required by law.

270 In particular, it was submitted that the judge failed to sufficiently articulate each of the following matters:

(a) why the measures specified in the injunctions, and 'no other measures', are actually required by the provisions of the Code;

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134 Liability Reasons, [380].

(b) why the judge concluded that ss 2.2.2.2 and 2.2.2.4 require precisely the same measures to be implemented by VicForests;

(c) why the judge concluded that the measures specified by the injunctions are 'management actions' consistent with the Standards, within the meaning of s 2.2.2.4; and

(d) on what basis the judge concluded that the measures are required as a matter of uniformity in every coupe, notwithstanding VicForests' submissions that the evidence established the contrary proposition.

271 In oral submissions, senior counsel for VicForests focused on the second proposition. Specifically, it was submitted that the requirements of ss 2.2.2.2 and 2.2.2.4 are, respectively, different. Accordingly, it was submitted, the judge failed to explain how she concluded that both the precautionary principle in s 2.2.2.2 and the management actions that arise under s 2.2.2.4 gave rise to a conclusion that the applicant be ordered 'to do the same thing'.

272 In response, the respondents submitted that the judge's reasons adequately explained why ss 2.2.2.2 and 2.2.2.4, on their correct construction, require identification of the location of greater gliders and yellow bellied gliders in each coupe before harvesting commences, and requires that the risks, affecting each species of glider, be properly addressed. Further, it was submitted, the judge sufficiently explained why the evidence established that the applicant had not complied with those obligations. Her Honour then explained how, on her consideration of the expert evidence, she determined the minimum measures the applicant was required to undertake in order to comply with the provisions of the Code.

273 In particular, it was submitted that the judge was not required to consider the 'entire universe' of measures that might satisfy ss 2.2.2.2 and 2.2.2.4. Rather, her Honour was limited to the evidence adduced by the parties and, specifically, to the measures that each of the two experts recommended. In examining that evidence, the judge explained why she preferred the measures propounded by VicForests' expert, Dr Wagner.

274 Further, it was submitted, the judge adequately explained how she concluded that the two provisions of the Code required surveys to be undertaken in order to ascertain where gliders live within a particular coupe. The judge reviewed the evidence in that respect and explained why she concluded that the measures advocated by Dr Wagner were preferable. Further, it was submitted, at trial VicForests did not contend that its own expert's recommendation for 60 per cent retention and protection of the greater glider home range was inconsistent with the Standards. Counsel contended that it is self-evident that those measures are consistent with the examples in s 2.2.2.4 of modified silvicultural techniques, exclusion areas and protection areas.

Analysis and conclusion

275 The principles relating to the requirement that a judge give adequate reasons for a decision are well-established.

276 There are two basic purposes to be served by the provision of reasons for judgment. First, the provision of adequate reasons enables an appellate court to ascertain the basis upon which the decision, the subject of the appeal, was made.[135] Secondly, a failure by a judge to provide adequate reasons can engender a real sense of grievance on the part of an unsuccessful party who is left in ignorance as to why the decision, adverse to its interest, has been made. Allied to that purpose is the public interest in maintaining public acceptance of judicial decisions and the integrity of the curial process.[136]

277 In order to vindicate both purposes, the reasons must disclose the 'path' or 'route' by which the trial judge reached the ultimate conclusion in the judgment.[137] In *Beale*, Meagher JA outlined the content of that requirement in the following terms:

> ... the content of the obligation is not the same for every judicial decision. No mechanical formula can be given in determining what reasons are required. However, there are three fundamental elements of a statement of reasons, which it is useful to consider. First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and it is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it. Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.
>
> Secondly, a judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached … But that is not to say that a judge must make explicit findings on each disputed piece of evidence, especially if the inference as to what is found is appropriately clear. Further, it may not be necessary to make findings on every argument or destroy every submission, particularly where the arguments advanced are numerous and of varying significance.
>
> Thirdly, a judge should provide reasons for making the relevant findings of fact (and conclusions) and the reasons in applying the law to the facts found. Those reasons or the process of reasoning should be understandable and preferably logical as well.[138]

278 In *Hunter v Transport Accident Commission,*[139] Nettle JA, in an application under s 93(4)(d) of the *Transport Accident Act 1986*, explained the fundamental requirements necessary for the provision of adequate reasons in similar terms:

> Furthermore, while the extent of the reasons will depend upon the circumstances of the case, the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or

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135 *Pettitt v Dunkley* [1971] 1 NSWLR 376, 387–8 (Moffitt JA).

136 *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430, 442 (Meagher JA) ('*Beale*'); *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, 18 (Gray J, Fullagar and Tadgell JJ agreeing at 20).

137 *Franklin v Ubaldi Foods Pty Ltd* [2005] VSCA 317, [38] (Ashley JA, Warren CJ agreeing at [1], Nettle JA agreeing at [2]); *ACN 005 565 926 Pty Ltd v Snibson* [2012] VSCA 31, [78]–[80] (Kyrou AJA, Mandie JA agreeing at [1], Hansen JA agreeing at [2]).

138 (1997) 48 NSWLR 430, 443–4 (citations omitted).

139 [2005] VSCA 1, [21] (Nettle JA, Batt JA agreeing at [2], Vincent JA agreeing at [4]) ('*Hunter*').

> other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion. It should also be understood that the requirement to refer to the evidence is not limited to the evidence that has been accepted and acted upon. If a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected. There may be exceptions. But, ordinarily, where a judge rejects or excludes from consideration evidence or other material which is relevant and cogent, it is simply not possible to give fair and sensible reasons for the decision without adverting to and assigning reasons for the rejection or exclusion of that material. Similarly, while it is not incumbent upon the judge to deal with every argument and issue that might arise in the course of a case, where an argument is substantial or an issue is significant, it is necessary to refer to and to assign reasons for the rejection of the argument or the resolution of the issue.

279 An examination of the judge's reasons demonstrates that, consistently with those principles, her Honour, in a detailed and methodical manner, disclosed the path or route by which she determined the relief that is contained in the injunctions that are the subject of ground 7.

280 Before considering each of the four specific points made by VicForests, it is appropriate, first, to revisit the manner in which the judge decided the critical issues that were agitated in the trial.

281 As we have noted, the judge effectively addressed 15 specific issues, which she formulated at the commencement of her reasons. Those issues included: the correct construction of ss 2.2.2.2 and 2.2.2.4 of the Code; the question as to whether the precautionary principle was engaged in respect of greater gliders and yellow-bellied gliders; the question as to whether the applicant was applying that principle to the protection of each of those two species of glider; and the question as to whether the applicant was applying s 2.2.2.4 of the Code to the gliders in both East Gippsland and the Central Highlands. It was based on the judge's examination and conclusions in respect of those questions that her Honour formulated the minimum measures that were required to be undertaken by VicForests in order to ensure that, consistently with the provisions in question, sufficient steps be taken in order to protect each species.

282 At the risk of repetition, it is important to briefly outline her Honour's reasons in respect of those issues.

283 The judge first found that the precautionary principle was engaged in relation to the greater glider, so that the applicant bore the burden of demonstrating that its timber harvesting operations in East Gippsland and the Central Highlands would not cause serious and irreversible damage to that species.[140] In addressing the question as to whether VicForests was applying the precautionary principle to the protection of greater gliders, her Honour noted that the two expert ecologists, Associate Professor Wardle-Johnson and Dr Wagner, had recommended two alternative measures.[141] The judge

140 Liability Reasons, [203].
141 Liability Reasons, [216].

considered that the measures proposed by Dr Wagner were more proportionate and were, therefore, the minimum measures required to be undertaken.[142]

284 Next, the judge found, on the evidence, that the applicant did not take either of the measures recommended by the expert ecologists, and thus concluded that the applicant was failing to apply the precautionary principle to the protection of greater gliders.[143]

285 The judge then turned to the question of the application of the precautionary principle to yellow-bellied gliders. Her Honour again outlined the alternative measures advocated by the two expert ecologists, which could be taken to conserve that species.[144] Again, her Honour considered that the approach recommended by Dr Wagner was more proportionate, and therefore constituted the minimum measures required to be undertaken in order to ensure the appropriate application of the precautionary principle to yellow bellied gliders.[145] Finally, in that respect, the judge concluded that VicForests' steps fell short of those advocated by Dr Wagner, and accordingly, it was not applying the precautionary principle to the conservation of yellow-bellied Gliders in East Gippsland or the Central Highlands.[146]

286 The judge then turned to the question of the surveys, which are required to be undertaken in order to detect gliders. Her Honour reviewed, in some detail, the opinions of the two expert witnesses as to the appropriate survey methods, which were required to be applied in order to sufficiently identify greater gliders and yellow-bellied gliders, in coupes in the Central Highlands and East Gippsland.[147] Having undertaken that review, her Honour concluded that the VicForests' current approach to detecting greater gliders and yellow-bellied gliders was 'considerably less' than the precautionary principle required. Specifically, its practice of limiting the survey effort to a one kilometre transect in a coupe was inadequate, as it left most parts of a coupe unsurveyed. In those circumstances, it was not possible for VicForests to retain the habitat that was essential for the conservation of the gliders.[148]

287 The judge then considered the evidence concerning issues that were raised regarding the safety and feasibility of the survey methods proposed by the expert witnesses.[149] Having examined that evidence in some detail, the judge concluded that in order to apply the precautionary principle to the two species of gliders the applicant must survey the whole of any coupe proposed for harvest which may contain glider habitats, and that it must do so using a survey method that is likely to detect gliders present in the coupe.[150] The judge thus concluded that as VicForests did not survey all of the coupe before harvesting it did not comply with the requirements of the precautionary principle.[151]

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142 Liability Reasons, [222].
143 Liability Reasons, [223]–[228].
144 Liability Reasons, [247]–[252].
145 Liability Reasons, [253].
146 Liability Reasons, [254]–[257].
147 Liability Reasons, [263]–[268].
148 Liability Reasons, [270].
149 Liability Reasons, [272]–[294].
150 Liability Reasons, [295].
151 Liability Reasons, [295]–[296].

288 The judge then turned to the question as to whether VicForests was applying s 2.2.2.4 in East Gippsland and in the Central Highlands.[152] As we have discussed when considering ground 4, the judge construed s 2.2.2.4 to constitute a mandatory action that required more of VicForests than compliance with the prescriptions in clause 4.2.1 and Table 13 of the Standards. Her Honour held that the section required VicForests during planning, to identify whether, and where, the biodiversity values listed in the first column of Table 13 are present in a coupe, and where they are so present, to address risks to them by taking management actions consistent with the Standards.[153]

289 Based on her examination of the evidence to which she had referred when considering the application of the precautionary principle, the judge concluded that VicForests did not meet its obligations under s 2.2.2.4 in respect of the gliders in each of the two areas in question.[154]

290 It was based on those conclusions, and the evidence examined in doing so, that her Honour then addressed the question of the appropriate injunctive relief to be granted to the plaintiff in each proceeding. As discussed when considering ground 1, the judge concluded that the survey protocol and harvesting practices of VicForests, did not comply with its obligations under ss 2.2.2.2 and 2.2.2.4 of the Code. It was based predominantly on the evidence of Dr Wagner that the judge then proceeded to formulate the injunctive relief granted to the respondents.

291 From the foregoing review of the judge's reasons, it is quite apparent that her Honour disclosed and explained the path by which she reached the conclusion that the measures undertaken by the applicant did not comply with the applicable provisions in the Code, and, further, by which she determined the minimum steps which VicForests is required to undertake in order to lawfully comply with those provisions. In particular, in conformity with the principles outlined by Meagher JA in *Beale*, and by Nettle JA in *Hunter*, the judge referred to the relevant evidence, made material findings and conclusions of fact in relation to it, and provided reasons for those findings. Specifically, in the context of ground 7, the judge, by reference to the evidence, and her conclusions concerning the evidence, explained how she concluded that the orders contained in the three injunctions were directed to ensuring that VicForests took the minimum steps requisite in order to comply with ss 2.2.2.2 and 2.2.2.4 of the Code.

292 It is in that context that we now turn to consider the four specific points relied on by VicForests in support of ground 7.

293 In respect of the first point raised by VicForests, it was not for the judge to surmise as to any other possible measures which might be undertaken by VicForests in compliance with the Code. The judge's role was to determine the issues, based on the evidence that was adduced by the parties during the trial. As we have discussed, the judge carefully assessed the evidence, and in particular the expert evidence, that was adduced in relation to those aspects of the case, and by doing so, determined the minimum steps which were

152 Liability Reasons, [302].
153 Liability Reasons, [152].
154 Liability Reasons, [304]–[308] (East Gippsland), [309]–[312] (Central Highlands).

required to be undertaken by VicForests in order to comply with ss 2.2.2.2 and 2.2.2.4 of the Code.

294 Further, it is quite evident that in view of the judge's construction of ss 2.2.2.2 and 2.2.2.4 respectively, it is unsurprising that in a particular case it may be possible to identify the minimum steps required to be undertaken by VicForests in order to comply with both of those two provisions. As we have noted, ss 2.2.2.2 and 2.2.2.4 are each part of a number of sub-provisions contained in Part 2.2.2 of the Code, which are addressed to the same Operational Goal — the specification of mandatory actions to address biodiversity conservation risks taking into account relevant scientific knowledge. Sections 2.2.2.2 and 2.2.2.4 are each expressly addressed to the conservation of biodiversity values by the identification of those values and of threats of serious or irreversible environmental damage to them, and as to the steps to be taken, consistent with the avoidance, where practicable, of serious or irreversible damage to them. Section 2.2.2.4 does not inflexibly require management actions prescribed in the Standards. Rather, the actions which must be taken are to be 'consistent with' those standards and procedures. As the foregoing summary of the judge's reasons demonstrates, her Honour, in some detail, adequately exposed her reasons for concluding that the injunctions which she formulated were necessary to ensure compliance with each of those two interrelated provisions and with the purpose to which they were directed.

295 Finally, it is apparent that the judge was cognisant of the submission advanced by VicForests that there may need to be some flexibility in prescribing the appropriate protocol for surveying each coupe.[155] The general terms, in which the first injunction was formulated, clearly caters for that proposition. In particular, the judge concluded that, although the survey protocol propounded by the plaintiffs was an effective way to detect and locate gliders within a coupe, it may not be the only effective way to do so. Her Honour noted:

> The selection and spacing of the transects to be walked during spotlight surveys will depend on the shape, topography and other characteristics of each coupe. As Associate Professor Wardle-Johnson observed, the precise survey method does not matter so long as the entire coupe is surveyed.[156]

296 For those reasons, the applicant has failed to demonstrate that the reasons provided by the judge were inadequate. On the contrary, her Honour's reasons were commendably thorough and detailed, and clearly demonstrated the path by which she concluded that the respondents were entitled to the injunctive relief that was the subject of the orders.

297 Accordingly, ground 7 must fail.

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155 See, eg, Liability Reasons, [300].

156 Liability Reasons, [271].

Cross-appeal: Did the primary judge fail to consider risks affecting gliders proximate to but outside the coupe?

298 In each of the two proceedings, the respondents,[157] by way of cross-application, rely on one proposed ground of appeal, namely:

> The trial judge failed to take account of the risk affecting greater gliders and yellow-bellied gliders located proximate to but outside a coupe at the time the coupe was surveyed.

299 Under that ground, the respondents seek orders which would materially enlarge the scope of the relief ordered by the judge. In effect, the respondents seek in each proceeding orders that extend the areas which VicForests is required to survey, and to which the injunctions apply, in two alternative ways.

300 First, the respondents seek orders expanding the area that VicForests is required to survey to an 'additional survey area' encompassing an area that extends 250 metres from the coupe boundaries, together with any other coupe that is located wholly or partially within that additional area. The respondents further seek orders extending the area in which VicForests is restricted in conducting its timber harvesting operations, to include that 'additional survey area'.

301 Alternatively, the respondents seek orders extending the survey that VicForests is required to undertake to include one which is likely to detect any gliders whose home range may extend into the coupe. Further, the respondents seek to extend the injunctions to extend the area in which restrictions apply to timber harvesting to include coupes in which gliders' home ranges or a part thereof may be located.

302 Thus, in the East Gippsland proceeding, EEG, by way of its first alternative, seeks the following orders in lieu of those made by her Honour:

> (1) VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe or in any 'additional survey area' (defined as an area that extends 250 metres from the coupe boundaries and any other coupe that is located wholly or partially within the area that extends 250 metres from the coupe boundaries) unless the coupe and that additional survey area have been surveyed using a reasonably practicable survey method that is likely to:
>
> (b) detect any gliders that may be present in the coupe or in the additional survey area and, so far as reasonably practicable, locate their home ranges; and
>
> (c) detect any yellow-bellied gliders that may be present in the coupe and the additional survey area and identify their feed trees and hollow-bearing trees in the coupe.

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157 For convenience, these reasons continue to adopt the terms 'respondents' instead of 'cross-applicants' for EEG and KFF.

(2) VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA in which greater gliders have been detected or if any greater gliders have been detected in the coupe's additional survey area unless:

(a) it excludes the greater glider's located home ranges from timber harvesting operations; and

(b) it excludes from timber harvesting riparian strips at least 100 metres wide located along all waterways in the coupe, with an exclusion area of at least 50 metres wide on each side of those waterways; and

(c) it retains at least 60 per cent of the basal area of eucalypts in the harvested area of the coupe.

(3) VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA in which yellow-bellied gliders have been detected, or if any yellow-bellied gliders have been detected in the coupe's additional survey area, unless:

(d) it excludes from timber harvesting riparian strips at least 100 metres wide located along all waterway in the coupe, with an exclusion area of at least 50 metres wide on each side of those waterways; and

(e) it retains at least 60 per cent of the basal area of eucalypts in the harvest area of the coupe, including all identified feed trees and hollow-bearing trees within the coupe.

303 Alternatively, in the East Gippsland proceeding, EEG, seeks, in lieu of the orders made by the judge, the following orders:

(1) VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA unless surveys have been conducted using a reasonably practicable survey method that is likely to:

(b) detect any greater gliders that may be present in the coupe and any greater gliders whose home range may extend into the coupe and, so far as it is reasonably practicable, locate their home ranges; and

(c) detect any yellow-bellied gliders that may be present in the coupe and any yellow-bellied gliders whose home range may extend into the coupe and identify their feed trees and hollow-bearing trees in the coupe.

(2) VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA in which greater gliders have been detected or in which greater gliders' home ranges or a part thereof may be located unless:

(a) it excludes the greater glider's located home ranges from timber harvesting operations; and

(b) it excludes from timber harvesting riparian strips at least 100 metres wide located along all waterways in the coupe, with an exclusion area of at least 50 metres wide on each side of those waterways; and

(c) it retains at least 60 per cent of the basal area of eucalypts in the harvested area of the coupe.

(3) VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA in which yellow-bellied gliders have been detected or in which yellow-bellied gliders' home ranges or a part thereof may be located unless:

(a) it excludes from timber harvesting riparian strips at least 100 metres wide located along all waterway in the coupe, with an exclusion area of at least 50 metres wide on each side of those waterways; and

(b) it retains at least 60 per cent of the basal area of eucalypts in the harvest area of the coupe, including all identified feed trees and hollow-bearing trees within the coupe.

304 In the Kinglake proceeding, KFF seeks orders to the same effect.

Respondents' submissions

305 In their joint written case, the respondents submitted that the evidence at the trial demonstrated that VicForests' timber harvesting operations create risks for gliders which are detected beyond the boundary of the coupes in which the foresting operations are to take place. Counsel noted that the proven home ranges of the greater glider and of the yellow-bellied glider are such that either species may be affected by logging within the coupe if that glider, at the time the survey is conducted, is located outside the coupe. The respondents further noted that, in final address in the trial, it was submitted that the relief ordered by the judge should include an order that an area surrounding each coupe be surveyed, and orders addressing the risks to gliders which have been detected outside the particular coupe. Counsel noted that the judge, in her reasons for the formulation of final orders, recognised that parts of the forest adjacent to a coupe should be surveyed.[158] However, the Final Orders did not require surveys to be conducted outside the coupe. Further, it was submitted the protective measures contained in the orders restricting forestry operations within the particular coupe, failed to take account of the need to protect gliders located proximate to, but outside, a coupe at the time the survey was conducted.

306 In oral submissions, counsel for the respondents identified the specific basis upon which it was submitted that the judge had erred in the formulation of the Final Orders. In effect, it was submitted that the judge made a '*House v The King*'[159] error in failing to take into

158 Reasons for Final Orders, [14].
159 (1936) 55 CLR 499.

account the issue relating to the detection and protection of gliders who are outside a coupe, but whose home range might extend into the coupe. Alternatively, it was submitted, insofar that the judge did take that factor into account, her Honour failed to give sufficient weight to it, and by doing so, erred in the exercise of the discretion in the formulation of the injunctive relief afforded to the respondents. In that respect, counsel relied on the expanded form of the *House v The King* principle as discussed by Kitto J in *Australian Coal and Shale Employees Federation & Anor v The Commonwealth & Ors*[160] and by the Full Court of the Federal Court in its recent decision in *Shepherd v Watt*.[161]

VicForests' submissions

307 Senior counsel for VicForests, in effect, made two principal points in response to the submissions made on behalf of the respondents.

308 First, counsel submitted that the arguments advanced on behalf of the respondents were based on an unstated premise, namely, that the judge had erred in failing to find that ss 2.2.2.2 and/or 2.2.2.4 of the Code required VicForests to undertake surveys beyond the coupe area in order to detect gliders who were outside the coupe areas but whose home ranges might extend into the coupe. Counsel submitted that that underlying premise to the arguments advanced on behalf of the respondents in support of the cross-application is not the subject of a specific ground of appeal in their notice of cross-application for leave to appeal.

309 Secondly, counsel for VicForests noted that the relief now sought by the respondents in the cross-appeal extends well beyond the relief which they sought in their pleadings and at trial. In particular, in the statement of claim in each proceeding, the respondents had each pleaded that, on the correct construction of ss 2.2.2.2 and/or 2.2.2.4 of the Code, VicForests was required to conduct surveys to identify greater gliders and yellow-bellied gliders inhabiting each coupe and the area 75 metres beyond the boundary of the coupe in order to address risks to those gliders in, and in the vicinity of, the coupe. That pleading, and that point, were the subject of the findings made by the judge in her primary reasons. Following delivery of the Liability Reasons, the respondents, in their submissions as to the final form of orders pronounced, departed from their pleading, and contended that the two provisions of the Code required surveys to be conducted 114 metres beyond the boundary of each coupe, as well as the entirety of any other coupe that was located wholly or partially within that area of 114 metres beyond the coupe boundaries.

310 Counsel for VicForests further noted that in the cross-application, the respondents have now contended that ss 2.2.2.2 and/or 2.2.2.4 of the Code require surveys to be conducted 250 metres beyond the boundary of each coupe. Further, as a new alternative, the respondents contend that the survey should be directed to detect any glider outside the coupe but whose home range might extend inside the coupe. VicForests submitted that the respondents should be held to their pleaded cases and the cases that were the subject of their final addresses before the judge, in respect of which the judge made the

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160 (1953) 94 CLR 621, 627.

161 [2022] FCAFC 78, [58]–[70] (Greenwood, Burley and Halley JJ) ('*Shepherd*').

fundamental findings which were the bases, ultimately, for the forms of relief which her Honour ordered.

Analysis and conclusion

311 For the reasons that follow, both points made by VicForests in response to the cross-appeal are correct, and the application by the respondents to cross-appeal the orders made by the judge must fail.

312 In essence, the orders made by the judge, which are the subject of the cross-application, were based on conclusions that her Honour reached in respect of specific issues that were the subject of the pleadings in the trial. The judge's conclusions concerning those issues are not the subject of any ground of appeal in the cross-application for leave to appeal, and, in essence, the respondents have not sought to impugn them.

313 In order to analyse the point relied on by the respondents on the cross-application, it is necessary to return to the issues that were defined and framed by the pleadings, and which were the subject of the substantive conclusions formed by the judge in her reasons. In each proceeding, the respondents' respective statements of claim underwent a number of amendments. The final edition of the pleading, in each proceeding, was that on the true construction of ss 2.2.2.2 and 2.2.2.4 of the Code, the following were required:

(a) Surveys to identify gliders in each coupe and in the area of 75 metres beyond the boundary of the coupe in order to address risks to gliders in, and in the vicinity of, the coupe.

(b) For each sighting of a greater glider, there be an exclusion area or other management action applied to exclude timber harvesting operations from a circular area of radius 240 metres centred on the location of the greater glider sighting (18 hectares).

(c) For each sighting of at least three yellow-bellied gliders within a 20 hectare area, there be an exclusion area or other management area applied to exclude timber harvesting operations from 38 hectares of suitable habitat for the yellow-bellied gliders centred on them, such area to be protected by appropriate buffers.

314 In each proceeding, the prayers for relief in the respective statements of claim sought declarations and injunctions which reflected those three requirements.

315 In final address, and in the written submissions before the judge, the respondents' counsel specifically addressed the form of relief sought in the pleading. The respondents' submissions on the issue of surveys focused principally on the kind of surveys which were required to comply with ss 2.2.2.2 and 2.2.2.4 of the Code, and the practicability of the surveys that were recommended by the respondents' expert, Associate Professor Wardell-Johnson. Similarly, the submissions by the respondents, concerning the dimensions and locations of the required protection areas, were substantially based on the expert evidence given by Associate Professor Wardell-Johnson and Dr Wagner. Only passing reference was made, in the submissions,

to the question whether the survey area, and any exclusion area, should extend beyond the coupe that was to be the subject of the foresting operations.

316 It was in that context that the judge, in the Reasons, determined the issues that had been addressed by the parties. Her Honour concluded that, in order to apply the precautionary principle to the conservation of greater gliders and yellow-bellied gliders, VicForests must survey the 'whole of any coupe' that is proposed for harvesting which may contain glider habitat, and that it must do so using a survey method that is likely to detect any gliders that may be present 'in the coupe' in order to locate the gliders' home ranges wherever practicable.[162] The judge considered that the survey protocol proposed by the respondents was an effective survey method, but it was not the only effective way to detect and locate gliders 'within a coupe'.[163] In considering the form of injunction which should be ordered, the judge concluded that it should not be in the terms sought by the respondents, because, in particular, her Honour did not consider that the respondents' survey protocol was appropriate for inclusion in such an order.[164]

317 In a similar way, in conformity with the issues framed by the pleadings, the judge addressed the differing views, respectively expressed by Associate Professor Wardell-Johnson and Dr Wagner, for preserving sufficient habitat of the greater gliders and yellow-bellied gliders in order to ensure their continued survival. The judge noted the evidence of Dr Wagner, which differed from the evidence of Associate Professor Wardell-Johnson, as to the steps that were necessary to protect those two species of gliders. In the case of each of the two species of gliders, the judge preferred the steps advocated by Dr Wagner as being more proportionate in achieving protection of those two species consistently with the precautionary principle in s 2.2.2.2 of the Code.[165] The judge concluded that the respondents were entitled to injunctions in the terms that we have quoted earlier in these reasons.[166]

318 Specifically, as we have earlier noted, the judge's formulation of those orders was based substantially on the evidence given by Dr Wagner, and in particular, Dr Wagner's opinion that, in order to provide sufficient protection for the two species of gliders, it was necessary to retain at least 60 per cent of the basal area within the harvested area of the coupe. Relevantly, in the context of the ground of cross-appeal, Dr Wagner's opinion, as identified by the judge in the Reasons, did not extend to identifying or protecting gliders outside the harvested area of the coupe.

319 The findings that were so made by the judge in her Reasons were the necessary basis for the relief contained in the orders that she subsequently pronounced. In providing the parties with the opportunity to make submissions concerning the orders which should be pronounced, the judge properly and correctly sought submissions in respect of orders which would 'give effect to [her] conclusions', taking the proposed orders, expressed by the judge in the Reasons, as the 'starting point'.[167]

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162 Liability Reasons, [295].
163 Liability Reasons, [297]–[298].
164 Liability Reasons, [376].
165 Liability Reasons, [26], [221]–[222], [252]–[253].
166 Liability Reasons, [377].
167 Liability Reasons, [378].

320 That approach by the judge was, of course, entirely orthodox and appropriate. As we have discussed, in the Reasons the judge made particular findings and reached particular conclusions concerning the steps and processes that were necessary in order that VicForests comply with ss 2.2.2.2 and 2.2.2.4 of the Code. It was those findings and conclusions that were the proper basis for any relief which the judge ultimately awarded. The process that followed, and in particular the opportunity for the parties to address and make submissions concerning the precise formulation of the relief to be the subject of the judge's final orders, was not an opportunity for the parties to range beyond the ambit of the issues that they had defined and framed in their pleadings and which had been determined by the judge.

321 In the present cross-application, the respondents have not sought to rely on any ground of appeal that the judge erred in determining that VicForests was required to apply the steps described by Dr Wagner in order to comply with the precautionary principle in s 2.2.2.2 of the Code. It was not put by counsel for the respondents that the judge erred in failing to conclude that, in order to comply with ss 2.2.2.2 and 2.2.2.4 of the Code, VicForests was required to conduct surveys outside the coupe, whether in the 'additional survey area' (be it 75 metres, 114 metres or 250 metres) contended for by the respondents, or to conduct surveys to detect gliders who might be outside the coupe, but whose ranges might extend into the coupe that was to be the subject of timber harvesting operations. Nor was it put by way of cross-appeal that the judge erred in failing to conclude that those provisions of the Code required that VicForests be restricted in harvesting areas that extended into the 'additional survey area', or alternatively that those provisions required that VicForests be restricted from engaging in timber harvesting operations in coupes into which the home ranges of gliders (detected outside the particular coupe) might extend.

322 As we have noted earlier in these reasons, following the delivery of the Liability Reasons, the respondents in each proceeding made submissions by which they proposed orders which in effect would require VicForests to survey the coupe, together with an area extending 114 metres beyond the coupe boundaries, and (in addition) any other coupe located wholly or partially within that area of 114 metres beyond the coupe boundary. The orders proposed by the respondents sought an injunction restraining VicForests from conducting timber harvesting operations unless it excluded a circular area with a radius of 228 metres from the location of the detection of any greater glider in any of those areas, and unless it also retained at least 60 per cent of the basal area of eucalypts in the harvested area.

323 A number of points may be immediately noted concerning the proposed orders so sought by the respondents.

324 First, the boundary area of 114 metres exceeded the area sought in the respondents' statements of claim (75 meters).

325 Secondly, as discussed, the judge did not make any express conclusion or finding to the effect that such additional area should be surveyed, or should be the subject of any timber harvesting restriction of the kind that the judge determined should be applied to the actual coupe areas.

326 Thirdly, in the Reasons, the judge specifically made a finding that it was not necessary to exclude timber harvesting within a radius of 228 metres from the location of any greater glider.

327 Fourthly, the proposed orders introduced an entirely novel aspect into the respondents' claim, namely, that the survey area (and thus the area which would be the subject of restricted harvesting) be extended to any other coupe the boundaries of which at any point intersected with the extended boundary of 114 metres proposed by the respondents. In their statements of claim, the respondents had not pleaded that the relevant provisions of the Code required VicForests to survey any such additional coupe area, or to implement any restricted forms of harvesting in them. For that reason, the judge did not make any finding to that effect, which could form the basis of that additional component of relief sought by the respondents.

328 In her reasons relating to the relief to be ordered, the judge noted that the form of injunctions, proposed by the respondents, sought to reintroduce a prescriptive approach in the two ways mentioned.[168] The judge noted that in support of that approach, the respondents had submitted that a survey only provides a snapshot of where a glider happens to be on the night of the survey, but that it is not possible to tell where the glider is within its home range at the time of the survey. Accordingly, the respondents preferred to quantify, in a prescriptive manner, the area to be protected.

329 The judge, having thus outlined the respondents' position, concluded:

> I did not share that preference. The ecologists agreed that knowledge of where *in a coupe* greater gliders occur is required to adequately plan for habitat retention and silvicultural regimes at the coupe level. They were clear that survey efforts could and should be directed to finding out where gliders live *within a coupe*. It is this objective that should guide VicForests in deciding what parts of the forest in and adjacent to a coupe should be surveyed when planning to harvest the coupe. Once those surveys have been done, observations of greater gliders made during the surveys can be combined with the scientific understanding of the average size of their home range to make an assessment of the likely location of a greater glider's home range within the coupe. That assessment is best made based on the actual survey observations, and the particular characteristics of the coupe and its surrounds.[169]

330 As we have discussed, it was not necessary for the judge to give reasons for rejecting the respondents' proposed form of injunctive relief, other than to note that that form was not based on, and was indeed contrary to, the judge's conclusions in the Reasons. Further, and in any event, the reasons given by the judge for rejecting the form of injunction proposed by the respondents were unimpeachable. Consistently with her Honour's findings in the Reasons, the judge rejected the prescriptive approach contended for on behalf of the respondents, and provided for appropriate surveys to be conducted within the coupe area in question. The respondents have not been able to identify or substantiate any error contained in that reasoning by her Honour.

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168 Reasons for Final Orders, [12].

169 Reasons for Final Orders, [14] (emphasis added).

331 Finally, it must be observed — and indeed was conceded by the respondents in their written case — that the relief now sought by them, on the cross-appeal, is different and more substantial than the relief that was the subject of the respondents' respective statements of claim, and that which was sought by the respondents after the delivery of her Honour's Reasons for judgment. First, the respondents now seek an additional survey area with a radius of 250 metres around the affected coupe. Secondly, by way of alternative, the respondents seek surveys to be conducted outside the coupe area, but which are likely to detect any glider, who at the time of survey was physically located outside the coupe, but whose home range could extend into the coupe. That alternative form of survey was not the subject of any pleading, any submission to the judge in final address, or any submission to the judge on the question of the orders to be made by way of final relief after delivery of the reasons for judgment. It is entirely novel. Further, it was not based on any finding of fact or conclusion by the judge in the Reasons.

332 As we have discussed, in their submissions to this Court, the respondents contended that the judge, by not making orders in the form now sought, failed to give any, or any adequate, weight to the need to protect the habitat of gliders, who, at the time of survey, may be outside the coupe boundaries, or gliders who, while resident outside the coupe area, may have a home range that extend inside the coupe area. In that way, the respondents have sought to contend that the judge, by failing to give that consideration any or any adequate weight, made an error of the kind identified by the High Court in *House v The King*, and as described in the recent decision of the Full Court of the Federal Court in *Shepherd*.

333 The submissions made by the respondents are flawed for two fundamental reasons. First, while the formulation and grant of equitable relief, in the form of a declaration or an injunction, is in part discretionary, it must be based on a finding of fact or conclusion from the facts made by the judge in the proceeding. For the reasons we have already discussed, the additional relief now sought by way of cross-appeal, was not based on any such identified finding of fact or conclusion by the judge. Secondly, as discussed, the matters that are now sought to be included in the relief contended for in the cross-application are substantially different to, and distinct from, the issues properly defined by the respondent in their pleadings and that were thus the subject of determination by the judge.

334 For those reasons, the ground of appeal, relied on by the respondents, must fail. The application by the respondents for leave to cross-appeal must therefore be refused. The application to amend the notice of cross-appeal is also refused, as the amended notice suffers from the same vices as the original notice.

Disposition

335 We have concluded that:

(a) VicForests' application for leave to appeal is granted but the appeal is dismissed;

(b) the respondents' application for leave to cross-appeal is refused; and

(c) the respondents' application for leave to amend the notice of the cross-appeal is refused.

336 We will make orders accordingly.

SCHEDULE OF PARTIES

S EAPCI 2022 0111

VICFORESTS	Applicant
v	
ENVIRONMENT EAST GIPPSLAND INC (ABN 30 865 568 417)	Respondent

S EAPCI 2022 0112

VICFORESTS	Applicant
v	
KINGLAKE FRIENDS OF THE FOREST INC (ABN 35 186 838 481)	Respondent

S EAPCI 2023 0007

KINGLAKE FRIENDS OF THE FOREST INC (ABN 35 186 838 481)	Cross-Applicant
v	
VICFORESTS	Cross-Respondent

S EAPCI 2023 0008

ENVIRONMENT EAST GIPPSLAND INC (ABN 30 865 568 417)	Cross-Applicant
v	
VICFORESTS	Cross-Respondent