

# Briefing Note: The importance of the precautionary principle in environmental and natural resources law

## The precautionary principle in general

The precautionary principle is a cornerstone of environmental law and governance. It is one of the bundle of legal principles comprising 'ecologically sustainable development'. It is the most well-known, and often considered to be one of the most important, of those principles.

The precautionary principle makes a key contribution to sustainable use of natural resources by requiring their use to be, among other things, prudent.<sup>1</sup> Usually, the precautionary principle applies to decision-making concerning resource uses because it is written into legislation and the precise formulation will be set out in a statutory provision.

Fundamentally, the precautionary principle is a rule of environmental prudence. It concerns the management of environmental risks where there is uncertainty, in order that human actions are calculated or designed to prevent or avoid actual degradation to the environment associated with such risks. Precaution requires decisions, action or conduct that may have adverse environmental consequences to be properly informed and subsequent responses to be properly calibrated to risk and what is and is not known. The response is to be proportionate and as such greater environmental threat, as well as greater uncertainty, requires greater exercise of precaution.

In Australian law and policy, the classic expression of the precautionary principle is as follows:<sup>2</sup>

*Where 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, public and private decisions should be guided by:*

- *careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and*
- *an assessment of the risk-weighted consequences of various options.*

## Steps and specifics of the precautionary principle

If we were to 'map' the specific elements of the precautionary principle, we can identify the following features:

- There is a threshold for the role of the precautionary principle in decision-making and action. This threshold is a matter of evidence showing that there is:
  - A serious or irreversible threat of environmental damage – this is the element of risk to the environment; and
  - Some degree of scientific uncertainty.
- Both in considering *whether* the precautionary principle applies and when *implementing* it, decision-making throughout must evidence 'careful evaluation' aimed at avoiding harm and consideration of risks associated with various decisions or management options ('risk-weighting').

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<sup>1</sup> *Telstra v Hornsby SC* [2006] NSWLEC 133, [109]

<sup>2</sup> This is the text of the precautionary principle found in the Intergovernmental Agreement on the Environment.

- Where there is a serious or irreversible threat and scientific uncertainty about it, precaution means the ‘benefit of the doubt’ is given to environmental protection.
- This does not mean that environmentally harmful actions will be prohibited (although that could be the case, depending on the circumstances) but rather that prudent decisions and actions respond proportionately in order to anticipate and prevent harm.

### The Precautionary Principle in Victorian Forest Law

Currently, the main regulatory instruments that apply environment protection standards to timber harvesting in Victorian State forests are the Code of Practice for Timber Production 2014 (the **Code**) and the Management Standards and Procedures for timber harvesting operations in Victoria’s State forests 2021. The obligation to comply with the precautionary principle is contained in clause 2.2.2.2 of the Code. Clause 2.2.2.2 states that the precautionary principle must be applied to the conservation of biodiversity values and that the application of the precautionary principle will be consistent with relevant monitoring and research that has improved the understanding of the effects of forest management on forest ecology and conservation values.

VicForests must conduct its timber harvesting operations consistently with the Code, including the precautionary principle.<sup>3</sup> DELWP is the regulatory agency with primary responsibility for enforcing VicForests’ compliance with this timber harvesting regulatory scheme.

Courts have played a critical role in interpreting the precautionary principle as expressed in the Code and determining whether VicForests has failed to act in accordance with it. The community’s right to have recourse to the Courts when VicForests appears to have acted unlawfully in breach of the precautionary principle, particularly where DELWP has not taken appropriate compliance action, has been integral to the protection of threatened species in Victoria’s native forests. Two examples of this are provided below.

In *Environment East Gippsland Inc v VicForests* [2010] VSC 335 (**Brown Mountain**), Environment East Gippsland sought to restrain VicForests from logging four coupes containing old growth forest on the edge of the Errinundra Plateau in East Gippsland. EEG claimed that the proposed logging would breach the precautionary principle as expressed in the Code<sup>4</sup> in respect of habitat preservation for several threatened species – including the Spot-tailed Quoll, Powerful Owl, Large Brown Treefrog and Greater Glider. EEG were successful and the Court determined that logging should be restrained because, in order to comply with the precautionary principle as expressed in the Code, VicForests must complete field surveys prior to commencing harvesting to ascertain whether threatened species are present in the coupes planned to be logged. The Court in Brown Mountain also found that the creation and review of management areas and reserves providing habitat for certain threatened species must be completed prior to logging commencing in order for VicForests to comply with the precautionary principle.<sup>5</sup>

*Friends of Leadbeater’s Possum Inc v VicForests* (No 4) [2020] FCA 704 (the **Possums Case**), concerned VicForests’ logging operations in over 60 coupes in the Central Highlands region of Victoria containing the Greater Glider and the Leadbeater’s Possum. The plaintiff claimed that VicForests had not complied with the precautionary principle with respect to the Greater Glider, as expressed in the Code,<sup>6</sup> in (a) logging that it had already undertaken and (b) was not likely to comply with the

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<sup>3</sup> *Sustainable Forests (Timber) Act 2004* (Vic), s46.

<sup>4</sup> Brown Mountain concerned a prior version of the Code (the Code of Practice for Timber Production 2007).

<sup>5</sup> *Environment East Gippsland Inc v VicForests* [2010] VSC 335, [761]-[777].

<sup>6</sup> The Possums Case concerned the Code as it stood prior to the amendments made in November 2021.

precautionary principle when harvesting coupes that were scheduled to be logged. The Court in the Possums Case found that VicForests had, and was likely to, breach the precautionary principle in several respects including:

- continuing to implement high intensity harvesting methods (such as clearfelling) in coupes where there had been detections of the Greater Glider (at [993]);
- failing to ensure that habitat currently reserved for the Greater Glider would be preserved in the long term when future logging operations occurred (at [1129]-[1131]);
- the absence of adequate detection based strategies, such as surveying, to identify the presence of the Greater Glider in logged coupes prior to harvesting commencing (at [958]).

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