

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: 3 February 2023  
DATE OF JUDGMENT: 17 February 2023  
CASE MAY BE CITED AS: Environment East Gippsland Inc v VicForests (No 6)  
MEDIUM NEUTRAL CITATION: [2023] VSC 60

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ENVIRONMENTAL LAW – Timber harvesting in State forests in East Gippsland and Central Highlands  
– Application to vary final orders – Defendant sought further exceptions to final injunctions –  
Application granted in part – Final injunctions subject to further exceptions.

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<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 Ms H Douglas	Johnson Winter & Slattery

HER HONOUR:

1 On 11 November 2022, I made final orders to give effect to my judgment in *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668 (*EEG No 4*), published on 4 November 2022. The following week, I published reasons explaining the form of the final orders, in *Environment East Gippsland Inc v VicForests (No 5)* [2022] VSC 707 (*EEG No 5*).

2 The final orders in the East Gippsland proceeding were:<sup>1</sup>

**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

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<sup>1</sup> 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.

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3 In the East Gippsland proceeding, I also made the ancillary orders described at [3] of *EEG No 5*, and the declarations set out at [4].

4 Orders to like effect were made in the Kinglake proceeding, in relation to the Central Highlands FMAs. Those orders did not include any declarations, which were only made in the East Gippsland proceeding.

5 On 25 November 2022, VicForests filed a summons in each proceeding seeking certain carve-outs from the injunctions in Orders 1, 2 and 3 of the final orders, in addition to those provided in Order 4. It also sought leave to reopen its case to rely upon a further affidavit of its Chief Executive Officer, Monique Dawson, affirmed on 25 November 2022.

6 I heard VicForests' application to reopen its case on 16 December 2022. For reasons given on transcript that day, I granted the application in part and allowed the parties to adduce limited further evidence. I then heard the balance of VicForests' applications to vary the final orders on 3 February 2022.

7 The additional carve-outs that VicForests ultimately sought from the injunctions were:

2. Orders 1, 2 and 3 of the Orders of the Honourable Justice Richards dated 11 November 2022 do not restrain VicForests from:

- (a) undertaking 'Road Maintenance' as defined in the *Code of Practice for Timber Production 2014 (as amended 2022)* (**Code**) including (to the extent not already captured by that definition) to widen and/or correct the geometry of existing corners within the minimum clearance widths or curve radius of the road class;
- (b) using and maintaining existing 'Coupe Infrastructure', 'Coupe Driveways' and 'Coupe Access Roads' as defined in the Code, which do not require the felling or cutting trees or parts of trees except as otherwise permitted.

3. Orders 2(b) and 3(a) of the Orders of the Honourable Justice Richards dated 11 November 2022 do not restrain VicForests from:

- (a) constructing, maintaining, using and rehabilitating roads, snig tracks, and 'Temporary Stream' and 'Permanent Stream' as defined in the Code crossings in riparian strips;
- (b) constructing, maintaining, using and rehabilitating roads and snig tracks across 'Drainage Lines' as defined in the Code for the purposes of coupe access.

8 VicForests did not press its application for a carve-out permitting it to undertake 'any work along Drainage Lines'. In accordance with my ruling of 16 December 2022, it adduced further evidence in support of paragraph 3 of its amended summons.

9 The plaintiffs opposed any variation to or further exceptions from the final orders made on 11 November 2022, and adduced a further expert report in opposition to paragraph 3 of the summons.

10 I have concluded that the final injunctions in each proceeding should be subject to some further exceptions, although not to the full extent sought by VicForests. The injunctions should not restrain VicForests from undertaking road maintenance of any existing road, or from using and maintaining existing coupe infrastructure, coupe driveways and coupe access roads. In addition, Orders 2(b) and 3(a) of my final orders should not restrain VicForests from using, maintaining and rehabilitating any existing road, snig track or stream crossing in or across a riparian strip, or from constructing a road, snig track or stream crossing across a riparian strip for the purposes of coupe access.

11 My reasons for those conclusions follow.

### **Road maintenance**

12 Order 4(c) of the final orders in each proceeding provides that the injunctions in Orders 1, 2 and 3 do not restrain VicForests from ‘felling trees or parts of trees for the maintenance of any road’. VicForests sought to expand that exception in two ways:

- (a) first, to enable it to undertake ‘road maintenance’ generally, as that term is defined in the Code; and
- (b) second, to enable it to widen and/or correct the geometry of existing corners within the minimum clearance widths or curve radius of the road class, which is one aspect of ‘significant road improvement operations’ on existing roads, as defined in the Code.

13 The final orders adopt the definition of ‘timber harvesting operation’ in the Code, which is:

‘**timber harvesting operation**’ means any of the following kinds of activities carried out by any person or body for the purposes of sale or processing and

sale –

- (a) felling or cutting of trees or parts of trees;
- (b) taking or removing **timber**;
- (c) delivering timber to a buyer or transporting **timber** to a place for collection by a buyer or sale to a buyer;
- (d) any works, including **road works**, **site preparation**, planting and **regeneration**, ancillary to any of the activities referred to in paragraphs (a) to (c) –

but does not include –

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

14 As a result, the injunctions in Orders 1, 2 and 3 extend to ‘road works’ ancillary to felling or cutting trees, taking or removing timber, and transporting that timber for sale. The Glossary to the Code defines ‘road works’ to include ‘road construction’, ‘significant road improvement operations’ and ‘road maintenance’. Each of those terms is also defined, as follows:

‘**road construction**’ means the establishment and extension of a new **road** or new section of **road**; this does not include **road maintenance** or **significant road improvement operations** on already existing **temporary** or **permanent roads**.

‘**road maintenance**’ means works designed to restore the serviceability of the surface, drainage and verges of an existing **temporary** or **permanent road** to the condition of its original **road** class and within the original **road** footprint. **Road maintenance** works include:

- i. Grading / re-forming **road** carriage way surface;
- ii. Re-surfacing / re-sheeting / or armouring carriage way surface with rock;
- iii. Clearing table-drains and culverts to maintain water runoff;
- iv. Blading-off of roads, where measures are in place to prevent adverse impacts on water quality; and
- v. the management of sight lines and road drying by the cutting of vegetation within the **road** verge to the maximum allowable width for original intended **road** class.

‘**significant road improvement operations**’ means operations on an existing road that

- i. improve the road to a higher road classification (e.g., 5D to 5B); and/or
- ii. correct excess adverse (uphill >10%) and/or favourable (downhill >15%) **road** grades; and/or
- iii. widens and/or correct the geometry of existing corners beyond the minimum clearance widths of a higher **road** class; and/or
- iv. requires removal of **native vegetation** greater than the following thresholds:
  - 0.5 ha of **native vegetation** in an **EVC** with Bioregional Conservation Status of Endangered, Vulnerable or **Rare**: and
  - 1 ha of **native vegetation** in an **EVC** with Bioregional Conservation Status of Depleted or Least Concern.

In general, these works include operations such as major resurfacing, major corner widening, significant bridge or other stream crossing structure works, including bridge replacement.

15 The Glossary also defines 'existing road' to mean:

a **permanent** or **temporary road** of any class that with or without **road maintenance** may be used for **haulage**. A road is not considered an **existing road** if **road construction** or **significant road improvement operations** are required for it to be usable for haulage.

16 VicForests described the first part of the proposed expansion of the exception for road maintenance as a 'tidying up' of the exception already provided in Order 4(c). It made the point that it only sought to maintain existing roads, and that it was already permitted to fell trees in order to do so. It said that it was not in truth a further step for it to be permitted to conduct other road maintenance activities on existing roads, in coupes that are yet to be surveyed or where gliders have been detected.

17 VicForests did not point to any evidence in support of the second part of the proposed expansion, beyond noting that it reflected paragraph (iii) of the definition of 'significant road improvement operations'.

18 The plaintiffs opposed expanding the exception for road maintenance at the level of principle, rather than by engaging with the specific expansions that were sought. They argued that all of the additional carve-outs sought by VicForests should be refused because:

- (a) the current Timber Release Plan is the result of a planning process that did not comply with s 2.2.2.4 of the Code. VicForests can avoid the need for carve-outs by appropriate location and configuration of coupes;
- (b) glider surveys are always required prior to conducting timber harvesting operations in order to best conserve gliders in the coupe;
- (c) greater gliders have restricted home ranges which are particularly sensitive to disturbance. VicForests can easily avoid encroaching on these ranges; and
- (d) the expert evidence establishes that interference with riparian strips will have a substantial impact on gliders and their habitat. VicForests can generally avoid locating roads, snig tracks and river crossings in riparian strips. Modified coupe boundaries will resolve any residual issues.

### *Consideration*

19 The plaintiffs' arguments are mainly relevant to the third and fourth additional carve-outs sought by VicForests, in relation to roads, snig tracks and stream crossings in and across riparian strips, and I will consider them there. They do not answer the simple logic of the proposition that, since VicForests is already permitted to fell trees in order to maintain existing roads, it should also be able to undertake other work within the Code definition of road maintenance to restore the serviceability of existing roads, such as grading or resurfacing the road and clearing drains. The logic is compelling. I am satisfied that the exception for road maintenance should be enlarged to allow the full range of 'road maintenance' activities to be undertaken in relation to existing roads.

20 In relation to the second part of the proposed expansion, I was not persuaded that VicForests should be permitted to undertake any kind of significant road improvement operations before it had surveyed the relevant coupe for greater gliders and yellow-bellied gliders, and without protecting any detected gliders in the ways set out in Orders 2 and 3. It was not clear to me why VicForests was particularly



concerned to correct the geometry of corners on existing roads. The evidence at trial did not touch on this issue.

21 I note that the injunctions do not prohibit VicForests from undertaking significant road improvement operations, or even constructing a new road through a coupe. VicForests can do those things, so long as it also complies with its obligations under ss 2.2.2.2 and 2.2.2.4 of the Code, by taking the measures to detect and protect greater gliders and yellow-bellied gliders that are specified in Orders 1, 2 and 3 of the final orders.

### **Existing coupe infrastructure, coupe driveways and coupe access roads**

22 The second additional carve-out sought by VicForests was to enable it to use and maintain existing coupe infrastructure, coupe driveways, and coupe access roads, as defined in the Code. Those definitions are:

**‘coupe infrastructure’** means log **landings**, log dumps / storage facilities, **snigging** and **forwarding tracks** and boundary trails.

**‘coupe driveway’** means a temporary **coupe access road** established to provide access to a **timber harvesting operation**. For planning purposes, a **coupe driveway** is a coupe access road less than 500 m long. **Coupe driveways** are considered part of a **coupe**.

**‘coupe-access road’** means a **temporary road** constructed to link existing **permanent roads** to **in-coupe** roads.

23 VicForests took the view that the injunctions presently restrain it from using existing coupe infrastructure, driveways, and access roads for any kind of timber harvesting operation, in a coupe that has already been harvested without having been surveyed as required by Order 1. It submitted that it would be beneficial to be able to continue to use these things rather than further disturbing the forest by constructing new infrastructure, driveways, and access roads.

24 Again, the plaintiffs’ opposition was at a general level, and did not engage with the specific carve-out sought by VicForests. The plaintiffs’ arguments did not appear to appreciate that this carve-out was sought only in relation to existing coupe

infrastructure, driveways, and access roads, and would not involve the felling of any additional trees.

### *Consideration*

25 I am satisfied that there should be an additional exception to the injunctions, to enable VicForests to use and maintain existing coupe infrastructure, coupe driveways, and coupe access roads. These things will typically have been established in coupes that were harvested before the final orders were made, which were not surveyed for gliders as required by Order 1, and where VicForests did not apply the protective measures required by Orders 2 and 3. There will be obvious benefits in permitting VicForests to continue to use existing coupe infrastructure in order to undertake permitted timber harvesting operations in neighbouring coupes, where the conditions in Orders 1, 2 and 3 must be observed. These benefits include being able to avoid clearing another large area to serve as a landing, where it is possible to use an existing landing nearby.

26 The exception sought by VicForests was framed so as not to permit the felling or cutting of trees that was not already permitted under the final orders. I will include a qualification to that effect in my orders in each proceeding.

### **Roads, snig tracks and crossings in riparian strips**

27 The third carve-out sought by VicForests related only to Orders 2(b) and 3(a) of the final orders. Those orders require VicForests, in any coupe in which greater gliders or yellow-bellied gliders have been detected, to exclude 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.

28 VicForests sought an exception from those orders to enable it to construct, maintain, use and rehabilitate roads, snig tracks,<sup>2</sup> temporary stream crossings and permanent

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<sup>2</sup> The Glossary to the Code defines 'snigging' to mean 'the towing or winching of a log from the stump to the landing site, usually along a snig track', and 'snig track' to mean 'the track along which a log is snigged.'

stream crossings in riparian strips. It sought to adopt the definitions of ‘temporary stream’ and ‘permanent stream’ in the Code.<sup>3</sup>

### *VicForests’ evidence*

29 I gave VicForests leave to reopen its case in relation to the third and fourth carve-outs sought in its summons. It did so, relying on parts of Ms Dawson’s affidavit of 25 November 2022, and an affidavit in reply of William Paul, its Director, Environmental Performance, dated 1 February 2023. It did not seek to adduce further expert evidence to explain or qualify the evidence of the ecologists about the importance of riparian strips, which informed Orders 2(b) and 3(a).<sup>4</sup>

30 According to Ms Dawson, the third carve-out would enable VicForests to meet its obligations under the Code in relation to road maintenance and would allow it to use existing roads in riparian strips. She said that, without the carve-out, VicForests would be unable to cross riparian strips even on existing roads, and would have to construct new roads around riparian strips. In some cases that would not be possible, so that there would be instances where VicForests could not access a coupe.

31 Ms Dawson exhibited to her affidavit a table containing examples of coupes in which VicForests has constructed, maintained and used roads, snig tracks and stream crossings in riparian strips, and coupes that it proposes to access that way in future. She asserted that the table demonstrated ‘both the benefits of constructed, maintained

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<sup>3</sup> The relevant definitions in the Glossary to the Code are:

‘**temporary stream**’ means a stream that has a clearly defined continuous channel or streambed and flow during certain seasonal periods of the year, such as following snowmelt, but not throughout the year. Temporary streams contain distinctive riparian vegetation (except where previously removed by human activity, and not including River Red Gum (*Eucalyptus camaldulensis*)), indicative of periods of saturation and distinguishable from vegetation communities in surrounding areas. Note: in native forests, temporary streams may be protected from harvesting by buffers or filter strips (Figure 3). Refer to the Management Standards and Procedures.

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‘**permanent stream**’ means a river or stream that flows throughout the year. Permanent streams may stop flowing or dry out in extremely dry years. Permanent streams will support distinctive riparian vegetation (except where previously removed by human activity, and not including River Red Gum (*Eucalyptus camaldulensis*)), indicative of extended periods of saturation and distinguishable from vegetation communities in surrounding areas. Streams have a well-defined incised permanent channel. See also pools and wetlands.

<sup>4</sup> EEG No 5, [20](a), referring to EEG No 4, [216], [252].

and used roads, snig tracks and stream crossings in riparian strips and the detrimental effects of not doing so and instead constructing new and/or longer roads, snig tracks and stream crossings in riparian strips, which in effect either duplicates crossings already present in the forest or [affects] greater [tracts] of forest'.<sup>5</sup>

32 The plaintiffs cross-examined Ms Dawson about this table, and the basis for the opinion she expressed about the benefits of constructing, maintaining and using roads, snig tracks and stream crossings in riparian strips. It emerged that the table had been prepared based on advice from various VicForests planners in East Gippsland and the Central Highlands. Ms Dawson accepted their advice as accurate because she had confidence in the skill and expertise of VicForests' planners. However, she was not familiar with the topography of any of the coupes or the location of waterways and existing roads, and was unable to answer questions about proposed and alternative access routes.

33 Otherwise, Ms Dawson emphasised the requirements of the Code and Standards in relation to waterway crossings.<sup>6</sup> These include requirements to minimise the extent of habitat damage where crossings are required, and to remove temporary crossings immediately after harvesting or regeneration work is complete, using a technique that minimises soil and habitat disturbance.<sup>7</sup> This evidence was supplemented by Mr Paul's description of the broader framework for the management of roads within Victorian forests. That framework includes s 2.4 of the Code, part 6 of the Standards, and chapter 7 of the Forest Management Plan for both East Gippsland and the Central Highlands.

### *Plaintiffs' evidence*

34 The plaintiffs relied on a fourth report of Associate Professor Grant Wardell-Johnson dated 16 January 2023, which I received in relation to paragraph 3 of the amended summons. Associate Professor Wardell-Johnson's fourth report commenced with

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<sup>5</sup> Affidavit of Monique Dawson dated 25 November 2022, [30].

<sup>6</sup> Affidavit of Monique Dawson dated 25 November 2022, [31]-[32].

<sup>7</sup> Code, ss 2.2.1.6 and 2.2.1.7.

some general background on the ecological effects of disturbance on the biodiversity of wetlands and drainage lines, the impacts of roads and road networks on biodiversity, and ecological considerations associated with road planning, design, construction, maintenance and use.

35 Associate Professor Wardell-Johnson then addressed the question of the impacts of roads and road networks on greater gliders and yellow-bellied gliders located in coupes in East Gippsland and the Central Highlands that would otherwise be protected by Orders 2(b) and 3(a). His answer focused on the construction of new roads, the impact of which is dependent on the type of road, the habitat to be traversed, and numerous other considerations. In his opinion, new roads should not be constructed through mature forest where glider conservation is a consideration, and nor should old forest tracks be upgraded to logging roads. Associate Professor Wardell-Johnson's recommended approach is to, wherever possible, focus on constructing roads through environments that are already hostile to gliders – in particular, regrowth forest that is less than 50 years old. He did not specifically address the likely impact of using or maintaining existing roads in or across riparian strips.

36 Associate Professor Wardell-Johnson was also asked about the impact on greater gliders and yellow-bellied gliders of VicForests undertaking work along or across 'drainage lines' as defined by the Code. His answer emphasised the sensitivity and importance of drainage lines as glider habitat, and the benefits of retaining a network of riparian strips along waterways. He said that 'for these riparian strips to be effective, they should not be disturbed', and that the impact of any works along drainage lines is 'most readily minimised by not being done'.<sup>8</sup> In Associate Professor Wardell-Johnson's opinion, 'works' involving the felling of mature trees should not be carried out in drainage lines where conservation of gliders is a consideration.

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<sup>8</sup> Report of Associate Professor Grant Wardell-Johnson dated 16 January 2023, [62]–[63] (**Fourth Wardell-Johnson report**).

37 Lastly, Associate Professor Wardell-Johnson provided a set of ‘ecological fundamentals’ to guide the design, construction, maintenance and use of roads in State forests. These were complementary to the ‘Suitable Habitat principles’ that informed the first declaration in the East Gippsland proceeding.<sup>9</sup> The five ecological fundamentals proposed by Associate Professor Wardell-Johnson were, in summary:

- (a) **Fundamental 1 (precaution concerning road networks and riparian buffers in waterways).** Location, management and use of roads, snig tracks, stream crossings and other forest ‘works’, should be guided by the location of suitable habitat and/or populations of gliders, and by the avoidance of buffers to protect biodiversity and hydrological values in waterways. This is to provide the greatest opportunity for the persistence of gliders and of other biodiversity and hydrological values. In other words, newly constructed roads, as well as road upgrades, snig tracks, stream crossings and forest ‘works’, should be carried out away from suitable glider habitat, and away from waterways.
- (b) **Fundamental 2 (gliders and habitat in relation to road, snig track and wetland crossings).** Road, snig track and stream zone crossing construction, maintenance and upgrade (including proposed ‘in-coupe’ roads) and other forest ‘works’, should avoid all areas with recent verifiable records of gliders, or that include mature, structurally diverse forest that is likely or potentially likely to be suitable for gliders or other mature forest dependent species.
- (c) **Fundamental 3 (size and shape considerations in roads, snig tracks and crossings on networks of riparian strips).** Construction, maintenance and upgrade of roads, snig tracks, waterway crossings and other forest ‘works’ should produce the minimum area of edge and fragmentation effect. Therefore, any newly constructed, maintained, upgraded or regularly used roads, snig tracks or stream crossings should minimise impacts in mature forest, and therefore, be in areas that are already degraded or rendered hostile

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<sup>9</sup> EEG No 4, [323]-[333], [389]-[394].

by previous logging activity.

- (d) **Fundamental 4 (roads and riparian buffer protection in fragmented landscapes).** Within fragmented landscapes, road, snig track and waterway crossing construction, maintenance and upgrades, and other forest 'works', should be restricted to unsuitable habitat or to extensively and intensively modified zones.
- (e) **Fundamental 5 (boundary conditions).** Road, snig track and stream crossing construction, maintenance and upgrades, and other forest 'works', should not act as conduits for weed invasion, erosion, pest animals or pathogens, and be in areas of mild slope and distant from waterways.

38 VicForests did not seek to cross-examine Associate Professor Wardell-Johnson about the opinions expressed in his fourth report.

#### *VicForests' submissions*

39 VicForests submitted that the third proposed carve-out would permit it to construct, use and maintain roads, snig tracks and stream crossings in riparian strips. It pointed out that this would still be conditional on surveys being conducted in accordance with Order 1, and that the other protection measures in Orders 2 and 3 would not be affected. It would also be subject to VicForests' existing obligations under the Code regarding riparian areas and stream crossings.

40 The rationale advanced by VicForests for this carve-out was that it would avoid the need to create circuitous roads to facilitate permitted harvesting, where a much shorter road would serve that purpose. It referred to one of the examples given in Ms Dawson's table, where a stream crossing would provide access to five coupes along a 600 metre access road, and where the alternative was a 3,800 metre road along a steep and rocky ridge. VicForests said that the carve-out would also permit it to perform maintenance on existing roads and crossings that would be of general ecological benefit, in accordance with its Code obligations in relation to road

maintenance.

41 In relation to Associate Professor Wardell-Johnson's fourth report, VicForests submitted that it did not address the specific carve-outs that it was seeking, and should be evaluated cautiously for that reason.

*Plaintiffs' submissions*

42 As mentioned, the plaintiffs advanced four arguments in opposition to all four carve-outs sought by VicForests.

43 The first of those arguments was that the current Timber Release Plan is the result of a planning process that did not comply with s 2.2.2.4 of the Code, and that a new Timber Release Plan that is informed by glider surveys can avoid the need for carve-outs by appropriate location and configuration of coupes.

44 Next, the plaintiffs submitted that glider surveys are always required before conducting timber harvesting operations, in order to best conserve gliders in the coupe.

45 The third argument was that greater gliders' home ranges are small and particularly sensitive to disturbance. The plaintiffs submitted that VicForests can easily avoid encroaching on these ranges, and should plan its timber harvesting operations and road design accordingly.

46 Finally, the plaintiffs relied on the expert evidence of Associate Professor Wardell-Johnson, which they said established that interference with riparian strips would have a substantial impact on gliders and their habitat, and should be avoided. This was particularly so in mature forest and riparian strips, where linear features such as roads produce magnified edge and fragmentation effects. The possible impact of the carve-out included the death of gliders, usually by predation, and other deleterious effects such as the spread of invasive organisms. The plaintiffs argued that VicForests can generally avoid locating roads, snig tracks and river crossings in riparian strips, and that modified coupe boundaries would resolve any residual issues.



### *Consideration*

- 47 Three of the plaintiffs' arguments against VicForests' third proposed carve-out can be dealt with briefly.
- 48 The argument in relation to the Timber Release Plan was difficult to follow. It bore no relationship to the issues at trial, which did not concern the lawfulness of the current Timber Release Plan. I did not find in *EEG No 4* that the current Timber Release Plan was not prepared in compliance with ss 2.2.2.2 and 2.2.2.4 of the Code. As is clear from the factual findings set out at [50] to [70] of *EEG No 4*, the schedule of coupes selected for timber harvesting in the Timber Release Plan was taken as a given, and as VicForests' starting point for coupe planning, operations planning, and timber harvesting. It was also difficult to understand how redrawing coupe boundaries might change the assessment that the most feasible road access to some coupes is across a waterway. Changing coupe boundaries will not alter the underlying topography, or the location of waterways and existing roads.
- 49 The plaintiffs' second argument concerned the necessity for glider surveys to be conducted before timber harvesting operations take place. This was not contested by VicForests in relation to the third (and fourth) proposed carve-outs, which only concern the exclusion of riparian strips under Orders 2(b) and 3(a).
- 50 The third argument related to the importance of not disturbing greater gliders' generally small home ranges, and the need for VicForests to design and build roads that avoid these areas. This was apparently accepted by VicForests, which did not seek an exception from Order 2(a) in relation to roads, snig tracks and stream crossings in riparian strips. VicForests expressly noted in its written submissions that, if its third carve-out was ordered, it would 'remain obliged to apply the other protection measures in Orders 2 and 3, namely, the exclusion of greater glider home ranges, the 60% basal area retention in a harvested area, and the retention of feed trees and hollow-bearing trees'.<sup>10</sup>

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<sup>10</sup> Defendant's submissions: Application to vary Order 4, dated 25 November 2022, [24].

51 The plaintiffs' arguments based on the evidence of Associate Professor Wardell-Johnson raised different considerations in relation to existing roads and new roads.

### *Existing roads*

52 I accept that there are existing roads, snig tracks, and stream crossings in coupes covered by Orders 2 and 3, which already intrude into or cross the riparian strips protected by Orders 2(b) and 3(a). In those instances, the impacts on gliders and other biodiversity outlined in Associate Professor Wardell-Johnson's fourth report have already occurred; the damage has already been done. Consistent with my reasoning in relation to road maintenance and existing coupe infrastructure, there is a case for an exception that will permit VicForests to continue to use and maintain – and eventually rehabilitate – existing roads and tracks that traverse riparian strips.

53 Associate Professor Wardell-Johnson's report was primarily concerned with the construction of new roads. At the general level, his opinion was that forest roads can cause a variety of impacts on local wildlife that may lead to loss, including facilitating the spread of invasive organisms, causing death or harm by vehicle strikes, and changing the behaviour of animals to their detriment.<sup>11</sup> Associate Professor Wardell-Johnson did not explain how these impacts might affect gliders that live in the forest canopy. He also said nothing about the specific impact on gliders of continuing to use existing roads and tracks through riparian strips.

54 While I accept that the continued use and maintenance of existing roads and tracks that follow or cross waterways may have an impact on biodiversity generally, the evidence does not establish that it is likely to result in further loss of glider habitat. On that basis, I am satisfied that there should be an exception from Orders 2(b) and 3(a), so that those orders do not restrain VicForests from using, maintaining and rehabilitating any existing road, snig track, or stream crossing in or across a riparian strip. The term 'riparian strip' will be defined to mean the areas that must be excluded from timber harvesting under Orders 2(b) and 3(a) of my final orders – namely,

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<sup>11</sup> Fourth Wardell-Johnson report, [23].

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.

### *New roads*

- 55 The more difficult question is whether there should also be an exception to permit VicForests to construct new roads in riparian strips. On this question, Associate Professor Wardell-Johnson's evidence was more definite. He said that for riparian strips to be effective, they should not be disturbed,<sup>12</sup> and that newly constructed roads should be located away from waterways and suitable glider habitat.<sup>13</sup>
- 56 The difficulty arises because it appears from the table annexed to Ms Dawson's affidavit that there are a number of coupes where there is no existing road access, and where a new road or track across a waterway will involve considerably less disturbance to the forest than the longer, often steeper, alternative. This was reinforced by the maps of some of the coupes mentioned in the table, which were used by the plaintiffs in cross-examination of Ms Dawson and were tendered by them.<sup>14</sup>
- 57 In relation to some of those coupes, the plaintiffs sought to demonstrate that there were alternative access routes that would not involve stream crossings. Ms Dawson was not familiar with the topography or other features of these coupes and was unable to answer questions about the relative merits of different access routes. I have examined both the table and the maps for myself, and it appears to me that the preferred access routes identified in the table take into account safety and environmental considerations, as well as cost.
- 58 It is relevant that the Code contains a section that deals with roading for timber harvesting operations, with which VicForests must comply when planning, designing and constructing roads in State forests. The specific requirements of the Code in relation to roads are additional to the Code's requirements for the conservation of

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<sup>12</sup> Fourth Wardell-Johnson report, [62].

<sup>13</sup> Fourth Wardell-Johnson report, [77].

<sup>14</sup> Exhibits P45 – Bundle of VicForests context maps; and P46 – Bundle of Forest Information Portal maps.

biodiversity, which the plaintiffs sought to enforce in this proceeding.

59 The section on roading fits within the three tiered conceptual structure of the Code,<sup>15</sup> as summarised in the below extract from Table 1 in s 1.3 of the Code:

Code Principles	Operational Goals	Section
The ecologically sustainable long-term timber production capacity of forests managed for timber harvesting operations is maintained or enhanced.	The planning and management of permanent and <b>temporary roads</b> for <b>haulage</b> and machinery transport is fit for intended purpose, and protects environmental and cultural values and the safety of all <b>road</b> users.  The management of all roads that are part ... of <b>timber harvesting operations</b> takes account of environmental and cultural values, the safety of <b>road</b> users and the intended use of the <b>road</b> .	<b>2.4</b> and <b>3.3</b> Roothing

60 Section 2.4 of the Code provides, relevantly:

#### 2.4 Roothing for Timber Harvesting Operations

This section covers the planning, design, construction, maintenance and use of permanent and **temporary roads** for **haulage** and machinery transport. This section does not consider requirements for **snigging** and **forwarding tracks**, which are covered under **coupe infrastructure** (section 2.5.2).

**Timber harvesting operation roads** have the potential to create significant environmental impacts, particularly on water quality and **river health**. This Code aims to protect a range of environmental values while allowing safe and economic roading for **timber harvesting operations**.

##### Operational Goal

The planning and management of permanent and **temporary roads** for **haulage** and machinery transport ensures that the **roads** are fit for purpose and protect environmental and cultural values and the safety of all **road** users.

##### 2.4.1 Road Planning

##### Mandatory Actions

2.4.1.1 Planning and management of **timber harvesting operations** that consist of **road** planning must comply with applicable provisions in this **Code** unless the **road** is covered by a formal roading agreement with the **Secretary** that would supersede this requirement.

<sup>15</sup> Described in *EEG No 4* at [29]–[32].

- 2.4.1.2 **Road** planning and design for new **roads** and **significant road improvements** must ensure the **road** network is safe and adequate for the intended range of uses and users, while ensuring the protection of water quality and conservation values, including **river health**.
- 2.4.1.3 **Road** planning must:
- i. locate **roads** so as to minimise risks to safety and environmental values, particularly soil, water quality and **river health**, during both construction and ongoing **road** use; and
  - ii. ensure that the timing of construction activities minimises risks associated with unsuitable weather conditions and provides for completion to the required standard in advance of **timber harvesting operations**.
- 2.4.1.4 **Existing roads** must be used for access to a **coupe** or work site and to haul **timber**, except where it can be clearly demonstrated that a new or relocated road further minimises or removes existing threats to soil, water quality or **biodiversity**.
- 2.4.1.5 **Forest Coupe Plans** for **roads** must be based on field surveys to ensure that all environmentally sensitive locations are identified and appropriate design and construction techniques are adopted.

## 2.4.2 Road Design

Good **road** design is vital to minimise construction and maintenance costs, reduce environmental risk such as impacts to water quality, improve efficiency of **haulage**, and ensure public safety is maintained. It is important when designing a new **road** or improvements to an **existing road** that water is moved off the **road** into undisturbed vegetation to reduce the velocity (and hence erosivity) of water, and to provide the greatest possible infiltration of water into soil to trap sediments before discharge into **waterways**.

**Road** design includes the consideration of location, use, traffic volume, aspect, soil type, slope, topography, surface materials, **road** shape as well as **road** drainage and other **coupe infrastructure** including culverts, drains, batters, bridges and fords.

### Mandatory Actions

- 2.4.2.1 Planning and management of **timber harvesting operations** that consist of **road** design must comply with this **Code** unless the **road** is covered by a formal roading agreement with the **Secretary** that would supersede this requirement.
- 2.4.2.2 New or upgraded **roads** must be designed to a standard capable of carrying anticipated traffic with reasonable safety, and ensure the protection of water quality and **river health**, and **biodiversity** conservation values.

...

### 2.4.3 Road Construction

#### Mandatory Actions

2.4.3.1 Planning and management of **timber harvesting operations** that consist of **road construction** must comply with this **Code** unless the **road** is covered by a formal roading agreement with the **Secretary** that would supersede this requirement.

2.4.3.2 **Road construction** must be conducted in a manner consistent with plans and designs.

...

61 The planning, design and construction of new roads in accordance with the Code is a complex exercise, which is also informed by Pt 6 of the Standards and VicForests' Road Design, Construction and Maintenance Guideline. The conservation of biodiversity values is a necessary component of that exercise, but it is not the only component. I accept that there may be occasions where the best – or the least worst – way to provide road access to and within a coupe that is to be harvested will involve crossing a waterway. As I did when framing the final orders,<sup>16</sup> I assume that VicForests will make that judgment based on the topography and other features of the coupe and its surrounds, the observations made during surveys of the coupe, and other relevant monitoring and research. I also assume that VicForests will plan, design and construct any new road, track or crossing in compliance with the Code, which requires it to apply the precautionary principle to the conservation of biodiversity and to locate roads so as to minimise risks to environmental values.

62 On that basis, I am satisfied that there should be a further exception to Orders 2(b) and 3(a), so that those orders do not restrain VicForests from constructing a road, snig track, or stream crossing across a riparian strip for the purposes of coupe access.

63 Beyond that, VicForests did not establish a case for an exception to permit it to construct new roads along waterways, as distinct from across them. The past and future examples in the table relied on by Ms Dawson all involved stream crossings.

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<sup>16</sup> See *EEG No 5*, [24(d)].

Neither the table nor Ms Dawson's explanation of why the third carve-out was sought demonstrated that VicForests has a need to construct new roads or tracks that follow a watercourse.

### Crossing drainage lines

64 The Glossary to the Code defines 'waterway' to mean any one or more of the following:

- i. a **waterway** within the meaning of the *Water Act 1989*;
- ii. a **permanent stream**;
- iii. a **temporary stream**;
- iv. a **drainage line**;
- v. a **pool**; or
- vi. a **wetland**.

65 Initially, VicForests sought an exception to permit it to undertake any work along 'drainage Lines' as defined in the Code. That definition is:

'**drainage lines**' means depressions that have visible evidence of periodically flowing water (including obvious sedimentation or other clear evidence of overland flow) that feed into **temporary** or **permanent streams**. A defined channel may or may not be present. Visible water flow would be expected after storm events or briefly in the wettest times of the year. Distinctive **riparian vegetation** is not likely to be present.

Artificial **drainage lines** that do not discharge directly into **waterways** are not considered within the above definition.

66 It appears that VicForests intended to argue that drainage lines should be excluded from the scope of Orders 2(b) and 3(a), on the basis that they are different from other waterways and should be considered as any other part of the coupe. However, it did not adduce any expert ecological evidence in support of that proposition.

67 Associate Professor Wardell-Johnson's fourth report clarified that drainage lines have 'a particularly high conservation value at the catchment scale', provide important

habitat for gliders, and are sensitive to disturbance.<sup>17</sup> His opinion was that works involving the felling of mature trees should not be carried out in drainage lines, where conservation of gliders is a consideration.<sup>18</sup>

68 Following receipt of Associate Professor Wardell-Johnson's fourth report, VicForests modified the carve-out it sought in relation to drainage lines. It no longer sought to be able to undertake work along drainage lines. Instead, it sought to be able to construct, maintain, use and rehabilitate roads and snig tracks across drainage lines for the purposes of coupe access.

69 I have already concluded there should be exceptions from Orders 2(b) and 3(a) to enable VicForests to:

- (a) use, maintain and rehabilitate any existing road, snig track, or stream crossing in or across a riparian strip;
- (b) construct a road, snig track, or stream crossing across a riparian strip for the purposes of coupe access.

The orders will define 'riparian strip' by reference to the Code definition of 'waterway', which includes drainage lines.

70 These orders in relation to riparian strips will permit VicForests to use, maintain and rehabilitate any existing road or track across a drainage line, and to construct a new road or track across a drainage line for the purposes of coupe access. There is therefore no need for an additional carve-out specifically in relation to drainage lines.

## **Disposition**

71 I will make orders in each proceeding as follows:

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<sup>17</sup> Fourth Wardell-Johnson report, [14]-[17], [61].

<sup>18</sup> Fourth Wardell-Johnson report, [63].



1. In addition to Order 4 of the Final Orders, Orders 1, 2 and 3 of the Final Orders do not restrain VicForests from:
  - (a) undertaking road maintenance of any existing road; or
  - (b) using and maintaining existing coupe infrastructure, coupe driveways and coupe access roads which does not (except as otherwise permitted) involve felling or cutting trees.
  
2. Orders 2(b) and 3(a) of the Final Orders do not restrain VicForests from:
  - (a) using, maintaining and rehabilitating any existing road, snig track, or stream crossing in or across a riparian strip; or
  - (b) constructing a road, snig track, or stream crossing across a riparian strip for the purposes of coupe access.

72 I will hear the parties on the question of the costs of VicForests' summonses.

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### CERTIFICATE

I certify that this and the 23 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 17 February 2023.

DATED this seventeenth day of February 2023.

A red circular seal of the Supreme Court of Victoria is positioned in the lower right quadrant. The seal features the text 'SUPREME COURT OF VICTORIA' around the top and 'Associate Judge of the Court' around the bottom. In the center is the coat of arms of Victoria. A blue ink signature is written across the seal.

.....  
Associate