

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

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JUDGE: Richards J  
WHERE HELD: Melbourne  
DATE OF HEARING: 17 December 2021  
DATE OF JUDGMENT: 22 December 2021  
CASE MAY BE CITED AS: Environment East Gippsland Inc. v VicForests (No 2)  
MEDIUM NEUTRAL CITATION: [2021] VSC 869

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ENVIRONMENTAL LAW - Timber harvesting in State forests - Applications for interlocutory injunctions - Whether serious question to be tried - Precautionary principle - Whether good arguable case that VicForests is required to apply the precautionary principle to conserve the greater glider in coupes where VicForests knows that greater gliders have been detected - Balance of convenience - Interlocutory injunctions granted - *Sustainable Forests (Timber) Act 2004* (Vic), s 46 - Code of Practice for Timber Production 2014, cl 2.2.2.2 - Management Standards and Procedures for timber harvesting operations in Victoria's State forests 2021.

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APPEARANCES:

For the Plaintiffs

For the Defendant

Counsel

Mr J Korman

Mr P Solomon QC with  
Mr H Redd and  
Ms H Douglas

Solicitors

Oakwood Legal

Johnson Winter & Slattery

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HER HONOUR:

- 1 VicForests is a Victorian Government owned business that conducts timber harvesting operations in State forests in Victoria. In doing so, it must comply with the provisions of the *Sustainable Forests (Timber) Act 2004* (Vic) and any relevant Code of Practice made under Pt 5 of the *Conservation, Forests and Lands Act 1987* (Vic).<sup>1</sup> Since 17 November 2021, the *Code of Practice for Timber Production 2014* (**Code**) has incorporated the *Management Standards and Procedures for timber harvesting operations in Victoria's State forests 2021* (**2021 Standards**). Before that date, it incorporated the *Management Standards and Procedures for timber harvesting operations in Victoria's State forests 2014*.
- 2 This decision concerns two separate proceedings brought by incorporated associations that claim to have a special interest in the preservation of State forests. Environment East Gippsland Inc. (**EEG**) seeks to preserve State forests in East Gippsland, while Kinglake Friends of the Forest Inc. (**KFF**) is concerned with State forests in the Central Highlands region of Victoria.
- 3 In the **East Gippsland proceeding**, EEG seeks declarations and injunctions to enforce what EEG contends are VicForests' obligations to identify and protect greater gliders, yellow-bellied gliders and common brush-tailed possums that live in State forests in the East Gippsland forestry management area (**FMA**). In the **Kinglake proceeding**, KFF seeks equivalent relief in respect of VicForests' obligations to identify and conserve greater gliders and yellow-bellied gliders in State forests in the Central Highlands FMAs.
- 4 By summonses filed 15 November 2021 and 24 November 2021 in each proceeding, the plaintiffs seek interlocutory injunctions to restrain VicForests from harvesting timber in State forests in East Gippsland and the Central Highlands in which greater gliders have been detected. As I explain below, the interlocutory relief sought by the plaintiffs has evolved over the past month. The orders now sought by EEG are:
  1. [U]ntil further order the defendant must not, whether by itself, its servants, agents, contractors or howsoever otherwise, conduct timber harvesting

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<sup>1</sup> *Sustainable Forests (Timber) Act 2004* (Vic), s 46(a).

operations within the meaning of section 2 of the Sustainable Forests (Timber) Act 2004 (**Timber Harvesting Operations**), in any coupe in East Gippsland, being the area set out in the map at page 26 of Exhibit KAL-2 of the Affidavit of Kwabena Adjei Larbi affirmed 23 November 2021, where there has been a sighting of a Greater Glider in, or within 500 metres of that coupe, known to the defendant.

2. Order 1 does not prohibit the defendant from felling or cutting trees or parts of trees in order to address a serious risk to human safety.
3. Order 1 does not restrain the defendant from conducting Timber Harvesting Operations in any of the coupes identified in the table at paragraph 58 of the Affidavit of Monique Dawson affirmed 24 November 2021 which are located in East Gippsland. For clarity, the coupes in East Gippsland in which the defendant is not restrained from conducting Timber Harvesting Operations are:
  - a. 833-507-0010 (Rolly)
  - b. 891-512-0007 (Silver carp)
  - c. 871-503-0015 (Sharpcorner)
  - d. 874-512-0010 (All Aboard)
  - e. 889-506-0021 (Telecom Spur)

5 In the Kinglake proceeding, the interlocutory relief sought by KFF is now:

1. [U]ntil further order the defendant must not, whether by itself, its servants, agents, contractors or howsoever otherwise, conduct timber harvesting operations within the meaning of section 2 of the Sustainable Forests (Timber) Act 2004 (**Timber Harvesting Operations**), in any coupe in the Central Highlands, being the area set out in the map at page 25 of Exhibit KAL-2 of the Affidavit of Kwabena Adjei Larbi affirmed 23 November 2021, where there has been a sighting of a Greater Glider in, or within 500 metres of that coupe, known to the defendant.
2. Order 1 does not prohibit the defendant from felling or cutting trees or parts of trees in order to address a serious risk to human safety.
3. Order 1 does not restrain the defendant from conducting Timber Harvesting Operations in any of the coupes identified in the table at paragraph 58 of the Affidavit of Monique Dawson affirmed 24 November 2021 which are located in the Central Highlands other than 309-505-0001 (Rookery). For clarity, the coupes in the Central Highlands in which the defendant is not restrained from conducting Timber Harvesting Operations are:
  - a. 346-510-0003 (Fabio)
  - b. 457-501-0027 (Corner Store)
  - c. 457-501-0030 (Turner Round)

- d. 460-504-0009 (Rolls Royce Thinning)
- e. 460-510-0030 (Faith Toe)
- f. 460-510-0038 (Benefactor)
- g. 464-506-0018 (Annex)
- h. 464-507-0008 (Uber)
- i. 467-504-0005 (Fergo)
- j. 467-506-0008 (Slytherin)
- k. 469-502-0015 (Aurora)
- l. 487-501-0009 (Tiller)
- m. 487-501-0008 (Portal)
- n. 487-502-0005 (Rudder)
- o. 287-515-0007 (Bison)
- p. 288-520-0007 (Gnu)
- q. 283-506-0004 (Big Bull Creek)
- r. 289-520-0003 (Setto)
- s. 299-510-0006 B (Hog Thinnings)
- t. 299-510-0007 (Yellow Brick Road)
- u. 300-503-0008 (Bungalow)
- v. 283-505-0012 (Bolognese)
- w. 283-505-0023 (Ratatouille)
- x. 288-519-0003 (Mayfly)
- y. 309-503-0003 (The Curd)
- z. 290-523-0006 (Yogi)
- aa. 320-503-0033 (Broody)
- bb. 293-500-0004 (Panacea)
- cc. 318-512-0037 (Ginger Snap)

6 Both EEG and KFF proffered the usual undertaking as to damages.

7 For the reasons that follow, I have decided to grant the interlocutory relief sought in both proceedings, in substantially the terms sought by the plaintiffs.

### **Biodiversity conservation measures under the Code and 2021 Standards**

8 The plaintiffs rely on mandatory actions prescribed by the Code and the 2021

Standards for addressing biodiversity conservation risks.

9 The Code relevantly provides:

**Mandatory Actions**

**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 **Management Standards and Procedures**.

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 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 **Management Standards and Procedures** prior to roading, harvesting, **tending** and **regeneration**. Address risks to these values through management actions consistent with the **Management Standards and Procedures** 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**.

2.2.2.6 Ensure chemical use is appropriate to the circumstances and provides for the maintenance of **biodiversity**.

2.2.2.7 **Rainforest** communities must not be harvested.

10 The Glossary to the Code includes a definition of the precautionary principle:

‘**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 this definition 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*).

11 Clause 4.2.1 of the 2021 Standards provides for detection-based management of fauna and flora, as follows:

**4.2.1 Detection-based management**

4.2.1.1 Detection based management obligations apply in any area that may be affected by current or planned **timber harvesting operations**, and in any area in which an obligation may affect the conduct of such **timber harvesting operations** (for example, if a **protection area** would include an area within which **timber harvesting operations** are proposed).

4.2.1.2 If evidence of the presence of a value listed in **Table 13 Rare or threatened fauna and invertebrate prescriptions** or **Table 14 Rare or threatened flora prescriptions** is identified, the **managing authority** must:

- a) notify the **Secretary**, providing details (including spatial information) of evidence and the value location; and
- b) unless the **Secretary** otherwise approves, take appropriate steps to **verify** evidence of the presence of the value.

**Note:** The **Secretary** may otherwise approve if the **Secretary** intends to take steps to **verify** the existence of the value.

4.2.1.3 If evidence of the [presence] of a value listed in **Table 13 Rare or threatened fauna and invertebrate prescriptions** or **Table 14 Rare or threatened flora prescriptions** is **verified**, apply and undertake any associated management action specified in the Table.

...

4.2.1.6 The **managing authority** must comply with the requirements of clause 4.2.1.2, 4.2.1.3, 4.2.1.4 and 4.2.1.5, either:

- a) prior to the commencement of **timber harvesting operations**; or
- b) if a requirement only arises after **timber harvesting operations** have commenced, as soon as possible after the requirement arises.

12 Table 13 to the 2021 Standards lists a large number of rare or threatened fauna or  
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invertebrates, including the greater glider, the yellow-bellied glider, and the common brush-tailed possum. In the East Gippsland FMA, but not in the Central Highlands FMA, certain management actions are prescribed:

Species name	Value	Applicable FMAs	Management Actions
<b>Greater Glider</b> <i>Petauroides volans</i>	Relative abundance (More than 10 per Spotlight Kilometre)	East Gippsland FMA	Apply a <b>protection area</b> 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. <b>Note:</b> Assumed rate of spotlighting per kilometre is 100mins per 1km and visible range either side of transect for this species is 25m, equating to assumed minimum survey area of 5 hectares.
<b>Yellow-bellied Glider</b> <i>Petaurus australis</i>	Relative abundance (More than 5 per Spotlight Kilometre)	East Gippsland FMA Otways FMA	Apply a <b>protection area</b> of approximately 100 ha of suitable habitat where records report a relative abundance of more than 5 individuals per spotlight kilometer (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. <b>Note:</b> Assumed rate of spotlighting per kilometer is 10mins per 100m and visible range either side of transect is 150m, equating to assumed minimum survey area of 30 hectares.



Species name	Value	Applicable FMAs	Management Actions
<b>Common Brush-tailed Possum</b> <i>Trichosurus vulpecula</i>	Relative abundance (More than 10 per Spotlight Kilometre)	East Gippsland FMA	Apply a <b>protection area</b> 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. <b>Note:</b> Assumed rate of spotlighting per kilometre is 100 mins per 1km and visible range either side of transect for this species is 25m, equating to assumed minimum survey area of 5 hectares.

### 15 November summonses

- 13 By summonses filed in each proceeding on 15 November 2021, the plaintiffs sought interlocutory injunctions restraining VicForests from conducting timber harvesting operations in certain coupes in the East Gippsland FMA and the Central Highlands FMAs:
- (a) unless and until surveys were conducted in accordance with a detailed survey protocol, directed at identifying greater gliders, yellow-bellied gliders and, in East Gippsland, common brush-tailed possums; and
  - (b) within 240 metres measured horizontally from every sighting of a greater glider recorded in the most recent such survey.
- 14 On 17 November 2021, Incerti J granted interim injunctions in both proceedings, and listed both summonses for further hearing on 13 December 2021. In a ruling given on transcript, her Honour found that both EEG and KFF had established serious questions for trial:

I do not intend to set out the legislative and regulatory framework underpinning the plaintiff's applications. The framework is set out in the plaintiffs' submissions and was not disputed by the defendant. Clauses 2.2.2.1 to 2.2.2.7 of the code are mandatory actions that apply to VicForests in respect of biodiversity conservation. It was not in dispute that VicForests must comply with these actions.

Clause 2.2.2.4 of the code, which is relied upon by the plaintiffs, requires that biodiversity values listed in the management standards, are identified prior to certain activities being conducted including harvesting and that risks to those values are managed via management actions that are consistent with the management standards.

It is not in dispute that a prescribed abundance of Greater Gliders and Yellow-Bellied Gliders in the East Gippsland FMA are biodiversity values listed in table 13 of the management standards. In my opinion Environment East Gippsland Inc. has established that a serious question exists about the adequacy of the existing data collection methods used to identify those values with the potential consequence that VicForests has failed to identify those values within the meaning of clause 2.2.2.4.

Further, while I accept the meaning of consistent as it applies to management actions is unclear, I consider that a broad construction of the term as advocated by the plaintiff is arguable. I therefore consider that the Environment East Gippsland Inc. has established a serious question for trial.

I turn now to the application by Kinglake Friends of the Forest Inc. As pointed out by the defendant, the Central Highlands FMA is not listed as an applicable FMA for the Greater Glider and Yellow-Bellied Glider in the management standards. I accept that this weakens the plaintiff's argument under clause 2.2.2.4 of the code.

However I do not consider that it necessarily weakens its argument with respect to the precautionary principle. Clause 2.2.2.2 of the code which mandates application of the precautionary principle refers to biodiversity values generally not just those that are listed in the management standards. This may be contrasted to clause 2.2.2.4 of the code where the reference to biodiversity values is limited to those in management standards.

The precautionary principle exists separately to and is not defined by reference to the management standards. It must therefore have work to do beyond these standards. The content of the precautionary principle within the code is itself a serious question to be tried and will have implications beyond this case.

The adequacy of VicForests' data collection methods, which I have already determined to be a serious question for trial, is directly relevant to VicForests' compliance with the precautionary principle. The application of the precautionary principle as outlined in the definition of that term requires careful evaluation to avoid serious environmental damage and assessment of risk weighted consequences. It is hard to imagine how those could be properly achieved without adequate environmental data.

Finally I do not accept the defendant's submission that there is no evidence of threats or irreversible environmental damage in relation to the Greater Glider and Yellow-Bellied Glider. On the contrary, those species are listed as rare or threatened fauna in table 13 of the management standards. Associate Professor Wardell-Johnson's report

also indicates the recent fires, logging, and the threat of global warming has placed the Greater Glider in a precarious survival position. I therefore consider that Kinglake Forest of the Friends Inc. has established a serious question for trial.

- 15 In relation to the balance of convenience, Incerti J acknowledged that VicForests did not have any evidence at that stage, and noted counsel's submission that ceasing harvesting operations would be costly and difficult. Her Honour referred to the evidence of Associate Professor Wardell-Johnson, relied on by the plaintiffs, that:

[T]he protection of the Greater Glider and Yellow-Bellied Gliders habitats are critical to the survival and protection of the species. If the Gliders habitats are damaged or worst still lost, the species survival is potentially in jeopardy. They cannot be replaced. On the other hand the cost and inconvenience to VicForests in the affected coupes can be met by an undertaking of damages and the trees of course will still be there if VicForests eventually succeeds.

#### **24 November summonses**

- 16 On 24 November 2021, the plaintiffs filed a further summons in each proceeding. KFF sought interlocutory injunctions restraining VicForests from engaging in timber harvesting operations in 16 coupes in the Central Highlands, unless and until surveys were conducted and within 240 metres of every sighting in the most recent survey. EEG sought to restrain VicForests from harvesting timber in 19 coupes in East and West Gippsland, on the same terms. Both summonses were listed for hearing by McDonald J on 25 November 2021. In the course of that hearing, the plaintiffs reduced the scale of the relief they sought. EEG sought only to adjourn its 24 November summons to the hearing of its 15 November summons before me on 13 December 2021. KFF pressed its application for interim injunctive relief in relation to one coupe only, and otherwise sought to have its 24 November summons adjourned for further hearing on 13 December 2021.
- 17 On 30 November 2021, McDonald J granted an interim injunction in the Kinglake proceeding, restraining VicForests from conducting timber harvesting operations in the 'Rookery' coupe until the determination of the 24 November summons or further order. His Honour also published reasons for granting that relief, in *Kinglake Friends*

18 As noted at [10] in *Kinglake*, VicForests had proffered an undertaking during the hearing on 25 November 2021 that when harvesting Rookery coupe it would retain a minimum of 40% of the basal area of eucalypts across the coupe. VicForests submitted that this would satisfy the precautionary principle in relation to the conservation of the greater glider, because it is the management action prescribed in the Greater Glider Action Statement published by the **Department** of Environment, Land, Water and Planning. Justice McDonald was not persuaded that this undertaking would necessarily meet VicForests' obligation to apply the precautionary principle:<sup>3</sup>

It is contestable whether the retention of at least 40% of the basal eucalypts across the Rookery coupe will comply with cl 5 of the action statement. Clause 5 requires retention of at least 40% of the basal area of eucalypts across the Rookery coupe '*prioritising live, hollow bearing trees, wherever a density of Greater Gliders equal to or greater than five individuals per spotlight kilometre (or equivalent measure) is identified*'.

The obligation imposed by cl 5 is not simply the retention of at least 40% of the basal area of eucalypts. Clause 5 requires VicForests to prioritise the retention of live hollow bearing trees wherever a density of Greater Gliders equal to, or greater than five individuals per spotlight kilometre (or equivalent measure) is identified. Absent VicForests undertaking a survey of all of the Rookery coupe, it is not readily apparent how the objective of prioritising the retention of Greater Glider habitat, wherever there are five Greater Gliders per spotlight kilometre, could be achieved. The reference to 'five individuals per spotlight kilometre' is plainly a reference to Greater Gliders identified as a result of a survey using spotlights.

It is arguable that timber harvesting in the Rookery coupe in accordance with the undertaking proffered by VicForests would not comply with cl 5 of the action statement. As such, I do not accept that the reasoning of Osborn JA in *MyEnvironment Inc v VicForests*, upon which VicForests relied, is applicable in circumstances where VicForests harvests up to 60% of the Rookery coupe without first identifying the population density and habitat of Greater Gliders throughout the entirety of the coupe.

In light of this conclusion, it is not necessary to express any concluded view in respect of the plaintiff's contention that, as cl 5 of the action statement does not have legislative force, the retention of 40% of basal eucalypts in a coupe does not satisfy the Precautionary Principle. It is common ground that, unlike the Code, the action statement is not a legislative instrument. It is arguable that the prescription of 40% of basal eucalypts in the action statement is not determinative of the level of habitat retention necessary to comply with the Precautionary Principle. It is unnecessary to

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<sup>2</sup> *Kinglake Friends of the Forest Inc v VicForests* [2021] VSC 788.

<sup>3</sup> *Kinglake*, [12]-[15].

further address the issue of what level of basal eucalypt retention is necessary to comply with the Precautionary Principle. For the purposes of the present application, it is sufficient to record my conclusion that it is arguable that cl 5 of the action statement supports the plaintiff's proposition that, in order to comply with the Precautionary Principle, VicForests must undertake spotlight surveys throughout all the Rookery coupe in order to first identify the Greater Glider population density and thereafter prioritise habitat retention.

- 19 On that basis, McDonald J was satisfied that KFF had established sufficient prospects of success to justify preservation of the *status quo*, at least until the determination of the summons listed for 13 December 2021:<sup>4</sup>

The Greater Glider is a threatened species. The plaintiff has established a serious issue to be tried in that, if VicForests undertakes timber harvesting in the Rookery coupe without first surveying all of the coupe, there is a risk of serious environmental damage. That risk is comprised of the potential for destruction of Greater Glider habitat.

- 20 Unlike Incerti J, McDonald J did not make orders permitting timber harvesting if VicForests undertook surveys in accordance with a specified survey protocol:<sup>5</sup>

I do not propose to make orders in the terms made by Incerti J on 17 November 2021 which permit timber harvesting subject to VicForests undertaking surveys in accordance with prescribed criteria. The CEO of VicForests deposed that VicForests has no capacity to undertake surveys of the kind set out in the orders made by Incerti J prior to 13 December 2021. On the basis of this evidence, there is no utility in permitting harvesting in the Rookery coupe subject to prescribed criteria. Whether harvesting should be permitted in the Rookery coupe subject to any, and if so, what, criteria is a matter which can be addressed by the parties on 13 December 2021 before Richards J. It goes without saying that in the intervening period prior to the hearing on 13 December 2021 VicForests is free to undertake any survey of the Rookery coupe it deems appropriate.

### **Separate question as to survey requirements**

- 21 In both proceedings, the plaintiffs contend that cll 2.2.2.2 and 2.2.2.4 of the Code oblige VicForests to conduct a survey in each coupe before conducting timber harvesting operations in the coupe, in accordance with the following protocol for carrying out spotlight surveys for greater gliders, yellow-bellied gliders and, in East Gippsland,

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<sup>4</sup> Kinglake, [17].

<sup>5</sup> Kinglake, [20].

common brush-tailed possums:

1. Subject to paragraphs (2) to (5) below, surveys must comply with the criteria set out in the document published by the Department of Environment, Land, Water and Planning titled 'Forest Protection Survey Program Survey Guideline – Spotlighting and Call Playback (V4.1)'.
2. Surveys targeting Greater Gliders and/or Common Brush-tailed Possums must be conducted along transects set 50 m apart, with deviations to the minimum extent necessary so as to:
  - (a) avoid safety hazards such as hanging limbs, hazardous trees, holes, thorn bushes, and flowing water; and
  - (b) avoid impenetrable vegetation, where a transect cannot be located through that vegetation by reasonable understorey trimming during pre-survey daytime marking out of transects.
3. Deviations from the 50m transect pattern should be designed so as to maximise the area of survey coverage.
4. Transects must be located so as to enable coverage of the entire area to be surveyed (other than where deviations are required as set out in paragraph 2 above), on the assumption of a visible range either side of transect of 25m for Greater Gliders or Common Brush-tailed Possums and 150m for Yellow Bellied Gliders.
5. Each transect must be surveyed three times.

22 The plaintiffs rely on the expert opinion of Associate Professor Grant Wardell-Johnson, a forest ecologist at the School of Molecular and Life Sciences and Centre for Mine Site Restoration, at Curtin University in Western Australia. In Professor Wardell-Johnson's opinion, the whole of each coupe should be surveyed using this method before timber harvesting commences, in order to determine whether any of the target species is present in the coupe.

23 VicForests' position is that its existing survey practices meet its obligations under the Code and the 2021 Standards. In particular, it disputes any suggestion that it is obliged to survey entire coupes along transects set 50 metres apart. Rather, it says it is sufficient for it to conduct pre-harvest surveys generally in accordance with the Department's *Forest Protection Survey Program: Survey Guideline – Spotlighting and Call Playback (v 4.1)*, following a transect of approximately one kilometre through a coupe.

24 By the time of the hearing on 13 December 2021, VicForests had filed a number of

affidavits in support of its contention that surveying entire coupes using the plaintiffs' proposed method was impracticable and unsafe. Its position was put strongly in an affidavit of its chief executive officer, Monique Dawson:<sup>6</sup>

If the Court made orders requiring VicForests to conduct surveys in accordance with the criteria specified in paragraph 2 of the summonses in every coupe in the Central Highlands region and the East Gippsland FMA, Timber Harvesting Operations (and by extension, harvest and haulage contractors' operations) in the Central Highlands region and the East Gippsland FMA will cease. I have read the draft affidavits of Jason Hellyer (General Manager, People, Safety and Culture at VicForests) and Joshua Zadro (Biodiversity Research Officer at VicForests) and believe the matters deposed in those draft affidavits to be true. Based on their evidence I say, as VicForests' CEO, VicForests will not undertake or conduct surveys in accordance with the specified criteria.

The primary reason VicForests will not conduct surveys in accordance with the survey criteria propounded by KLFF and EEG is because to conduct surveys in that way will give rise to such acute safety risks for VicForests staff and contractors that the surveys will simply not be undertaken. The safety concerns are material and VicForests will not conduct them and therefore it could not conduct Timber Harvesting Operations in coupes in the Central Highlands region or the East Gippsland FMA (other than the coupes that have been carved out from the 29 November summonses).

The requirement to conduct transects set 50 m apart (with a further transect 50 m outside the coupe boundary) in every coupe requires VicForests' staff and contractors to move through considerable areas of dense and often dangerous terrain at night. The requirement to undertake transects 50 m apart (with an allowance of plus/minus 10 m) will increase by a considerable magnitude the time taken to undertake one survey (one survey will take a number of days) and then to repeat it twice. This means that VicForests' staff and contractors will be exposed to the serious risk of injury due to lack of visibility, fatigue, falling limbs, animals and weather over long periods of time and over very large areas of forest.

25 After some discussion at the hearing on 13 December 2021, the parties reached a common position that VicForests' obligation under cll 2.2.2.2 and 2.2.2.4 of the Code to conduct pre-harvest surveys should be determined as a separate question. On 17 December 2021, I ordered that the following questions be determined as separate questions:

1. Does section 2.2.2.2 or section 2.2.2.4 of the Code:
  - a. require VicForests to conduct surveys to identify Greater Gliders, Yellow-bellied Gliders and Common Brush-tailed Possums in each coupe in the

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<sup>6</sup> Second affidavit of Monique Dawson made 3 December 2021 in the East Gippsland proceeding, [86]-[88] (*Second Dawson affidavit*).

East Gippsland FMA, prior to conducting Timber Harvesting Operations in that coupe?

- b. If so, require VicForests to conduct surveys to identify Greater Gliders and Yellow-bellied Gliders 75 metres beyond the boundary of each coupe in the East Gippsland FMA, prior to conducting Timber Harvesting Operations in that coupe?
2. If the answer to question 1(a) is yes, does section 2.2.2.2 or section 2.2.2.4 of the Code require VicForests to conduct the surveys in accordance with the Survey Protocol, or a Survey Protocol that is no less effective?

26 The Survey Protocol referred to in question 2 is set out at [21] above.

27 The trial of the separate question will commence on 7 March 2022.

### **Interlocutory injunctions – principles**

28 While they agreed to the early trial of a separate question as to VicForests' survey obligations, the plaintiffs pressed their claim for interlocutory injunctions to preserve greater glider habitat.

29 As VicForests submitted,<sup>7</sup> granting interlocutory injunctive relief is a matter of discretion. In the exercise of that discretion, the Court needs to be satisfied that there is a serious question to be tried, and that the balance of convenience favours granting the injunction.<sup>8</sup>

30 The two inquiries are interrelated. In particular, a plaintiff may have to demonstrate strong prospects of success before the Court will grant an interlocutory injunction that will have serious practical effects for the defendant and third parties. The Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong', in the sense of granting an injunction to a party which failed to establish its right at the trial, or in failing to grant an injunction to a party who succeeded at trial.<sup>9</sup>

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<sup>7</sup> Defendant's submissions dated 10 December 2021, [142]-[144].

<sup>8</sup> *Bradto Pty Ltd v State of Victoria* (2006) 15 VR 65, [4]; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [19] (Gleeson CJ and Crennan J).

<sup>9</sup> *Bradto*, [35].



## Serious question to be tried

31 It is convenient to set out in full the plaintiffs' submissions as to why there is a serious question to be tried:<sup>10</sup>

Professor Wardell-Johnson's most recent expert report establishes that the destruction of Greater Gliders constitutes serious and irreversible environmental damage, and Gliders perish if their home range is not protected from logging. This evidence weighs heavily in favour of temporarily suspending the logging of coupes in which they are likely to be found.

Professor Wardell-Johnson's expert evidence establishes the following unchallenged facts:

- a. Greater Gliders are listed as vulnerable nationally and in Victoria.
- b. The Southern Greater Glider – the unique Greater Glider species found in Victoria – is the most threatened of the Greater Glider species and has suffered the sharpest declines. Its decline has been exacerbated by logging, bushfires, and the effects of global warming.
- c. Large scale logging has caused population numbers to fall by almost 80% in some areas, and over half of the forest set aside for glider protection burned in the Black Summer fires.
- d. It takes over 200 years for suitable Greater Glider habitat to recover from the effects of logging.

The same picture emerges from the Fauna and Flora Guarantee Scientific Advisory Committee final recommendation report (SAC 2017). It found:

- a. The Greater Glider is in a demonstrable state of decline likely to lead to extinction;
- b. The Greater Glider is significantly prone to future threats that are likely to lead to extinction;
- c. The threats are operating and are expected to continue to operate in the future at a level likely to lead to extinction.

VicForests' approach to harvesting coupes with likely or known populations of Greater Gliders is set out in the second affidavit of VicForests' CEO, Monique Dawson, affirmed 3 December 2021.

Ms Dawson explains that VicForests retains 40% of the basal area of eucalypts across each coupe where a density of more than five Greater Gliders per kilometre is identified. VicForests has also committed itself to "the almost universal application of Variable Retention harvesting".

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<sup>10</sup> Plaintiffs' submissions dated 16 December 2021, [8]-[10].

While Ms Dawson does not state to what extent VicForests has delivered on that commitment, VicForests' plans for logging Rookery exemplify the approach Ms Dawson has set out in her affidavit:

- a. retention of forest covering 40% of the coupe area, but without reference to the location of Greater Glider populations sighted within the coupe;
- b. variable retention logging regimes whereby one tree every 33 metres (VR1) or every 25 metres (VR2) is retained.

Professor Wardell-Johnson analyses VicForests' harvesting plans for Rookery. His expert assessment is stark: all or nearly all of the Greater Gliders in the harvest area will be dead within three years.

The gliders will die because Variable Retention logging opens up the forest and creates deadly "edge effects". Predators will start killing the gliders within months after logging. The microclimate of logged forests – including forests logged with variable retention silvicultural methods – is changed and remains changed for decades. This creates higher ambient temperatures which Greater Gliders are not equipped to handle, killing them from exposure. The gliders are likely, as well, to die from starvation. They are very particular feeders, and variable retention methods make no attempt to retain species essential for their survival.

As for the 40% retention policy, given that a Greater Glider's home range extends no more than 140 metres in any direction, it is difficult to understand the rationale for preserving parts of the forest many hundreds of metres from where they are known to exist.

The only silvicultural method that enables Greater Gliders to survive is undisturbed retention of their home range, with a buffer to protect against edge effects. But in the absence of effective coupe surveys, it is impossible to know where the gliders are and where their home range might be.

For this reason, until the survey questions are resolved, the only way to protect Greater Gliders is to temporarily suspend logging of the coupes where they are likely to be found.

32 VicForests appeared to accept that these matters raised a serious question to be tried, but submitted that the plaintiffs' argument based on the precautionary principle did not have sufficient strength to justify granting interlocutory relief. It submitted:<sup>11</sup>

In *MyEnvironment Inc v VicForests*,<sup>12</sup> Osborn JA held that, if it is accepted that prescriptions relate to coupes that have been produced by "a balanced planning exercise which takes account of considerations of ecologically sustainable development", and logging will comply with those prescriptions, the plaintiff will "[face] a difficult task in establishing that logging will breach the precautionary principle."

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<sup>11</sup> Defendant's submissions dated 10 December 2021, [149]-[152].

<sup>12</sup> *MyEnvironment Inc v VicForests* [2012] VSC 91, [271].

The plaintiffs' claim with respect to section 2.2.2.4 of the Code must fail. The plaintiffs in effect allege that the section requires VicForests to take actions that are fundamentally inconsistent with the Management Actions 2014 and the Management Actions 2021. On orthodox principles of statutory interpretation that construction cannot be maintained. In summary:

- (a) section 2.2.2.4 of the Code requires VicForests to "address risks to [listed biodiversity values] through management actions *consistent with* the Management Standards" (emphasis added);
- (b) the management actions for the relevant species are extracted above at paragraph 62, and require particular actions to be taken where certain densities of the species are detected, and where those detections are verified;
- (c) those management actions do not require the survey methods or habitat retention contended for by the plaintiffs, nor do they require any actions be taken in the Central Highlands region;
- (d) nonetheless, the plaintiffs contend that section 2.2.2.4 requires those measures to be taken.

In the EEG Proceeding, EEG seeks to enjoin VicForests from logging in a coupe known as Wheel, unconditionally. The basis upon which that injunction is sought is not clear. To the extent that EEG alleges that section 2.2.2.4 of the Code mandates a specific protection area for the Yellow-bellied Glider in Wheel, the allegation cannot be sustained, for the same reasons outlined above.

In circumstances where there is no allegation (nor any evidence) that VicForests is not addressing risks to biodiversity values by taking management actions consistent with the Management Standards 2021 (or put another way, there is no allegation that VicForests is not acting in accordance with specific prescriptions designed for Greater Glider, Yellow-bellied Glider and Common Brush-tailed Possum), the plaintiffs face a difficult task of establishing breaches of the precautionary principle.

### ***Consideration***

33 Like both Incerti J and McDonald J, I am satisfied that the plaintiffs have established a serious question to be tried that VicForests is required by cl 2.2.2.2 of the Code to apply the precautionary principle to conserve the greater glider in coupes where VicForests knows that greater gliders have been detected.

34 As explained by Osborn J in *Environment East Gippsland Inc v VicForests*,<sup>13</sup> the precautionary principle should be applied when it is shown that there is a real threat of serious or irreversible damage to the environment, about which there is a lack of

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<sup>13</sup> *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 (*Brown Mountain*), [176]-[212].

full scientific certainty. Where those conditions are established, the evidentiary burden shifts to VicForests to show that the threat does not exist, is negligible, or can be addressed by 'adaptive management'.<sup>14</sup>

35 The plaintiffs have established a good arguable case that there is a real threat of serious or irreversible damage to the environment, specifically the viability of the greater glider species. On VicForests' evidence,<sup>15</sup> the greater glider was listed as vulnerable under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in May 2016, and was listed as threatened under the *Flora and Fauna Guarantee Act 1988* (Vic) in June 2017.<sup>16</sup>

36 The Department's *Greater Glider Action Statement*, published in 2019, says the following about the greater glider's conservation status:<sup>17</sup>

In its final recommendation report (SAC 2017), the Flora and Fauna Guarantee Scientific Advisory Committee found that:

- the Greater Glider is in a demonstrable state of decline likely to lead to extinction;
- the Greater Glider is significantly prone to future threats that are likely to lead to extinction; and
- the threats are operating and are expected to continue to operate in the future at a level likely to lead to extinction.

There is evidence that the Greater Glider has declined in some parts of its range in Victoria, including in the Central Highlands and in East Gippsland. In the montane ash forests of the Victorian Central Highlands, Lindenmayer et al. (2011) reported a decline over a 12-year period in the proportion of 160 long-term monitoring sites known to be occupied by Greater Gliders, with annual decline of occupied sites averaging 8.8%. The observed period of decline was associated with a prolonged and severe drought in south eastern Australia (Dijk 2013).

Evidence has also been presented (Lucas Bluff unpubl.) that Greater Gliders have declined in East Gippsland: site-level occupancy rate has declined by ~50% in ~20 years and has declined further than the occupancy rate of other arboreal species, based on resampling of 49 sites across East Gippsland at which Greater Gliders had been recorded in the late 1980s or early 1990s.

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<sup>14</sup> *Brown Mountain*, [199]-[211].

<sup>15</sup> First affidavit of Monique Dawson dated 24 November 2021, [38], exhibiting the *Greater Glider Action Statement* at 97-112 of exhibit MD-1.

<sup>16</sup> *Greater Glider Action Statement*, 5.

<sup>17</sup> *Ibid.*

Beyond Victoria, there is further evidence of rapid population decline at Booderee National Park on the south coast of New South Wales, where Lindenmayer et al. (2011) reported a decline over a five-year period based on repeated surveys at sites established in a range of habitat types and fire histories, to the point of Greater Gliders being absent from all monitoring sites.

37 The *Greater Glider Action Statement* summarises the key threats to the greater glider as ‘elevated mortality, habitat degradation and the risks associated with small, fragmented populations, including genetic decline’:

Factors contributing to elevated mortality and the loss of hollow-bearing trees include bushfire, planned burning, drought, timber harvesting and hyper-predation (SAC 2017). There is some evidence to indicate that climate change in the form of more extreme droughts and higher temperatures might result in a reduction in quality or availability of food. Increased morbidity or mortality might also be associated with heat stress. As populations decline and become more isolated, they are more prone to the effects of small population size and potentially genetic decline. This may result from habitat fragmentation due to land management practices or contraction of suitable habitat due to climate change. Fragmentation and isolation impact on the ability of Greater Gliders to recolonise suitable habitat and reduce genetic exchange between sub-populations.

38 These statements were reinforced by Professor Wardell-Johnson in his report dated 14 December 2021. His opinion is that destruction of greater gliders’ habitat through intensive logging constitutes a real threat of serious and irreversible damage to the species.<sup>18</sup>

39 VicForests has collated data from a range of sources to identify the coupes in East Gippsland and the Central Highlands in its timber release plan that are likely to contain greater gliders.<sup>19</sup> However, VicForests has not surveyed all of those coupes – indeed, it says it cannot and will not survey the whole of every coupe in the manner that the plaintiffs and their expert witness maintain is required. In those circumstances, there is at present a lack of full scientific certainty about the extent to which greater gliders are present in the coupes scheduled for harvesting, and where they are to be found within each coupe.

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<sup>18</sup> Report of Professor Wardell-Johnson dated 14 December 2021, [38]-[47].

<sup>19</sup> Second Dawson affidavit, [138]-[149], exhibiting the spreadsheets ‘Approved TRP\_FPSP Analysis\_Greater Glider’ and ‘FPSP Greater Glider Score by Approved TRP’.

40 Professor Wardell-Johnson identified a number of matters about which there is, in his opinion, a lack of full scientific certainty about the extent to which logging threatens the viability of the greater glider species, on a range of time scales:<sup>20</sup>

- 1) The actual boundaries of the home range of any individual SGG<sup>21</sup> (immediate).
- 2) The presence or otherwise of SGGs in the areas retained or logged (immediate).
- 3) The persistence of retained habitat or seed trees and associated hollows beyond a potentially foreshadowed regeneration fire (immediate to a few months).
- 4) Whether individual SGGs present in the coupe prior to logging are killed during the actual logging operation, or following the operation, and whether from predation, exposure or starvation (immediate to a few months).
- 5) The restoration success or otherwise of the forest following logging (three years).
- 6) The species composition of the regenerated stand (three years) and whether this stand will include species that subsequently provide suitable habitat for the SGG (50-200 years).
- 7) The forest surviving the hostile stage involving potential impacts of fire, insect and other impacts associated with climate change (50 years).
- 8) The forest reaching sufficient age to allow large-hollow formation or whether policy, management, climate change impacts or other factors circumvent the return of this mature forest (50- 200 years).
- 9) The presence of SGGs nearby that are able to re-colonise the logged coupe once it again becomes suitable habitat (approximately 200 years).
- 10) The retention and longevity of dispersal corridors of appropriate habitat that will allow the return of SGGs once it again becomes suitable habitat (200 years).

41 The evidence currently available demonstrates that the plaintiffs have good prospects of succeeding in establishing that VicForests is required under cl 2.2.2.2 of the Code to apply the precautionary principle to the conservation of the greater glider.

42 VicForests contends that it observes the precautionary principle by applying the management action specified in the *Greater Glider Action Statement*, in coupes where it detects greater gliders in sufficient numbers. The specified action is to:

Retain at least 40% of the basal area of eucalypts across each timber harvesting coupe, prioritising live, hollow bearing trees, wherever a density of Greater Gliders equal to or greater than five individuals per spotlight kilometre (or equivalent measure) is identified. Note that this prescription replaces the existing requirement to establish a

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<sup>20</sup> Report of Professor Wardell-Johnson dated 14 December 2021, [48].

<sup>21</sup> The acronym 'SGG' is used to denote the southern greater glider.

Special Protection Zone in cases where greater than 10 individuals per spotlight kilometre (or equivalent measure) are detected in the East Gippsland Forest Management Area”.

43 However, the opinion of Professor Wardell-Johnson strongly suggests that this is not an effective method of preventing serious or irreversible damage to greater gliders as a species. He referred in his report to a 2000 study that had concluded that ‘Greater Glider populations can be maintained at or near pre-logging levels when at least 40% of the original tree basal area is retained [throughout] logged areas and when the usual practice of retaining unlogged forest in riparian strips is applied’.<sup>22</sup> Professor Wardell-Johnson then observed that, unfortunately, this outcome ‘has not generally been borne out in practise as landscapes subject to extensive, intensive logging become increasingly fragmented’.<sup>23</sup> He reported a pronounced loss, possibly local extinction, of greater gliders in the State forests the subject of the 2000 study.<sup>24</sup> In his opinion, the effects of starvation, predation and exposure were particularly pronounced ‘where the retained vegetation is not aligned with the requirements of the species being protected’.<sup>25</sup>

44 In addition, Professor Wardell-Johnson examined VicForests’ plan to retain 40% of the basal area of eucalypts in the Rookery coupe in the Central Highlands, and concluded that it was ineffective for a number of reasons. These include the lack of information about the actual locations of greater gliders in and around the coupe, uncertainty as to whether appropriate habitat for the greater glider is being retained, the impacts of edge effects and fragmentation, and the results in other coupes where logging has been carried out and greater gliders have been lost or killed.<sup>26</sup> In Professor Wardell-Johnson’s opinion, greater gliders in the Rookery coupe are highly likely to die during the planned logging operation, or soon afterwards, from predation, exposure, or starvation.<sup>27</sup>

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<sup>22</sup> Report of Professor Wardell-Johnson dated 14 December 2021, [40].

<sup>23</sup> Ibid.

<sup>24</sup> Ibid [41].

<sup>25</sup> Ibid [42].

<sup>26</sup> Ibid [49].

<sup>27</sup> Ibid [50]-[53].

45 I acknowledge that a different picture may emerge when VicForests has presented further evidence on these questions, including expert ecological evidence. However, on the evidence presently available, the plaintiffs have established a strongly arguable case that the measures that VicForests proposes to take are not adequate to protect the greater gliders that live in the coupes scheduled for harvesting in the Central Highlands and East Gippsland, or to protect the species from further decline towards extinction.

### **Balance of convenience**

46 The plaintiffs submitted that the balance of convenience favours granting the injunctions sought, to temporarily restrain VicForests from undertaking logging that they say will result in 'the permanent and irreversible destruction of threatened fauna and its habitat'. They pointed out that 146 of the 233 available coupes in the Central Highlands may contain greater gliders or their habitat, leaving 87 available coupes for harvesting. In East Gippsland, 103 of 417 available coupes may contain greater gliders or their habitat, leaving 314 coupes available to be harvested. They rejected VicForests' submission that granting the injunctions would bring the timber industry in the Central Highlands and East Gippsland to a halt. At most, the plaintiffs submitted, there would be some administrative inconvenience to VicForests as it adjusted its harvesting schedule. If it should turn out that VicForests is entitled to harvest timber in the greater glider coupes, it will be able to do that in future. The trees will still be there.

47 A good deal of VicForests' evidence in relation to the balance of convenience was directed to the safety and practicability of the surveys that the plaintiffs contend it must carry out when planning its timber harvesting operations in a coupe, and the reasons why it would not carry out those surveys pending trial. There was less evidence in relation to the impact of the injunctions now sought by the plaintiffs.

48 Ms Dawson deposed that restraining harvesting in coupes that contain greater glider detections would involve 'a not insignificant number of coupes, which in turn would



affect VicForests' existing supply commitments and the context of the extant supply constraints'.<sup>28</sup> A loss of supply will have a material impact on the supply of timber to timber processors and sawmills, which are significant employers in their local communities. Eight harvesting and haulage crews in East Gippsland and the Central Highlands had already been affected by the interim injunctions granted by Incerti J on 17 November 2021. Two crews had been stood down, and although VicForests has committed to making stand down payments to contractors, some staff have already resigned and others are expected to do so in the near future. Further resignations will mean that VicForests does not have access to the contractor workforce it needs to undertake its operations in 2022.<sup>29</sup>

49 Based on VicForests' recent litigation experience, Ms Dawson anticipated that an interlocutory injunction could be in place for at least 12 to 18 months, possibly longer.<sup>30</sup> She explained that it is not a simple matter to find a replacement coupe when a scheduled coupe becomes available for harvesting. It is necessary to identify another coupe with equivalent quantities of the species, grade and quality of timber, ideally within the same area.<sup>31</sup> It also takes time to plan coupes for harvesting, including undertaking habitat assessments, roading, constructing landings, and identifying and marking buffers.<sup>32</sup>

50 VicForests relied on evidence from three heads of timber mills and timber manufacturing operations that depend on VicForests' timber for their business. Their evidence was to the effect that, if VicForests cannot supply timber from the East Gippsland and Central Highlands regions, their operations will cease within days or weeks. If they are without supply for three months, they may be unable to restart their operations once supply resumes. If there is no supply for six months or longer, closure is a virtual certainty. That would result in more than 300 staff across the three

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<sup>28</sup> Second Dawson affidavit, [103].

<sup>29</sup> Ibid, [104]-[107].

<sup>30</sup> Ibid, [108]-[131].

<sup>31</sup> Ibid, [74]-[75].

<sup>32</sup> Ibid, [79]-[80].

businesses losing their jobs, together with a number of contractors.

51 In addition, VicForests relied on a report prepared by Julia Kaye, a chartered accountant with Deloitte Financial Advisory Pty Ltd, which provided her opinion as to the gross profit that may be lost by VicForests if it is prohibited from harvesting certain coupes in the Central Highlands and East Gippsland between November 2021 and February 2022. Her opinion was that it stood to lose a total gross profit of \$1,449,223 across all restrained coupes in that period.

52 The questions Ms Kaye was asked, and the opinions she provided, do not relate directly to the injunctions now sought by the plaintiffs. Questions 7 and 8 appear to be the most relevant:

#### **Question 7**

**What, if any, is VicForests' gross profit (excluding overheads) that would be lost in the Relevant Period by a prohibition on it conducting Timber Harvesting Operations in coupes in the East Gippsland FMA that contain Greater Glider?**

5.21 I have been provided with a document titled 'AWFIx\_Oct season OMT.xlsx' which shows details and status of coupes in East Gippsland that contain data on Greater Glider detections. The document indicates that many of these coupes still require action to be taken before they can be harvested, including:

- a) Managing the biodiversity conservation;
- b) Getting DELWP's approval; and
- c) Carrying out roading in order to harvest.

5.22 Noting that the above activities would take longer to complete than the duration of the Relevant Period, I assume that there is no further loss in gross profit in the Relevant Period in the East Gippsland FMA.

#### **Question 8**

**What, if any, is VicForests' gross profit (excluding overheads) that would be lost in the Relevant Period by a prohibition on it conducting Timber Harvesting Operations in coupes in the Central Highlands region that contain Greater Glider?**

5.23 The document 'AWFIx\_Oct season OMT.xlsx' also shows details and status of coupes in the Central Highlands region that contain data on Greater Glider detections. The document indicates that many of these coupes also require action to be taken before harvesting can commence.

5.24 I therefore assume that there is no further loss in gross profit in the Relevant Period for the Central Highlands region.

53 If the restraint continued until May 2022, Ms Kaye forecast that VicForests would lose a gross profit of \$2,399,530 in the Central Highlands and \$57,944 in East Gippsland. After a further year, the estimated loss of gross profit increased to \$24,487,548 in the Central Highlands, and \$779,543 in East Gippsland. These figures were, however, based on an assumption that VicForests could not identify any replacement coupes that could be harvested in the required timeframe.

### *Consideration*

54 Determining where the balance of convenience lies in this case has not been easy. On the one hand, there is cogent evidence that logging poses an existential threat to the greater glider as a species, and a good arguable case that VicForests is obliged under cl 2.2.2.2 of the Code to apply the precautionary principle to conserve the greater glider and its habitat. On the other hand, it is clear that granting the injunctions will adversely affect VicForests' financial bottom line, and hamper its ability to supply timber to its customers. Those customers are in turn likely to suffer disruption to their businesses, with the prospect of closure and job losses if VicForests is unable to identify suitable replacement coupes.

55 On balance, I have come to the view that there is a lower risk of injustice in granting the injunctions sought by the plaintiffs, until further order. It appears to me that, in weighing the balance of convenience, I should also have regard to the precautionary principle that is central to the balance between competing interests that is struck in the Code and the 2021 Standards. The risk of permanent and irreversible harm to greater gliders, a threatened species, outweighs the cost and disruption that is likely to result from the injunctions.

56 On the present state of the evidence, I am not persuaded that granting the injunctions sought will have the effect of shutting down the timber industry in the Central Highlands and East Gippsland. The orders sought by the plaintiffs specifically exclude from the injunctions a number of coupes in each region scheduled for harvesting during December. Beyond that time, as the plaintiffs pointed out, there

remain a number of coupes in both regions that are not known to contain greater gliders and are available for harvesting. While I accept that identifying and planning to harvest replacement coupes is not a simple task, the evidence does not lead me to conclude that VicForests is unable to perform it. To the contrary, it appears that preparations could be made to harvest Dry Cleaner coupe in the Central Highlands within a few weeks.<sup>33</sup> Assuming it has the will to do so, VicForests has the time and expertise to minimise the impact of the injunctions on its profitability and that of its customers, and the livelihoods of their workers.

57 Having decided to grant the injunctions, I also intend to expedite the hearing and determination of both proceedings. At the hearing on 17 December 2021, VicForests foreshadowed a potential further hearing in relation to the interlocutory injunctions early in the new year. VicForests has liberty to apply, and the Court will deal with any application it may make to vary the interlocutory injunctions ordered today. However, it may be preferable to focus the parties' and the Court's efforts on the trial of the proceeding. The trial of the separate questions concerning VicForests' survey obligations is listed to commence on 7 March 2022, and the trial of the remaining issues will be listed to commence on 16 May 2022.

58 In view of the conclusions I have reached, it is not necessary to give separate consideration to whether Dry Cleaner coupe in the Central Highlands should be carved out of the injunction in the Kinglake proceeding. Greater gliders were detected in the south-eastern corner of the coupe in a Forest Protection Survey Program survey conducted in November 2019. They have also been detected in two neighbouring coupes, Kinabalu and Gulmarg. For the reasons I have already given, I consider that these three coupes should be covered by the interlocutory injunction in the Kinglake proceeding.

59 I record here that the manner in which VicForests sought to carve out Dry Cleaner coupe was unsatisfactory. On 4 December 2021, William Paul, VicForests' Manager,

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<sup>33</sup> Affidavit of William Paul dated 4 December 2021, [247]-[254]; cf affidavit of Erin Simmons dated 17 December 2021, [5]. See also transcript, 17 December 2021, 59:7-31, 62:21-63:19.

Environmental Performance deposed that the coupe was at the early operations planning stage, and that detailed planning was not complete.<sup>34</sup> Less than two weeks later, on 17 December 2021, VicForests' Corporate Counsel, Erin Simmons, deposed on information and belief that the scheduled harvesting date for Dry Cleaner coupe was 3 January 2022, and that it was a 'critical coupe' for VicForests' operations. No explanation was offered for this sudden change. It was only after I pointed out the conflict in the evidence that senior counsel explained, on instructions, that Dry Cleaner and adjacent coupes had become available for harvesting on 10 December 2021, when the High Court refused special leave to appeal from the Full Court of the Federal Court's decision in *VicForests v Friends of Leadbeater's Possum Inc.* Senior counsel advised that VicForests had urgently progressed planning to permit those coupes to be harvested, including permitting contractors to work over the Christmas period. VicForests' failure to volunteer a frank explanation of its changed approach to Dry Cleaner coupe was, in my view, not in keeping with its obligation to act as a model litigant.

## Disposition

60 With two variations, I granted the interlocutory relief sought by the plaintiff in each proceeding. The injunctions take effect from 23 December 2021 and will remain in force until further order.

61 The first variation concerns the scope of the injunctions. They apply to coupes where there has been a sighting of a greater glider known to the defendant in, or within 240 metres of the coupe – not 500 metres, as sought by the plaintiffs. The distance of 240 metres corresponds with the relief sought in each proceeding.<sup>35</sup> It is also, in Professor Wardell-Johnson's opinion, the radius of the protection area that should be established around each sighting of a greater glider within a coupe.

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<sup>34</sup> Affidavit of William Paul dated 4 December 2021, [84], [247]-[254].

<sup>35</sup> Paragraph BB of the prayer for relief in the second further amended statement of claim filed 20 December 2021 in the East Gippsland proceeding; paragraph C of the prayer for relief in the amended statement of claim filed 20 December 2021 in the Kinglake proceeding.

62 The second variation was to add to the second order an exception, permitting VicForests to remove and sell timber that had been felled as at 22 December 2021. This variation was requested by VicForests and agreed to by the plaintiffs.

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**CERTIFICATE**

I certify that this and the 27 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 22 December 2021.

DATED this twenty second day of December 2021.

  
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Associate