

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
VALUATION, COMPENSATION AND PLANNING LIST

Not Restricted

S ECI 2021 01527

ENVIRONMENT EAST GIPPSLAND INC.

Plaintiff

v

VICFORESTS

Defendant

S ECI 2021 04204

KINGLAKE FRIENDS OF THE FOREST INC.

Plaintiff

v

VICFORESTS

Defendant

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 11 November 2022
DATE OF JUDGMENT: 18 November 2022
CASE MAY BE CITED AS: Environment East Gippsland Inc v VicForests (No 5)
MEDIUM NEUTRAL CITATION: [2022] VSC 707

ENVIRONMENTAL LAW - Timber harvesting in State forests in East Gippsland and Central Highlands - Form of final orders to give effect to conclusions in *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668 - Where it has been decided that permanent injunctions should be granted - Final form of permanent injunctions - Where it has been decided that declarations should be granted - Final form of declarations.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr J Korman and Dr K Weston-Scheuber	Oakwood Legal
For the Defendant	Mr PH Solomon KC with Mr OM Ciolek and Ms H Douglas	Johnson Winter & Slattery

HER HONOUR:

- 1 Following publication of *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668 (**Judgment**) on 4 November 2022, the parties filed proposed forms of final orders and short written submissions on 10 November 2022. There were many aspects of the form of the final orders about which the parties did not agree.
- 2 I heard oral submissions about the form of the final orders to be made on 11 November 2022. Later that day, I made the following orders in the East Gippsland proceeding:¹

THE COURT ORDERS THAT:

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

¹ These reasons use terms defined in the Glossary to *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668 (**Judgment**).

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.

4. Orders 1, 2 and 3 of these Orders do not restrain VicForests from:

- (a) felling or cutting trees or parts of trees in order to address a serious risk to human safety or as otherwise advised, ordered or directed by a responsible authority, including the Department of Environment, Land, Water and Planning or Parks Victoria;
- (b) removing and/or selling timber already felled as at 11 November 2022;
- (c) felling trees or parts of trees for the maintenance of any road;
- (d) cutting limbs of trees for the purposes of seed collection;
- (e) regeneration activities after permitted logging; or
- (f) undertaking any work within a coupe to manage or prevent environmental degradation, whether on the instruction, recommendation or direction of the Department of Environment, Land, Water and Planning or as otherwise required to comply with the Code.

5. VicForests has liberty to apply:

- (a) by 25 November 2022, to vary Order 4 of these Orders including, to the extent necessary, to reopen its case in relation to that Order; and
- (b) otherwise, in the event of a material change to the law.

...

3 I also made orders in the East Gippsland proceeding discharging the interlocutory injunctions that had been in place, releasing VicForests from undertakings given during the interlocutory stages of the proceeding, and for VicForests to pay EEG's costs of the proceeding.

4 In addition, I made the following declarations in the East Gippsland proceeding:

THE COURT DECLARES THAT:

1. 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 Forest Management Area 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.
2. For the purposes of the management action for the greater glider in the East Gippsland Forest Management Area in Table 13 of the Standards, a substantial population in isolated habitat is 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.
3. For the purposes of the management action for the yellow-bellied glider in the East Gippsland Forest Management Area in Table 13 of the Standards, a substantial population in isolated habitat is 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 Habitat are less than 100 metres wide.

The Suitable Habitat principles, reflecting the ten principles set out at [325] of the Judgment, were annexed to the final orders.

- 5 Orders to like effect were made in the Kinglake proceeding, in relation to the Central Highlands FMAs. Those orders did not include the declarations made in the East Gippsland proceeding.
- 6 I indicated at the conclusion of the hearing on 11 November 2022 that I would publish written reasons for the form of the final orders, in relation to matters of contention. These are those reasons.

Plaintiffs' proposed form of injunctions

- 7 At [377] of the Judgment, I proposed a form of the injunctions to be granted in each proceeding, to reflect the conclusions I had reached in relation to Issues 5, 8, 9, 10 and 11.² I asked the parties to prepare draft orders in each proceeding that gave effect to my conclusions, taking the proposed orders as their starting point. The variations that

² See especially [216]–[222], [252]–[253], [295], [305]–[306], [310]–[311] of the Judgment.

were proposed from that starting point, by the plaintiffs and by VicForests, respectively, are shown in markup at [8] and [27] below.

8 The plaintiffs proposed injunctions in the following form:

2. ~~VicForests~~ The defendant must not, whether by itself, its servants, agents, or 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:

- (a) the coupe; and
- (b) the area that extends 114 metres beyond the coupe boundaries; and
- (c) any other coupe that is located wholly or partially within the area that extends 114 metres beyond the coupe boundaries; but
- (d) not areas that have been clear-felled since 1939

~~has~~ have been surveyed using a reasonably practicable survey method that is likely to:

- (e) detect any greater gliders that may be present in the Survey Area the coupe and locate their home ranges; and
- (f) detect any yellow-bellied gliders that may be present in the Survey Area the coupe and identify their:
 - (i) all yellow-bellied glider feed trees and
 - (ii) all hollow-bearing trees and
 - (iii) an appropriate number of recruitment treesin the coupe.

3. The defendant must make publicly available on its website, a reasonable time prior to commencement of timber harvesting operations in a coupe:

- (a) an Operations Map for the coupe showing locations of all glider detections known to the defendant and details of the proposed timber harvesting operations to be conducted in the coupe; and
- (b) where the defendant has conducted surveys in the coupe's Survey Area, details of the survey method, area surveyed, transects (if relevant), and survey detections, including GPS co-ordinates of the detected gliders' locations.

4. ~~VicForests~~ The defendant must not, whether by itself, its servants, agents, or contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland FMA/Central Highlands FMAs ~~in which~~ if any greater gliders have been detected in the coupe's Survey Area unless:
- (a) for each greater glider detection, it excludes a circular area with radius of 228 m measured horizontally from the location of that detection (Protected Area) the greater gliders' home ranges from timber harvesting operations; and
 - (b) it retains at least 60% of the basal area of eucalypts in the harvested area of the coupe, evenly dispersed across the harvested area and including all identified hollow-bearing and an appropriate number of recruitment trees; and
 - (c) it excludes from timber harvesting operations:
 - (i) corridors at least 100 m wide connecting all Protected Areas within the coupe;
 - (ii) at least one corridor at least 100 m wide connecting a Protected Area or Protected Areas to suitable glider habitat outside the harvested area of the coupe; and
 - (iii) riparian strips at least 100m wide located along all waterways in the coupe, with an exclusion area at least 50m wide on each side of those waterways.
5. ~~VicForests~~ The defendant 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~~ if any yellow-bellied gliders have been detected in the coupe's Survey Area unless it retains
- (a) at least 60% of the basal area of eucalypts in the harvested area of the coupe, evenly dispersed across the harvested area, including:
 - (i) all identified yellow-bellied glider feed trees within the coupe;
 - (ii) and all identified hollow-bearing trees within the coupe; and
 - (iii) an appropriate number of recruitment trees around those feed trees and hollow-bearing trees; and
 - (b) riparian strips at least 100m wide located along all waterways in the coupe, with an exclusion area at least 50m wide on each side of the waterway.

...

9 The plaintiffs' proposed order 1 provided definitions of various terms, including relevantly:

"gliders" means:

- (i) greater gliders (*Petauroides volans*); and
- (ii) yellow-bellied gliders (*Petaurus australis*).

...

"Survey Area" means, in respect of any coupe, the total area identified in Order 2(a), 2(b), 2(c) and 2(d).

...

Detection and protection of greater gliders' home ranges

10 At [295] of the Judgment, I 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 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 necessary in order that their home ranges can be excluded from timber harvesting operations, as the precautionary principle requires.

11 At trial, the plaintiffs sought to achieve this outcome by injunctions that restrained VicForests from harvesting any coupe unless the coupe had been surveyed for gliders using a highly prescriptive survey protocol. While I found that this survey protocol was generally effective, safe and feasible, I considered that it may not be safe or practical to apply it in every coupe. I also found that it was not the only effective survey method available. For those reasons, I proposed a form of injunction that specified the outcome to be achieved rather than prescribing the survey method to be used. The expert ecologists agreed that survey efforts should be directed at finding where gliders are within a coupe. In the case of greater gliders, that involves attempting to locate their home ranges in order that they can be excluded from harvesting.

- 12 The plaintiffs' proposed form of injunction following the Judgment sought to reintroduce a prescriptive approach, in two ways. The first was to specify in detail the areas to be surveyed before any coupe could be harvested, including areas beyond the coupe boundaries, and adjoining coupes. The second was to exclude from harvesting a circular area with a radius of 228 metres measured horizontally from the location of the detection of any greater glider. This radius was derived from the finding that the typical home range of an adult male greater glider is up to 4.1 hectares,³ which is the area of a circle with a radius of 114 metres. I understood the plaintiffs to be relying on Associate Professor Grant Wardell-Johnson's approach of assuming a circular home range and an observation anywhere from the edge to the middle of the home range.⁴
- 13 In support of their proposed approach, the plaintiffs submitted that it would be impossible for VicForests to carry out an order that required it to locate the home range of a greater glider. A survey gives a snapshot of where a glider happens to be on the night of the survey, but it is not possible to tell where the glider is within its home range at the time of the survey. For that reason, the plaintiffs preferred to quantify the area to be protected.
- 14 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.⁵ 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

³ Judgment, [80]. The ecological evidence was that the home range of a male is typically between 1.4 and 4.1 hectares; for females the range is between 1.3 and 3 hectares. Individual gliders have been observed to extend their home range to up to 18 hectares.

⁴ Judgment, [209].

⁵ Judgment, [265](b).

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.

15 However, I did accept that it is difficult to locate a greater glider's home range with absolute precision. For that reason, I considered it appropriate to qualify the obligation to locate their home ranges by including the words 'so far as is reasonably practicable' in paragraph 1(a) of the final orders.

16 I emphasise that the survey requirements that are specified in the first injunction are minimum requirements. They clarify the surveying that VicForests must do to comply with its obligations under s 2.2.2.2 of the Code, to apply the precautionary principle to the conservation of greater gliders and yellow-bellied gliders, and under s 2.2.2.4, to identify those biodiversity values during planning. The injunction does not displace VicForests' existing obligations to plan and conduct its timber harvesting operations in East Gippsland and the Central Highlands in accordance with those provisions. It must continue to discharge those obligations 'consistent with relevant monitoring and research' and considering 'the advice of relevant experts and relevant research in conservation biology and flora and fauna management'.⁶ If there is scientific uncertainty about the boundaries of a particular greater glider's home range, s 2.2.2.2 of the Code requires VicForests to take a precautionary approach in determining the area to be excluded from harvesting.

Areas not to be surveyed

17 The plaintiffs proposed that, instead of using the phrase 'that may contain habitat for gliders' in relation to coupes to be surveyed, the first injunction should exclude areas that have been clear-felled since 1939 from the survey requirement. In support of this formulation, the plaintiffs submitted that the words 'that may contain habitat for gliders' were uncertain in scope, and apt to give rise to further disputes. They referred

⁶ *Code of Practice for Timber Production 2014 (as amended 2022)*, ss 2.2.2.2, 2.2.2.3.

to the evidence that gliders may occur in any area of East Gippsland and the Central Highlands that includes mature forest, and that the only forested areas that do not include mature forest are those clear-felled since 1939.⁷

18 I agreed that the evidence on this issue was clear, and it was preferable that this should be reflected in the final orders. I did so by specifying that the first injunction, in relation to survey requirements, does not apply to a coupe that has been clear-felled since 1939.⁸

Habitat to be retained

19 The plaintiffs' proposed form of order included additional areas of habitat that they said should be excluded from harvesting, in order to reflect my conclusions about the need to maintain connectivity between areas of retained habitat, including by retaining riparian strips along waterways.

20 I considered this point to be well made, in relation to connecting riparian strips along waterways. There were several reasons why I considered it appropriate to specify, in the second and third injunctions, that riparian strips at least 100 metres wide located along all waterways in the coupe, are to be excluded from timber harvesting operations:

- (a) First, both ecologists stressed the importance of riparian strips in maintaining connectivity between areas of retained habitat. This is reflected in my conclusions at [216] and [252] of the Judgment.
- (b) Second, VicForests is already required by the Code to retain buffer strips along waterways, with minimum widths as prescribed in the Standards.⁹ However, the minimum prescribed width of these buffer strips is narrower than the

⁷ Report of Associate Professor Grant Wardell-Johnson dated 8 March 2022, [154]; Judgment, [300].

⁸ Judgment, [300].

⁹ Code, ss 2.2.1.1, 2.2.1.3–2.2.1.4; *Management Standards and Procedures for timber harvesting operations in Victoria's State forests*, cl 3.3.1.1, Table 9.

100 metres recommended by Dr Benjamin Wagner.¹⁰

(c) The third reason was related to my conclusion that the 40% retention prescription in the Greater Glider Action Statement is wholly inadequate for the protection of greater gliders within a coupe – because the Greater Glider Action Statement does not specify that 40% basal retention must be in addition to the retention of riparian buffers.¹¹ For that reason, I considered it important to specify in the injunctions that riparian buffer strips must be excluded from harvesting. This has the additional benefit of clarifying that these riparian buffer strips are not part of the harvested area of a coupe, within which a minimum of 60% of the basal area of eucalypts must be retained.

21 Beyond that, I did not consider it appropriate for the injunctions to include detailed prescription about connectivity between retained areas of habitat. I reiterate that the injunctions ordered in these proceedings clarify rather than replace VicForests' existing obligations under ss 2.2.2.2 and 2.2.2.4 of the Code. When planning and conducting timber harvesting operations, VicForests should continue to be guided by relevant experts and relevant research, including as to the need for connectivity between areas of retained glider habitat and the characteristics of these wildlife corridors.

60% basal retention in harvested area

22 The plaintiffs sought to include, in the second and third injunctions, an additional requirement that the 60% basal area of eucalypts to be retained in the harvested area of the coupe be 'evenly dispersed across the harvested area'.

23 In relation to the proposed requirement that the 60% to be retained should be evenly dispersed, the plaintiffs pointed out that, although VicForests' present variable retention harvesting method involves retention of 40% or more of the forest in a coupe,

¹⁰ Report of Dr Benjamin Wagner dated 1 April 2022, [66] (**Wagner report**); Judgment, [213].

¹¹ Judgment, [224](d).

it is indistinguishable from clearfelling because the retained forest is not evenly dispersed. The plaintiffs feared that, absent a requirement for even dispersal of retained trees, VicForests could declare the entire coupe to be a harvest zone, including areas that are unavailable for logging, and effectively clearfell 40% of the coupe. They sought to characterise 60% retention as a form of selective harvesting, which according to VicForests' guidelines involves even dispersal across the harvest zone.¹²

24 I did not think it necessary to include this stipulation in the second and third injunctions for the following reasons:

- (a) First, the terms of those injunctions require VicForests to retain 60% of the basal area of eucalypts in the *harvested area* of a coupe – an area that must exclude greater gliders' located home ranges and riparian strips along waterways through the coupe. The injunctions do not repeat the error made in the Greater Glider Action Statement, of confusing the coupe with the harvested area of the coupe.
- (b) Second, it was not Dr Wagner's evidence that the 60% basal area to be retained should always be evenly dispersed across a coupe. He spoke of 'aggregated retention', which he said means 'not dispersing the resources that are left after harvesting meaning that as you would put in ... patch retention for the greater glider observations, your remaining habitat would also need to be similarly clustered to allow these habitat islands'.¹³ He further explained that 'their resources should be aggregated rather than dispersed, because the dispersal makes it harder for the gliders to access'.¹⁴
- (c) Third, the evidence indicates that 60% retention across the harvested area is a

¹² Referring to VicForests, *Harvesting and Regeneration Systems* (version 1.2, 16 August 2019), exhibited to the Affidavit of James Murdoch Gunn dated 8 April 2022.

¹³ Transcript, 13 May 2022, 501:17–22 (Wagner).

¹⁴ Transcript, 13 May 2022, 501:22–25 (Wagner).

form of selective or selection harvesting.¹⁵ I do not consider that retention of 60% of the basal area of timber within the area that is harvested can be characterised as intensive or clearfall harvesting, regardless of how the retained trees are dispersed across the harvest area.

- (d) Finally, the plaintiffs appeared to assume that VicForests will determine the retention pattern within a coupe in a way that will maximise the yield of merchantable timber, without also considering whether it will best conserve the gliders known to live in the coupe. I preferred to assume that VicForests will make those decisions having regard to the observations actually made during surveys of a coupe, and other relevant monitoring and research. For that reason also, I did not consider it necessary to specify that the 60% of basal area of eucalypts to be retained should include ‘an appropriate number of recruitment trees’, as the plaintiffs proposed.

Publication of survey data

25 The plaintiffs also sought an order requiring VicForests to publish on its website, or alternatively make available to the plaintiffs, coupe operations maps showing the locations of all glider detections known to VicForests, and details of the surveys of the coupe that were conducted by VicForests. They said that, without this information, they would not be in a position to monitor compliance with the Court’s orders. They added that the proposed order would ensure transparency and was consistent with VicForests’ existing obligation to publish maps and harvesting schedules before commencing harvesting operations in a coupe.

26 This proposed order appeared to be something of an afterthought on the plaintiffs’ part. It formed no part of the relief sought in their pleaded case, and was not the subject of evidence or submissions at trial. For that reason, I did not consider it appropriate for inclusion in the final orders to be made in either proceeding.

¹⁵ Judgment, [67]; see also Wagner report, [65]; Transcript, 13 May 2022, 502:3–13 (Wagner).

VicForests' proposed form of injunctions

27 As a preface to its submissions about the form of the final orders, VicForests reiterated its opposition to the grant of any relief in the plaintiffs' favour and reserved its position, for the purposes of any appeal, in respect of every aspect of the Judgment and the entirety of any relief ultimately granted by the Court. Under cover of that submission, it proposed injunctions in the East Gippsland proceeding in the following form:¹⁶

1. VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations within the meaning of the Code of Practice for Timber Production 2014 (2022 version) (Code) (timber harvesting operations) in any coupe in the East Gippsland Forest Management Area, being the area covered by the East Gippsland Regional Forest Agreement between Victoria and the Commonwealth, that may contain habitat for greater gliders or yellow-bellied gliders, unless the coupe has been surveyed by VicForests, its servants, agents, contractors or otherwise, using a reasonably practicable survey method that is likely to:
 - a. detect any greater gliders that may be present in the coupe and 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.
2. VicForests must not, whether by itself, its servants, agents, contractors or otherwise, conduct timber harvesting operations in any coupe in the East Gippsland Forest Management Area in which greater gliders have been detected by a survey undertaken in accordance with Paragraph 1(a) of these Orders, unless:
 - a. it excludes the greater gliders' home ranges from timber harvesting operations; and
 - b. it retains at least 60% of the basal area of eucalypts in the planned 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 Forest Management Area in which yellow-bellied gliders have been detected by a survey undertaken in accordance with Paragraph 1(b) of these Orders, unless it retains at least 60% of the basal area of eucalypts in the planned harvested area of the coupe, including

¹⁶ VicForests' suggested variations to the form of order proposed at [377] of the Judgment are shown in markup.

all identified feed trees and hollow-bearing trees within the coupe.

...

- 28 The same form of injunctions was proposed in the Kinglake proceeding, except with references to the Central Highlands Forest Management Area and Regional Forest Agreement.
- 29 Some of the suggested variations from the form of order proposed at [377] of the Judgment concerned the definition of terms to be used in the orders. These definitions were not controversial and were included in 'Other Matters' in the final orders. There were three contentious aspects of the form of injunction proposed by VicForests:
- (a) whether the first injunction should require that surveys be carried out only by VicForests, its servants, agents or contractors;
 - (b) relatedly, whether there should be an explicit link between VicForests' survey observations and the areas to be excluded from harvesting in the second and third injunctions; and
 - (c) whether the 60% basal area retention requirement should apply only to the 'planned' harvested area of a coupe.
- 30 The first two of these variations were proposed, it was submitted, for operational certainty. It was not clear to me why VicForests would wish to cease its reliance on third party surveys, in particular the FPSP surveys conducted by DELWP. I was not persuaded that there was good reason to provide that the surveys required by the first injunction should only be conducted by VicForests staff or contractors. Third party surveys, in particular those conducted by DELWP, have been a valuable source of information in the past, and that is likely to remain the case.
- 31 Nor could I discern a proper basis on which to limit the sources of information about where greater gliders and yellow-bellied gliders live in forest that VicForests plans to harvest. It was faintly suggested in oral submissions that VicForests would have to

determine the accuracy, completeness and honesty of any third party surveys of which it was made aware. There was no evidence to support that submission and it was, appropriately, not pressed. The evidence at trial was that both the FPSP surveys and the numerous spotlight surveys conducted by volunteers associated with KFF are conducted in accordance with a recognised survey method.¹⁷ Observations of gliders made during those surveys are routinely recorded using GPS coordinates, and there is often also photo or video evidence of glider sightings. There is no basis to conclude that these third party sightings are unreliable, or to exclude them from glider detections for the purposes of the second and third injunctions.

32 The third variation suggested by VicForests was to qualify 'harvested area' in the second and third injunctions with the word 'planned'. It submitted that it would be a suitable balance that the 60% basal retention should be in the harvested area contained in the operations plans – as distinct from the harvested area assessed on the ground. I did not consider that variation to be appropriate. According to the ecologists, retention of 60% of the basal area of eucalypts in the area actually harvested is what is required to conserve greater gliders and yellow-bellied gliders. VicForests is responsible not only for planning the area to be harvested, but also for ensuring that its contractors harvest a coupe in accordance with the operations plan, operations map and HCV map for the coupe.

Carve-outs

33 VicForests proposed an extensive 'carve-out' from the injunctions to be ordered in each proceeding, as follows:

4. Paragraphs 1, 2 and 3 of these Orders do not restrain VicForests from:
 - a. removing timber felled on or before 11 November 2022, including cutting that timber or snigging that timber through the coupe to a collection point;
 - b. delivering timber to a buyer or transporting to a place for

¹⁷ Judgment, [155]–[157]; fifth affidavit of Susan Mary McKinnon dated 28 January 2022, [16]–[32], including the video referred to at [30].

- collection by a buyer or sale to a buyer;
- c. felling or cutting trees or parts of trees in order to address a serious risk to human safety;
 - d. felling or cutting trees or parts of trees as otherwise advised, ordered or directed by a responsible authority, including the Department of Environment, Land Water and Planning or Parks Victoria;
 - e. conducting 'road maintenance' as defined by the Code, including felling trees or parts of trees;
 - f. conducting 'significant road improvement operations' as defined by the Code, that does not require the felling of mature eucalypt trees;
 - g. cutting limbs of trees for the purposes of seed collection;
 - h. regeneration activities;
 - i. undertaking any work within a coupe to manage or prevent environmental degradation, whether on the instruction, recommendation or direction of the Department of Environment, Land, Water and Planning or as otherwise required to comply with the Code, including as it may be amended;
 - j. using existing 'Coupe Infrastructure' as defined in the Code;
 - k. undertaking 'Salvage Harvesting Operations' as defined in the Code; or
 - l. undertaking any work within a coupe pursuant to an exemption or approval granted in accordance with the Code.
- ...

34 This went considerably further than the carve-outs provided in the interlocutory injunctions that had been in place in both proceedings, which were maintained in Order 4 of my final orders. These carve-outs flowed largely from the breadth of the definition of 'timber harvesting operations' in the Glossary to the Code, which both sides agreed should be adopted for the purposes of the orders. The reasoning behind the carve-outs contained in Order 4 was as explained in my interlocutory ruling in a

separate proceeding, *Gippsland Environment Group Inc v VicForests*.¹⁸

35 The more extensive carve-outs sought by VicForests formed no part of its case at trial. It frankly acknowledged that there was an ‘evidentiary lacuna’ in respect of some features of some of the carve-outs it sought. It foreshadowed an application to reopen its case and to file fresh evidence in that regard. In the face of my evident surprise at this development, following delivery of my judgment after a trial on all issues, VicForests referred me to the Court of Appeal’s decision in *Di Stasio Pty Ltd v R&K Services Pty Ltd*.¹⁹ It said that it would seek to demonstrate that it had ‘acted without fault or neglect’ and that an oversight had occurred which, if not repaired, would cause injustice. It emphasised that it was foreshadowing the application before final orders were made in the proceedings, as *Di Stasio* and other authorities require.

36 With some misgivings, I acceded to VicForests’ request for an opportunity to apply to reopen its case. I did so by granting VicForests liberty to apply, by 25 November 2022, to vary Order 4 including, to the extent necessary, to reopen its case in relation to that Order. If and when that application is made, I will set a timetable for hearing and determining it on its merits. When considering whether to make the foreshadowed application, VicForests will no doubt bear in mind that the Court’s jurisdiction to reopen a case is to be exercised to prevent injustice, and ‘not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases’.²⁰

37 The plaintiffs accepted that some activities within the Code definition of ‘timber harvesting operations’ should be carved out from the injunctions, and did not oppose the carve-outs in paragraphs (a), (b), (e) and (f) of Order 4. They opposed paragraphs (c) – felling trees or parts of trees for the maintenance of any road – and (d) – cutting limbs of trees for the purposes of seed collection. In support of their

¹⁸ [2022] VSC 296, [63]–[67]. Those reasons were later adopted in relation to the carve-out from the interlocutory injunctions in the Kinglake proceeding, for reasons given on transcript on 10 August 2022.

¹⁹ [2018] VSCA 340, [75]–[76] (Tate JA, with whom McLeish and Niall JJA agreed).

²⁰ *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300, 302–3 (Mason CJ).

opposition they put forward some scenarios that appeared to me to be far-fetched. In relation to road maintenance, they suggested that VicForests might remake an old, disused track through a coupe that is not scheduled for harvest, in order to recover merchantable timber from trees that have regrown on the track. In relation to seed collection, they posited a scenario in which VicForests might send a contractor deep into untouched forest to cut branches for seed collection, and then take the opportunity to fell another tree for safety reasons. In my view, neither of these scenarios is at all likely to occur. Even if they did, there is no evidence to suggest they would present a risk to gliders that may live nearby.

38 The plaintiffs also opposed the more extensive carve-outs sought by VicForests. I will leave those arguments for the hearing and determination of VicForests' foreshadowed application, if made.

Liberty to apply

39 VicForests also sought an order reserving general liberty for it to apply to discharge the injunctions. It submitted that the power of the Court to order permanent injunctions is 'limited by the nature of the act which it is sought to restrain'²¹ – here, an apprehended contravention of the Code. If the Code, or the broader statutory scheme of which it forms a part, changes so that the restrained conduct would no longer be unlawful, the basis for the injunctions would fall away. In that event, VicForests submitted, it should have liberty to apply to discharge the injunctions.

40 More broadly, VicForests stressed the permanent nature of the injunctions, and indicated that it also wished to have liberty to discharge the injunctions if it transpires that future circumstances are not as presumed, or if there are changed circumstances. It did not elaborate on the kind of changes that might prompt it to apply to discharge the injunctions.

²¹ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, [31] (Gaudron, McHugh, Gummow and Callinan JJ).

41 The plaintiffs did not oppose there being liberty to apply in the event of a material change to the law. They resisted more general liberty to apply based on changed factual circumstances, on the basis that there should be finality in litigation. They counselled VicForests to be careful what it wished for, and pointed out that there may be future changes – such as new scientific research – that might bring the plaintiffs back to Court to seek to enlarge the injunctions.

42 I was satisfied that I should reserve liberty to apply in the event of a material change to the law. The Code and Standards were amended while these proceedings were pending, and there have been other proceedings involving VicForests which have taken an unexpected turn following a change in the relevant law.²² It is foreseeable that there may be some future amendment to the Code or Standards, or some other component of the regulatory scheme that applies to timber harvesting in Victoria's State forests, that might change the legal basis on which the injunctions were granted and, in the East Gippsland proceeding, the declarations were made.

43 However, I was not persuaded to reserve liberty to apply more generally. VicForests did not point to any likely or even possible change of circumstances that might justify qualifying the finality of litigation in that way. I am conscious that the injunctions are permanent injunctions, and will apply to VicForests' timber harvesting operations in native forests in East Gippsland and the Central Highlands until those operations are phased out in 2030.²³ The plaintiffs have made out their case for that relief, for the reasons given in the Judgment.²⁴

Declarations

44 In relation to the form of the declarations in the East Gippsland proceeding proposed

²² Eg, *Kinglake Friends of the Forest Inc v VicForests (No 5)* [2021] VSC 830; *Warburton Environment Inc v VicForests (No 5)* [2022] VSC 633, [2], [61]–[63], [179]–[182].

²³ Both the East Gippsland RFA and the Central Highlands RFA expire on 30 June 2030, and contemplate that, from 1 July 2030, all commercial harvesting of timber resources from native forests on public land in Victoria will cease. However, both RFAs may be amended and extended by agreement between Victoria and the Commonwealth.

²⁴ See in particular Judgment, [371]–[386].

at [393] of the Judgment, VicForests raised two complexities for my consideration.

45 The first concerned the lack of any definition of ‘suitable habitat’, a term used in all three declarations. This complexity was addressed by defining ‘suitable habitat’ to mean habitat that is not Hostile Habitat – which is in turn defined to mean land cleared of forest or intensively logged less than 50 years ago and other vegetation types such as heathland, shrubland, woodland, or dry sclerophyll forest. The definitions appear in ‘Other Matters’ in the final orders.

46 The second complexity related to the ‘Suitable Habitat principles’ referred to in the first declaration, set out in Annexure A to the final orders in the East Gippsland proceeding. VicForests noted that Associate Professor Wardell-Johnson acknowledged that there would be circumstances where all ten principles could not be met, and proposed a means of applying the principles in those circumstances.²⁵ It further noted his evidence about how the principles should be applied where more than 100 hectares is available for a protection area.²⁶

47 VicForests queried whether I intended that evidence to find a voice in the final orders. I did not. The first declaration is framed differently from that initially proposed by EEG. Rather than declaring that Suitable Habitat is habitat that satisfies criteria drawn from Associate Professor Wardell-Johnson’s ten principles, I preferred to declare that a protection area of 100 hectares of suitable habitat should be designed having regard to those principles. The declaration is intended to give effect to my finding at [333] of the Judgment that the ten principles provide a sound scientific basis, informed by relevant research, to guide decisions about 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. This leaves room for judgments to be made about the design of a protection area, in circumstances where all ten principles cannot be satisfied or where more than 100 hectares of suitable

²⁵ Judgment, [327].

²⁶ Judgment, [328].

habitat is available.

48 For completeness, I note that the declarations made in the East Gippsland proceeding merely clarify how the management actions for the greater glider and the yellow-bellied glider in Table 13 of the Standards should be applied. They do not displace VicForests' existing obligations under ss 2.2.2.2 and 2.2.2.4 of the Code, which continue to apply in relation to both species of glider.

CERTIFICATE

I certify that this and the 20 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 18 November 2022.

DATED this eighteenth day of November 2022.



.....
Associate