

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

Not Restricted

S ECI 2022 01719

GIPPSLAND ENVIRONMENT GROUP INC

Plaintiff

v

VICFORESTS

Defendant

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 27 May 2022
DATE OF JUDGMENT: 3 June 2022
CASE MAY BE CITED AS: Gippsland Environment Group Inc v VicForests
MEDIUM NEUTRAL CITATION: [2022] VSC 296

ENVIRONMENTAL LAW - Timber harvesting in State forests - Application for interlocutory injunction - Serious question to be tried - Precautionary principle - Balance of convenience - Interlocutory injunction granted, with exceptions - *Sustainable Forests (Timber) Act 2004* (Vic), s 46 - Code of Practice for Timber Production 2014, cl 2.2.2.2.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Dr K Weston-Scheuber	Oakwood Legal
For the Defendant	Mr P Solomon QC with Mr O Ciolek and Ms H Douglas	Johnson Winter & Slattery

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).¹ Currently, VicForests' timber harvesting operations are governed by the *Code of Practice for Timber Production 2014 (as amended November 2021)* (**Code**), which incorporates the *Management Standards and Procedures for timber harvesting operations in Victoria's State forests 2021* (**2021 Standards**).
- 2 Gippsland Environment Group Inc (**GEG**) is an incorporated association that claims to have a special interest in the preservation of the State forests of Gippsland, comprising the flora and fauna of those forests. On 13 May 2022, GEG commenced this proceeding, in which it seeks a declaration and permanent injunctions to enforce what GEG contends are VicForests' obligations to identify and protect greater gliders and yellow-bellied gliders in State forests in the Gippsland Forest Management Areas (**FMAs**).
- 3 The issues in this proceeding are almost identical to those in two other proceedings in this Court: S ECI 2021 01527 *Environment East Gippsland Inc v VicForests* (**East Gippsland proceeding**) and S ECI 2021 04204 *Kinglake Friends of the Forest Inc v VicForests* (**Kinglake proceeding**), which concern the East Gippsland FMA and the Central Highlands FMAs respectively. Since December 2021, the East Gippsland proceeding and the Kinglake proceeding have been managed together. I heard the evidence in the trial of both proceedings in May, and will hear final submissions on 23 June 2022.
- 4 By summons filed 23 May 2022, GEG sought an interlocutory injunction restraining VicForests from conducting timber harvesting operations in any coupe in the Gippsland FMAs in which there has been a sighting of a greater glider in, or within 240 metres of, that coupe, known to VicForests. The interlocutory injunction sought

¹ *Sustainable Forests (Timber) Act 2004* (Vic), s 46(a).

was in very similar terms to the interlocutory injunctions that have been in place in the East Gippsland proceeding and the Kinglake proceeding since 23 December 2021.² The summons was listed for hearing before me in the Practice Court on 27 May 2022.

5 On 27 May 2022, I made the following orders, on the basis that GEG had given the usual undertaking as to damages:

1. From 28 May 2022 until 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 3 of the *Sustainable Forests (Timber) Act 2004* (**Timber Harvesting Operations**), in any coupe in the Gippsland Forest Management Areas,³ where there has been a sighting of a greater glider in, or within 240 metres of, that coupe, known to the defendant.
2. Order 1 does not restrain the defendant from conducting Timber Harvesting Operations in the following coupes:
 - (a) Deluded (770-507-0014), generally in accordance with the Operations Map, Operations Plan and HCV Summary & Retention Plan reproduced at pages 177 to 211 of Exhibit MD-1;⁴
 - (b) Clarks (775-506-0001), provided that an area with a radius of at least 240 metres from the greater glider detections recorded on the map reproduced at page 214 of Exhibit MD-1 is excluded from harvesting;
 - (c) the northern portion of Doors (490-510-0003), generally in accordance with the Operations Map, Operations Plan and HCV Summary & Retention Plan reproduced at pages 216 to 255 of Exhibit MD-1;
 - (d) Zappo (490-501-0004), provided that an area with a radius of at least 240 metres from the greater glider detections recorded on the Operations Map reproduced at page 257 of Exhibit MD-1 is excluded from harvesting;
 - (e) Prime (490-502-0015); and
 - (f) Bang (490-510-0002), provided that an area with a radius of at least 240 metres from the greater glider detections recorded on

² *Environment East Gippsland Inc v VicForests (No 2)* [2021] VSC 869 (*EEG No 2*).

³ Gippsland Forest Management Areas was defined in the orders as the area set out in the map exhibited at page 19 of Exhibit LC-1 to the affidavit of Louise Crisp affirmed 20 May 2022.

⁴ Exhibit MD-1 was defined in the orders as the bundle of documents referred to in the affidavit of Monique Dawson affirmed 26 May 2022 (**Dawson affidavit**).

the Operations Map reproduced at page 293 of Exhibit MD-1 is excluded from harvesting.

3. Order 1 does not restrain the defendant 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; or
 - (b) removing and/or selling timber already felled as at 27 May 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 of Practice for Timber Production 2014 (2021 version).

6 These are my reasons for making those orders.

Matters not in dispute

7 The principles relevant to an application for an interlocutory injunction were not in contention. Whether to grant 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.⁵

8 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

⁵ *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).

failed to establish its right at the trial, or in failing to grant an injunction to a party who succeeded at trial.⁶

9 For the purposes of the interlocutory hearing, VicForests accepted that there is a serious question to be tried. This was an appropriate concession in the unusual circumstance that I am currently trying almost identical questions in the East Gippsland and Kinglake proceedings, having previously concluded that there were serious questions to be tried in each proceeding.⁷

10 GEG relied on two reports of Associate Professor Grant Wardell-Johnson, an expert ecologist, to establish that there is a serious question to be tried. The first report, dated 8 March 2022, was prepared for the East Gippsland and Kinglake proceedings. In his second report, dated 24 May 2022, Associate Professor Wardell-Johnson adopts certain opinions given in his earlier report in relation to the Gippsland FMAs.

11 I am satisfied that there is 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.⁸ Further, on the basis of Associate Professor Wardell-Johnson's reports, GEG has established a good arguable case that timber harvesting poses a real threat of serious or irreversible damage to the viability of greater gliders as a species, and that the precautionary principle requires the retention of an area of habitat around the locations of each greater glider detection.⁹ I discuss Associate Professor Wardell-Johnson's reports further below.

12 VicForests also did not query GEG's standing to seek interlocutory relief – that is, it did not dispute that there is a serious question to be tried that GEG has a special interest in the subject matter of the proceeding. Again, that was an appropriate position for VicForests to take at this stage of the proceeding, which does not preclude

⁶ *Bradto*, [35].

⁷ *EEG No 2*, [33]-[45].

⁸ *EEG No 2*, [9]-[10], [33].

⁹ *EEG No 2*, [34]-[45].

it from contesting GEG's standing at trial should it choose to do so.

- 13 In addition, VicForests accepted that my assessment of the balance of convenience would be consistent with my reasons for granting interlocutory injunctions in the East Gippsland and Kinglake proceedings.¹⁰ Its evidence and submissions were directed to persuading me that the balance of convenience favoured permitting it to harvest, or continue harvesting, six specific coupes that it planned to harvest over the next three months, and that there should be some general exceptions to the injunction. As will be clear from the orders set out at [5] above, I was persuaded to take that course. What follows explains why I reached that view, and why the exceptions provided in orders 2 and 3 varied from those sought by VicForests.

The precautionary principle

- 14 Clause 2.2.2 of the Code deals with conservation of biodiversity. It sets out a number of operational goals, including that timber harvesting operations in State forests specifically address biodiversity conservation risks and consider relevant scientific knowledge at all stages of planning and management. It then prescribes a number of mandatory actions, as follows:

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

¹⁰ EEG No 2, [54]-[56].

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.

15 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*).

16 In *Environment East Gippsland Inc v VicForests*¹¹ Osborn J explained that 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

¹¹ *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1, [176]-[212] (*Brown Mountain*).

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'.¹²

Reports of Associate Professor Wardell-Johnson

17 As mentioned, GEG relied on two reports of Associate Professor Wardell-Johnson. In his report dated 8 March 2022, Associate Professor Wardell-Johnson outlined some facts about the southern greater glider, the only species of greater glider that is found in Victoria.

18 The southern greater glider is the largest Australian gliding mammal.¹³ It is found from the montane forests of the Victorian central highlands to northern New South Wales. Within Victoria, it is distributed throughout the forested parts of eastern Victoria, and as far west as Daylesford. Southern greater gliders are mature forest dependent and prefer older tree age classes in moist forest types; they use hollow-bearing trees for shelter and nesting, with up to 20 den trees within their home range.¹⁴ They are nocturnal, solitary herbivores, feeding almost exclusively on eucalyptus leaves and buds.

19 The movements of southern greater gliders are mainly restricted to gliding between tree canopies. The home range of a male is between 1.4 and 4.1 hectares; for females the range is between 1.3 and 3.0 hectares. Their home ranges may overlap, but they are generally solitary creatures and rarely interact outside of the breeding season between February and May. A southern greater glider reaches sexual maturity after between 18 months and two years, and lives for up to 15 years. Females bear a single young each year.¹⁵

20 Greater gliders as a group are listed as 'vulnerable' nationally, in Queensland and Victoria, under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth),

¹² *Brown Mountain*, [199]-[211].

¹³ Report of Associate Professor Wardell-Johnson dated 8 March 2022 (**First Wardell-Johnson report**), [13].

¹⁴ First Wardell-Johnson report, [15].

¹⁵ First Wardell-Johnson report, [16].

the *Nature Conservation Act 1992* (Qld), and Victorian Advisory List of Threatened Vertebrate Fauna, respectively. Of the three species of greater glider, the southern greater glider is thought to be the most threatened and has suffered the sharpest declines. In Associate Professor Wardell-Johnson's opinion, it is beyond dispute that the species is highly vulnerable to the synergistic impacts of intensive and extensive logging, fire, and global warming. He considers that thought should be given to upgrading the conservation status of the southern greater glider from 'vulnerable' to 'endangered'.¹⁶

21 Clearing, intense fire, logging, and fragmentation of habitat have long been recognised as the major threats to the southern greater glider. More recently, extreme droughts and higher temperatures (including overnight temperatures) associated with global warming have been demonstrated to be emerging threats, due to a reduction in quality or availability of food and increased morbidity or mortality due to heat stress.¹⁷ Southern greater gliders are not well equipped to handle high ambient temperatures as they inefficiently use water for evaporation through salivation, and often have limited access to water in their arboreal habitat.¹⁸ As populations decline and become more isolated, they are more prone to the effects of small population size and potentially genetic decline. Before late 2019, significant logging in the forests of Victoria and New South Wales had led to the removal of large areas of hollow bearing trees that southern greater gliders depend on, and the species had declined by almost 80% in some areas. A significant proportion of the species' habitat burned during the 2019-20 bushfire season, including more than half of the forest set aside in Victoria for glider protection. It can be expected that southern greater gliders will be rendered locally extinct from parts of the forest that have been both extensively burned and logged.¹⁹

22 Associate Professor Wardell-Johnson's opinion is that the conservation of the southern greater glider is assisted by reserving from logging additional areas of suitable habitat

¹⁶ First Wardell-Johnson report, [18].

¹⁷ First Wardell-Johnson report, [19].

¹⁸ First Wardell-Johnson report, [17].

¹⁹ First Wardell-Johnson report, [19].

in each forest block occupied by southern greater gliders. He considers that an additional level of protection is required to prevent local extinction of this species from forest blocks managed for timber production.²⁰

23 In Associate Professor Wardell-Johnson's first report, he opined that any confirmed record of a southern greater glider in suitable habitat in forest blocks managed for timber production should be the target of conservation efforts. This is in part because of the long timeframe required to re-develop the structure of the forest as suitable habitat for the southern greater glider after intensive logging – a period of 200 years or more. It is also due to the high risk of local extinction of the species within reserved old-growth remnants in typical forest blocks managed for timber production.²¹ He considered that an area of 18 hectares around any confirmed sighting of a greater glider should be reserved from logging, on the following basis:²²

SGGs²³ have a minimum home range of approximately 1.5 ha (Kavanagh & Wheeler 2004; Pope et al., 2004), defined by scent-marking trees, and they use up to 18 den sites (Cronin 2008). Male home ranges rarely overlap, but female home ranges often overlap those of males and other females (Cronin 2008). Unlike Yellow-bellied Gliders, SGGs are generally solitary outside of the breeding season, and once established, do not travel beyond their home range. A home range of 1.5 ha corresponds to a radius of approx. 70 m. Assuming a circular home range and an observation anywhere from the edge to the middle of this home range, the minimum radius of the home range of an SGG may extend approx. 140 m in any direction from that sighting. Therefore, each confirmed sighting of a SGG in suitable habitat, corresponds with an area of approx. 6.15 ha.

To limit the impacts of edge effects (e.g., Lindenmayer et al., 1993; Nelson et al., 2013), a buffer of 100 m should be established in suitable habitat from road building, logging, tending, activities associated with regeneration (e.g., burning), or other activities likely to be detrimental to this species. Thus, the home range plus buffer will be approx. 18 ha of suitable habitat surrounding the observation. In other words, the confirmed sighting of a SGG in suitable habitat should form the centre of 18 ha of this habitat set aside from management activity.

24 Associate Professor Wardell-Johnson said in his first report that there is 'a real threat of serious or irreversible damage to the environment without exclusion of intensive

²⁰ First Wardell-Johnson report, [20].

²¹ First Wardell-Johnson report, [166]-[167].

²² First Wardell-Johnson report, [168]-[169].

²³ SGG is used by Associate Professor Wardell-Johnson as an abbreviation for southern greater glider.

logging from an approximately circular area of radius 240 metres centred on any confirmed SGG sighting in suitable habitat'.²⁴ In his opinion, this serious or irreversible damage to the environment is partly because southern greater gliders are highly sensitive to the edge and fragmentation effects generated by intensive logging operations and their aftermath. He did not consider the threat to be lessened by retention of some habitat, seed or feed trees, or by small patches, because the structure of the forest following this kind of logging is fundamentally different and unfavourable to greater gliders. Further, he considered that an understanding of the locations of southern greater gliders can only be achieved by appropriate surveys.²⁵

25 In relation to the conclusion of a study by Kavanagh in 2000, 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 [through] out logged areas and when the usual practice of retaining unlogged forest in riparian strips is applied', Associate Professor Wardell-Johnson said:²⁶

Unfortunately, this outcome has not generally been borne out in practise as landscapes subject to intensive logging over extensive areas become increasingly fragmented. This is partly because of the edge effects formed by individual logging operations and because follow-up fire management can damage or destroy retained stems. However, of greater impact is the longer-term (>120 years) fragmentation of mature forest habitat by intensive logging, carried out extensively. The longer-term stochastic effects generated by extensive areas of intensive logging provides numerous other potentially lethal impacts on SGG populations. That is why the SGG has declined so dramatically in the extensive areas of intensively managed forests in Victoria and NSW. ...

There has subsequently been a pronounced loss (possibly local extinction) in the State forests reported by Kavanagh (2000) and surrounds, as logging proceeded at landscape scale. Presumably some animals were killed in the logging operation, while others were subsequently killed by predation (see Tyndale-Biscoe & Smith 1969), or died from starvation or exposure at the sites, due to fragmentation and edge effects generated by the logging activity as it progressed across the landscape. Thus, starvation, predation and exposure have immediate serious effects on populations of SGGs in their impacted habitat.

These effects are particularly pronounced in a situation where any retained vegetation is not aligned with the requirements of the species being protected

²⁴ First Wardell-Johnson report, [172].

²⁵ First Wardell-Johnson report, [181].

²⁶ First Wardell-Johnson report, [176]-[178], [181] (emphasis in original).

(i.e., in this case the SGG). As Kavanagh (2000) also found, *'The presence and absence of particular tree species also influenced the distribution of the Greater Glider. Forests containing Manna Gum E. viminalis and Mountain Gum E. dalrympleana were highly preferred compared to forests with a high proportion of E. obliqua. The presence of E. cypellocarpa appeared to improve the quality of habitat for the Greater Glider in forests dominated by E. obliqua.'* Thus, when retaining vegetation for SGG, it is imperative to retain relevant vegetation (i.e., mature vegetation of the appropriate species composition) where SGGs actually occur.

...

A failure to know where SGGs occur in a proposed coupe means that it is very possible (even likely), that any retained vegetation does not reflect the requirement of the SGGs. In other words, there is some risk that habitat without SGGs, or unsuitable for SGGs, will be retained while habitat containing them, or suitable for them will not. If this occurs, retention of vegetation within the coupe may not provide any protection for this species in this area. Thus, for the intent to retain SGGs within a local region to be enacted, it is necessary to survey the entire proposed coupe using an appropriate methodology likely to detect them (should they be present). Once their locations are known, it becomes possible to take action to avoid a real threat of serious or irreversible damage to the environment. This would require exclusion from logging, an approximately circular area of approximately 240 metres radius centred on the confirmed SGG sighting.

26 Associate Professor Wardell-Johnson identified a number of ways in which the threat of damage to the environment he had identified is attended by a lack of full scientific certainty. These include whether individual greater gliders present in a coupe prior to logging are killed during the actual logging operation, or following the operation, and whether from predation, exposure or starvation.²⁷

27 In his second report, Associate Professor Wardell-Johnson adopted the opinions set out above, in relation to the Gippsland area.²⁸ He restated his opinions in relation to both greater gliders and yellow-bellied gliders:²⁹

[W]ithout set asides wherever these species are detected, there is also a real threat of serious or irreversible damage to the environment. This serious or irreversible damage to the environment is partly because of the high degree of sensitivity of SGGs and YBGs³⁰ to the edge and fragmentation effects generated by intensive logging operations and their aftermath. This threat is not lessened by retention of some habitat, seed or feed trees; or by small patches. This is because of the fundamentally different structure of the forest following such

²⁷ First Wardell-Johnson report, [182].

²⁸ Report of Associate Professor Wardell-Johnson dated 24 May 2022, [23]-[24], [27]-[31], [36] (**Second Wardell-Johnson report**).

²⁹ Second Wardell-Johnson report, [32]-[33].

³⁰ YBG is used by Associate Professor Wardell-Johnson as an abbreviation for yellow-bellied glider.

operations; structures unfavourable to SGGs and YBGs.

These effects are pronounced in a situation where any retained vegetation is not aligned with the requirements of the species being protected (i.e., in this case the SGG or YBG). Thus, when retaining vegetation for SGGs or YBGs, it is imperative to retain relevant vegetation (i.e., mature vegetation of the appropriate species composition) where SGGs actually occur.

VicForests' evidence on balance of convenience

28 VicForests relied on an affidavit of its chief executive officer, Monique Dawson, affirmed 26 May 2022, which outlined a number of constraints on VicForests' business.

These are:

- (a) supply constraints due to litigation, the 2019-20 fires, and new or anticipated exclusion zones for the protection of threatened species;³¹
- (b) difficulties in matching coupes for harvesting to the supply commitments of VicForests' customers, when a scheduled coupe becomes unavailable for harvesting;³²
- (c) the time taken to undertake the necessary planning to prepare a coupe for harvesting, and other operational difficulties associated with finding a suitable replacement coupe when a scheduled coupe becomes unavailable for harvesting;³³ and
- (d) seasonal constraints on timber harvesting, with a smaller range of coupes able to be harvested safely in the wetter, colder winter months.³⁴

29 Ms Dawson deposed that the Gippsland FMAs are critical geographic areas for VicForests' business, and that timber from those areas is required to fulfill VicForests' customers' orders. Approximately 23% of VicForests' overall mixed timber supply and 25% of the overall Ash supply for June 2022 is forecast to come from the Gippsland

³¹ Dawson affidavit, [23]-[31].

³² Dawson affidavit, [32]-[39].

³³ Dawson affidavit, [40]-[44].

³⁴ Dawson affidavit, [49].

FMAAs.³⁵

30 The combined effect of these constraints is that, if an injunction were to be granted in the terms sought by GEG, VicForests' timber harvesting operations in the Gippsland FMAAs 'would come to a complete standstill'.³⁶ Ms Dawson stated unequivocally that VicForests has no suitable coupes that it could use as a contingency until, at the earliest, late August 2022.³⁷ The practical effect of the orders sought would be that, for at least the next three months:

- (a) VicForests would have to stand down three of its contractors because there would be no work for them to do;³⁸
- (b) there would be a material impact on the supply of timber needed to enable sawmills to continue operating;³⁹
- (c) VicForests would not be able to supply its customers with the contracted volume and grade of timber,⁴⁰ in circumstances where VicForests is already struggling to meet its supply commitments;⁴¹ and
- (d) VicForests would be liable to pay compensation to customers of approximately \$4,155,981.74 and would lose approximately \$1,210,557.41 in revenue from selling timber scheduled for harvest during that period.⁴²

31 Ms Dawson identified six coupes that VicForests planned to harvest in the Gippsland FMAAs over the next three months: Deluded (770-507-0014), Clarks (775-506-0001), Doors (490-510-0003), Zappo (490-501-0004), Prime (490-502-0015), and Bang (490-510-0002). These six coupes are the only coupes that are sufficiently planned and accessible for harvesting over the winter period. Ms Dawson said that if VicForests is

³⁵ Dawson affidavit, [45]-[48].

³⁶ Dawson affidavit, [67].

³⁷ Dawson affidavit, [67], [70].

³⁸ Dawson affidavit, [52]-[59].

³⁹ Dawson affidavit, [69].

⁴⁰ Dawson affidavit, [60]-[66], [68].

⁴¹ Dawson affidavit, [50]-[51].

⁴² Dawson affidavit, [146].

able to harvest those six coupes, it would be able to meet some but not all of its contracted obligations to its customers, and ensure that the three contractors already mentioned will continue to have work. If VicForests cannot harvest those coupes then its operations in the Gippsland FMAs would cease.⁴³

32 Ms Dawson provided information in relation to each of the six coupes, which is summarised in the following paragraphs.

33 Deluded coupe was scheduled for harvesting in June 2022, although harvesting in fact commenced on 26 May 2022.⁴⁴ Planning for the coupe is complete, including a survey for habitat trees. Surveys by the Department of Environment, Land, Water and Planning (**DELWP**) conducted in February 2022 detected one greater glider and one yellow-bellied glider within the coupe, and three greater gliders within 240 metres of the coupe boundary. The location of these detections is marked on the Operations Map for the coupe, shown in **Annexure 1**. The measures planned to address risks to the gliders are set out in the Operations Plan and High Conservation Values (**HCV**) Summary and Retention Plan for the coupe. The measures include retaining approximately 79.6% of the basal area to be harvested, including where the greater glider was detected within the coupe.⁴⁵

34 Clarks coupe is also scheduled for harvesting in June 2022. Planning for the coupe is ongoing. The preliminary results of surveys conducted by DELWP in February and March 2022 indicate that five or six greater gliders were detected on one night within the coupe, at locations shown on the Greater Glider Detections Map for the coupe, reproduced at **Annexure 2**.⁴⁶ A habitat tree survey was conducted in February 2022. No Operations Map, Operations Plan, or HCV Summary and Retention Plan was

⁴³ Dawson affidavit, [70]-[71].

⁴⁴ Ms Dawson initially deposed in her affidavit dated 26 May 2022 that harvesting was scheduled to commence in June 2022. On 27 May 2022, after the hearing of the application, she made a further affidavit in which she deposed that she had been informed that a harvesting contractor was signed into Deluded coupe on 25 May 2022 and had commenced harvesting the coupe on 26 May 2022. Up to one hectare was harvested before harvesting was stopped at 1:30pm on 27 May 2022.

⁴⁵ Dawson affidavit, [73]-[81]; and Exhibit MD-1, 177-211.

⁴⁶ Six detections are marked on the map at 214 of Exhibit MD-1, while Ms Dawson deposes at [89] that five detections were reported by DELWP.

provided for Clarks coupe. Ms Dawson deposed that, within Clarks coupe, in accordance with DELWP's Greater Glider Action Statement,⁴⁷ VicForests would retain a minimum of 40% basal area.⁴⁸

35 Doors coupe is bisected by a Leadbeater's possum reserve, which is excluded from harvesting. Planning has been completed for the northern portion of the coupe that will be harvested using variable retention harvesting, and harvesting commenced on 16 May 2022. Planning for the northern part of the coupe that will be harvested using thinning, and for the southern portion of the coupe, is ongoing. Habitat tree surveys have been done. Surveys conducted by VicForests in April and May 2022 detected six greater gliders within the coupe over three nights. Another greater glider was detected within 500 metres of the coupe. The location of these detections is marked on the Operations Map for the coupe, shown at **Annexure 3**. The measures planned to address risks to the gliders are set out in the Operations Plan and HCV Summary and Retention Plan for the coupe. These measures include retaining a minimum of 68% basal area, prioritising retention of large hollow bearing trees, and tree spacings within the harvested area to support glider movement throughout the landscape.⁴⁹

36 Planning for Zappo coupe is complete, including a habitat tree survey in April 2022. Harvesting commenced on 19 May 2022. Surveys conducted by VicForests in March and April 2022 detected three greater gliders within the coupe, and five more greater gliders within 240 metres of the coupe boundary. The location of these detections is shown on the Operations Map for the coupe, reproduced at **Annexure 4**. The measures planned to address risks to the gliders are set out in the Operations Plan and HCV Summary and Retention Plan for the coupe. These measures include retaining a minimum of 44% basal area, prioritising retention of large hollow bearing trees, and tree spacings within the harvested area to support glider movement throughout the landscape.⁵⁰

⁴⁷ Greater Glider Action Statement No. 267, prepared under s 19 of the *Flora and Fauna Guarantee Act 1988* (Vic) and published by DELWP in 2019.

⁴⁸ Dawson affidavit, [85]-[91], Exhibit MD-1, 213-214.

⁴⁹ Dawson affidavit, [95]-[104], Exhibit MD-1, 216-255.

⁵⁰ Dawson affidavit, [109]-[117], Exhibit MD-1, 257-290.

- 37 Harvesting in Prime coupe was scheduled to commence after 27 May 2022. Planning for the coupe is ongoing. Surveys conducted by a VicForests' contractor in April and May 2022 over three nights detected no greater gliders in the coupe or within 240 metres of the coupe boundary. A habitat tree survey was conducted in April 2022. VicForests will retain a minimum of 40% of the basal area within the coupe.⁵¹
- 38 Bang coupe is adjacent to Doors coupe. Harvesting is scheduled to commence in mid-June 2022. Planning is ongoing, and VicForests is waiting for DELWP to finalise a survey within the coupe. A survey conducted by VicForests in April 2022 detected one greater glider within the coupe, as shown **Annexure 3**. In addition, the surveys of Doors coupe mentioned at [35] above detected several greater gliders within 240 metres of the western boundary of Bang coupe. A VicForests' contractor conducted a habitat tree survey in March 2022. VicForests will harvest the coupe by thinning, with 50% retention across the coupe to maintain connectivity.⁵²
- 39 Ms Dawson also provided evidence in support of VicForests' argument that there should be a number of general exclusions from the injunction, including to permit trees to be felled for safety reasons, for the creation, widening or maintenance of roads, and to permit regeneration activities after logging.

GEG's submissions

- 40 In relation to the balance of convenience, GEG submitted that the interlocutory injunction it sought was the least intrusive order that would maintain the status quo in respect of at-risk greater gliders. It said that there was cogent evidence that logging poses an existential threat to the greater glider as a species, and that there is 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.
- 41 GEG said that it would have been content with an injunction requiring VicForests to conduct pre-harvest surveys of the whole of each coupe, in accordance with the survey

⁵¹ Dawson affidavit, [122]-[129], Exhibit MD-1, 291.

⁵² Dawson affidavit, [133]-[140], Exhibit MD-1, 292-293.

protocol set out in its statement of claim, and for an exclusion area with a 240 metre radius to be applied around each greater glider detected during those surveys. In view of VicForests' position that it will not conduct such surveys,⁵³ GEG had not sought an injunction in that form. GEG argued that any inconvenience that VicForests might experience as a result of the injunction would be due to its refusal to conduct thorough pre-harvest surveys.

42 GEG submitted that I should find, as I had in *Environment East Gippsland Inc v VicForests (No 2)*⁵⁴ (*EEG No 2*), that the risk of permanent and irreversible harm to greater gliders, as a threatened species, outweighs the cost and disruption likely to result from the injunction. It argued that this conclusion applied with greater force in this proceeding, given that the duration of the injunction is likely to be shorter than was the case when the interlocutory injunctions were granted in *EEG No 2*.

43 In oral submissions, GEG emphasised Associate Professor Wardell-Johnson's opinion that 40% basal retention of an entire coupe is insufficient to protect any greater gliders within that coupe. It relied on his opinion that it is necessary to exclude an area of 240 metres around the location of any greater gliders that are detected. It argued that the protective measures outlined in Ms Dawson's affidavit for the six specified coupes would be inadequate.

44 GEG opposed any general exceptions to the injunction, other than to permit trees to be felled or cut to address a serious risk to human safety, and to permit the removal and sale of timber already felled.

VicForests' submissions

45 VicForests submitted that the balance of convenience would be appropriately struck by an order in the terms sought by GEG, but with two carve-outs:

- (a) excluding the six specified coupes from the scope of the order, to permit VicForests to conduct timber harvesting operations in order to meet its

⁵³ *EEG No 2*, [24].

⁵⁴ [2021] VSC 869, [55].

contractual commitments over the next few months; and

- (b) permitting certain specified activities within coupes the subject of the injunction.

46 VicForests relied on the evidence of Ms Dawson, which I have summarised above.

47 In relation to the six specified coupes, VicForests pointed out that all of them had been surveyed for greater gliders and habitat trees. It planned to retain between 40% and 79.6% of the basal area in each coupe. It said that, taken together, the planned harvest area amounts to 0.00538% of the modelled top 20% of greater glider habitat in forest available for harvesting by VicForests.

48 On the other hand, if an injunction were granted that prevented VicForests from harvesting the six coupes as planned, it said that the following consequences would follow:

- (a) harvesting and haulage contractors in the region would have little to no work;
- (b) at least three contractors would be stood down in the short term;
- (c) customer sawmills would experience compounding undersupply, over critical winter months, and would face the prospect of having to shut down permanently;
- (d) VicForests would be liable to pay compensation to customers in the order of \$4 million, and would lose over \$1.2 million in revenue.

49 VicForests submitted that, in the context of the already significant interlocutory injunctive restraints on its operations, a small exception such as this would achieve an appropriate balancing of the plaintiff's interest in preserving the subject matter of its claims and the legitimate interests of VicForests and the businesses that rely on it.

50 VicForests argued that the evidence did not establish that its planned harvesting of the six named coupes posed a threat of serious or irreversible damage to the

environment. VicForests acknowledged that it was reasonable to deduce from Associate Professor Wardell-Johnson's evidence that there was some risk of damage to the environment. However, it pointed out that he had not opined that any greater gliders within the six coupes would inevitably perish if the coupes are harvested using the protective measures proposed by VicForests. It contrasted the uncertainty of the outcome for the gliders in those coupes with the certainties that contractors would be stood down, supply contracts with customers would not be fulfilled, and VicForests would suffer financial losses.

51 In relation to the general carve-outs sought, VicForests relied on Ms Dawson's evidence of the activities that should reasonably be excepted from a prohibition on 'timber harvesting operations', in order to enable it to comply with various obligations under the Code and 2021 Standards with respect to road maintenance, coupe rehabilitation, and regeneration works.

Consideration

52 The orders I made on 27 May 2022 excluded the six coupes from the injunction, although not to the full extent sought by VicForests. I considered that the balance of convenience favoured excluding those six coupes from the injunction for the following reasons.

53 As was the case in *EEG No 2*, it was necessary to weigh the cogent evidence that logging poses an existential threat to greater gliders as a species, against the adverse financial impact that restraining all logging in coupes where greater gliders have been detected will undoubtedly have on VicForests, its customers and contractors, and their workers.⁵⁵ I also had regard to the precautionary principle that is central to the balance between competing interests that is struck in the Code.⁵⁶ There were two particular respects in which the balance of convenience in this case differed from that in *EEG No 2*.

⁵⁵ *EEG No 2*, [54].

⁵⁶ *EEG No 2*, [55].

54 First, in *EEG No 2* it was significant that the orders sought by the plaintiffs specifically excluded a number of coupes in East Gippsland and the Central Highlands that were scheduled for harvesting in December 2021. In light of those agreed exclusions, I was not satisfied that granting the injunctions sought would have the effect of shutting down the timber industry in those regions.⁵⁷ In this case, GEG had not agreed to exclude any coupes from the scope of the injunction sought, even where logging had already commenced.

55 Second, in *EEG No 2* there was evidence of a large number of coupes in both regions that would not be affected by the injunction – that is, they were not known to contain greater gliders and so would be available for harvesting by VicForests. I considered that VicForests had the time and expertise available to identify and plan to harvest suitable replacement coupes, so as to minimise the impact of the injunctions on its profitability, and that of its customers, and the livelihoods of their workers.⁵⁸ In this case, there was clear evidence that there are no alternative coupes that are suitable for harvesting in the short term, at least until late August 2022.

56 All six coupes have been surveyed for the presence of greater gliders, albeit not as thoroughly as GEG claims is required. With the modifications specified in order 2 of my orders, I considered that timber harvesting could take place in the six coupes with measures in place for the protection of greater gliders that are broadly consistent with Associate Professor Wardell-Johnson’s opinion. In the following paragraphs I explain my thinking in relation to each of the six coupes.

57 Deluded coupe has a total area of 40.1 hectares, of which 7.9 hectares was harvested in 2016. VicForests plans to harvest an additional 7.1 hectares only. The Operations Map for Deluded coupe shows a cluster of greater glider detections around the north-eastern corner of the coupe.⁵⁹ According to the Operations Map and other planning documents that were exhibited to Ms Dawson’s affidavit, VicForests plans to retain an area of habitat in the north of the coupe, with a radius of at least 240 metres from the

⁵⁷ *EEG No 2*, [56].

⁵⁸ *EEG No 2*, [56].

⁵⁹ See Annexure 1.

cluster of glider detections. The area that VicForests plans to harvest is more than 240 metres from where greater gliders were detected. While three surveys of the southern part of that area in February 2022 did not detect any greater gliders, VicForests will retain an average minimum of five habitat trees per hectare within the area to be harvested, prioritising hollow-bearing trees. I considered that the measures that VicForests planned to take in Deluded coupe for the protection of greater gliders were consistent with Associate Professor Wardell-Johnson's opinion.

58 Surveys of Clarks coupe detected five or six greater gliders within the coupe.⁶⁰ No Operations Map or other planning document was provided to indicate what areas of habitat VicForests plans to retain within the coupe, and how these areas relate to the places where greater gliders were observed in the coupe. The only protective measure that VicForests proposes to take is to retain 40% of the basal area of eucalypts across the entire coupe. While that is the measure specified in DELWP's Greater Glider Action Statement, I understand Associate Professor Wardell-Johnson's opinion to be that the measure is insufficient to protect any greater glider whose home range is within the harvested area of the coupe. His opinion is that it is necessary to preserve an area of habitat with a radius of at least 240 metres centred on any confirmed sighting of a greater glider.⁶¹ It appeared to me that exclusion zones of this radius around the known greater glider detections would protect those gliders from serious and irreversible harm pending trial, while still leaving parts of the coupe available for harvest.

59 Doors coupe is bisected by an exclusion zone with a 200 metre radius around an observation of a Leadbeater's possum in April 2022.⁶² A number of greater gliders were detected within the same area of forest. VicForests has commenced harvesting in the northern portion of Doors coupe, in which there are no known detections of greater gliders. The harvesting methods that VicForests plans to use within that area are variable retention and thinning, retaining a minimum of 40% of the basal area.

⁶⁰ See Annexure 2.

⁶¹ See [22]-[27] above.

⁶² See Annexure 3.

Applying an exclusion area with a radius of 240 metres around the greater glider detections at the southern end of the Leadbeater's possum reserve leaves little if any of the southern portion of the coupe available for harvesting. For that reason, the exclusion in order 2 applies only to the northern portion of the coupe. Having regard to Associate Professor Wardell-Johnson's opinion, the balance of convenience rested with allowing VicForests to continue to harvest the northern portion of the coupe as planned, with sufficient retained habitat in the southern part of the coupe to protect the known greater gliders from serious and irreversible harm.

60 The surveys of Zappo coupe detected three greater gliders within the coupe, and an additional five greater gliders within 240 metres of the coupe boundary. The areas of habitat that VicForests plans to retain in the vicinity of those detections are less than the areas that, in Associate Professor Wardell-Johnson's opinion, are necessary to protect those gliders from serious and irreversible harm. The retained habitat shown on the Operations Map is not centred on where the gliders were detected, and has a radius of less than 240 metres.⁶³ I considered that the balance of convenience favoured continued harvesting of Zappo coupe, but with an exclusion zone with a radius of 240 metres applied around the location of each detection.

61 The surveys of Prime coupe detected no greater gliders within the coupe, or within 240 metres of the coupe boundary. GEG presented no evidence that greater gliders had ever been sighted within or near the coupe. On the evidence before me, the injunction sought by GEG would not have applied to Prime coupe. For the avoidance of doubt, I included Prime in the order specifying the coupes that are excluded from the injunction.

62 Harvesting of Bang coupe is scheduled to commence in mid-June 2022. At least one greater glider has been detected within the coupe, with DELWP yet to formally report the results of its most recent survey. Several more greater gliders have been detected inside neighbouring Doors coupe, within 240 metres of the western boundary of Bang

⁶³ See Annexure 4.

coupe.⁶⁴ No Operations Map or other planning document was provided to indicate what areas of habitat VicForests plans to retain in Bang coupe, and how these areas relate to the known locations of greater gliders in and near the coupe. As with Clarks coupe, I considered on balance that harvesting of Bang coupe could proceed without posing a risk of serious and irreversible harm to the greater gliders detected within and near the coupe, as long as an exclusion zone with a radius of 240 metres is applied around the location of each detection.

63 As to the general carve outs sought by VicForests, I considered these to be appropriate with the following variations.

64 GEG accepted that the injunction should not restrain VicForests from felling or cutting trees or parts of trees in order to address a serious risk to human safety. This is the way in which I have formulated the safety exception in several injunctions granted against VicForests over the last two years.⁶⁵ I have used the word ‘serious’ to indicate that a risk must be more than trivial or negligible to justify the removal of a tree that is the subject of the injunction.

65 VicForests proposed a differently worded safety exception, which omitted the word ‘serious’. Ms Dawson’s affidavit addressed in some detail the need for VicForests to be able to remove hazardous trees or parts of trees for safety reasons.⁶⁶ However, her evidence did not identify any occasion on which VicForests had been prevented from taking action to address a safety risk because the risk was not ‘serious’. I considered that the safety exception should continue to apply only to serious risks to human safety.

66 VicForests also sought an exception to permit it to fell trees or parts of trees for the creation, widening of or maintenance of any road. Ms Dawson explained in her affidavit that the definition of ‘timber harvesting operations’ in s 3 of the *Sustainable*

⁶⁴ See Annexure 3.

⁶⁵ See, eg, *Kinglake Friends of the Forest Inc v VicForests* [2020] VSC 394, [50] – Order 1; *Environment East Gippsland Inc v VicForests* [2021] VSC 569, [43] – Order 2; *EEG No 2*, [4] – Order 2.

⁶⁶ Dawson affidavit, [148]-[150].

Forests (Timber) Act 2004 (Vic) includes road works ancillary to logging activities. She outlined VicForests' road maintenance responsibilities under the Code and the 2021 Standards.⁶⁷ I was satisfied on the basis of that evidence that there should be an exception for road maintenance. However, Ms Dawson did not explain why VicForests might need to create new roads or widen existing roads in State forest to which the injunction applies – that is, in coupes where greater gliders are known to have been detected, which are to be preserved from logging pending the trial of the proceeding. The evidence did not justify an exception for the creation of new roads or widening of existing roads.

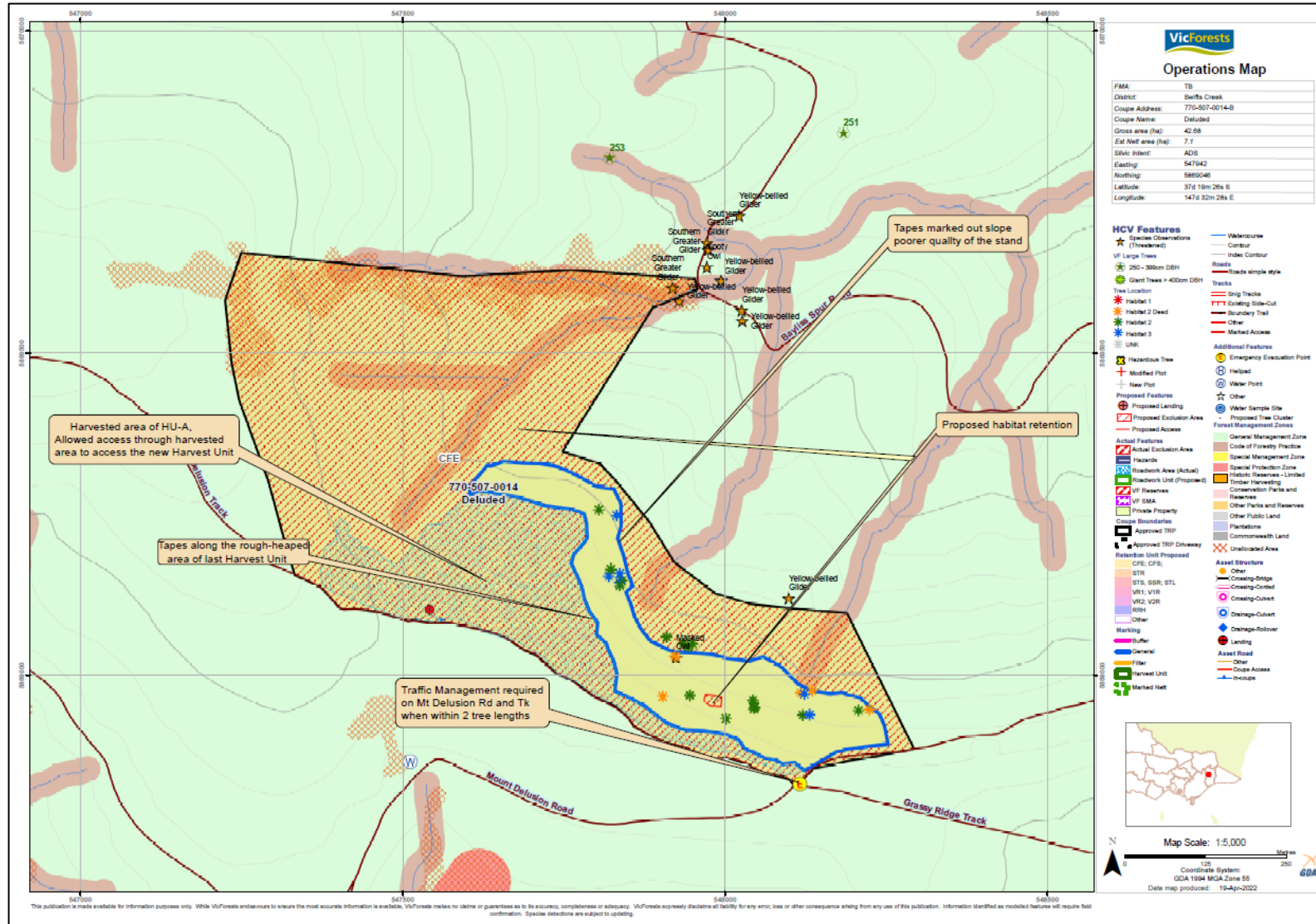
67 In addition, VicForests sought an exception permitting regeneration activities in any coupe in the Gippsland FMAs. Regeneration burning is included in the definition of 'timber harvesting operations' that is referred to in the injunction. I was satisfied that regeneration activities should be permitted in coupes to which the injunction applies that have already been logged – either before the injunction took effect, or as permitted by the exceptions to the injunction.

68 The parties submitted, and I accepted, that no further steps should be taken in this proceeding until the East Gippsland and Kinglake proceedings have been determined. Although those proceedings are at an advanced stage, it is unlikely that they will be finally determined before late August 2022. Anticipating that the interlocutory injunction would extend beyond that date, VicForests foreshadowed that it would apply for further coupes to be carved out from the order in due course. Any such application is to be made by 25 July 2022, with a further hearing of GEG's summons listed on 1 August 2022.

⁶⁷ Dawson affidavit, [151]-[155].

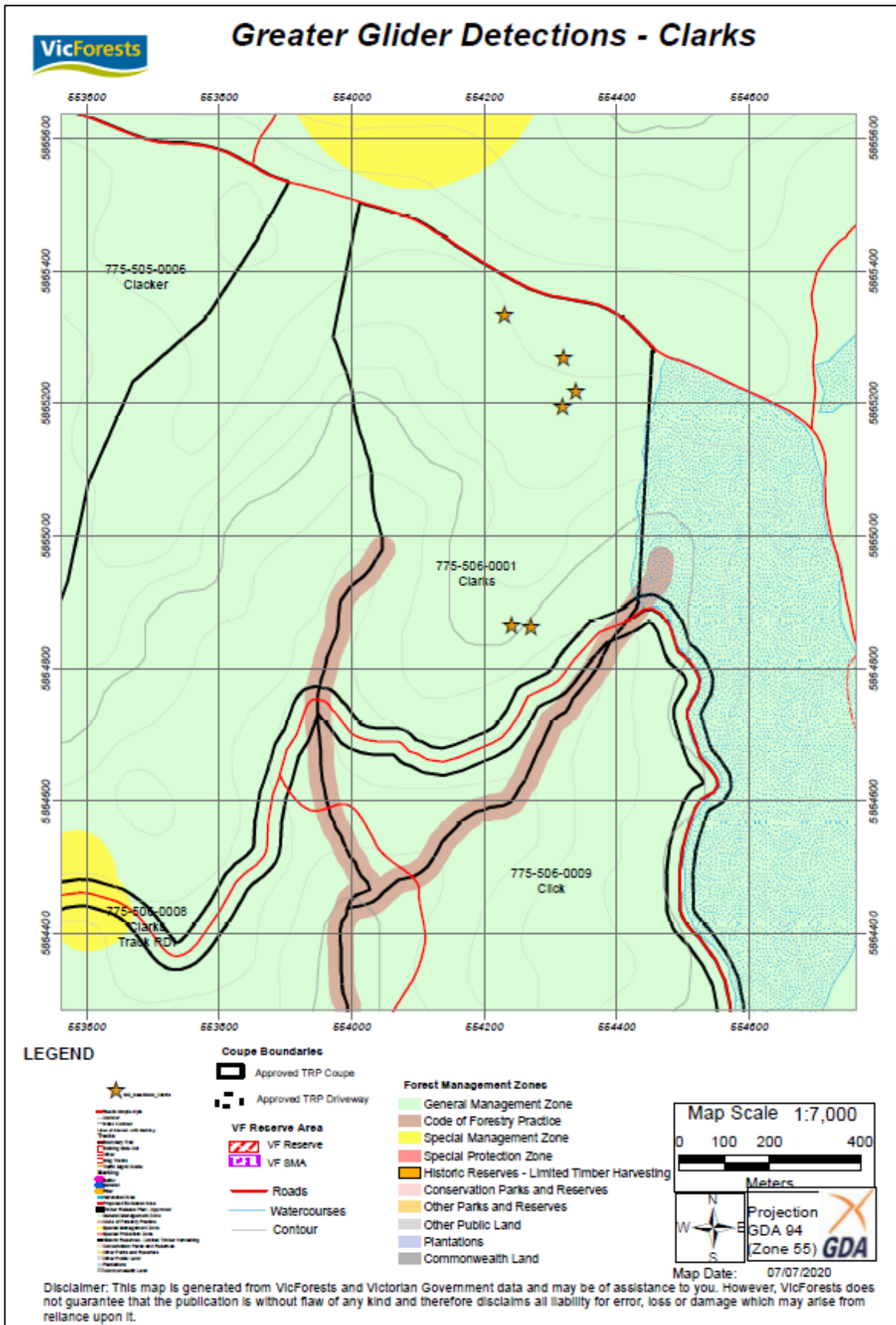
Annexure 1

Operations Map for Deluded coupe, at page 177 of Exhibit MD-1.



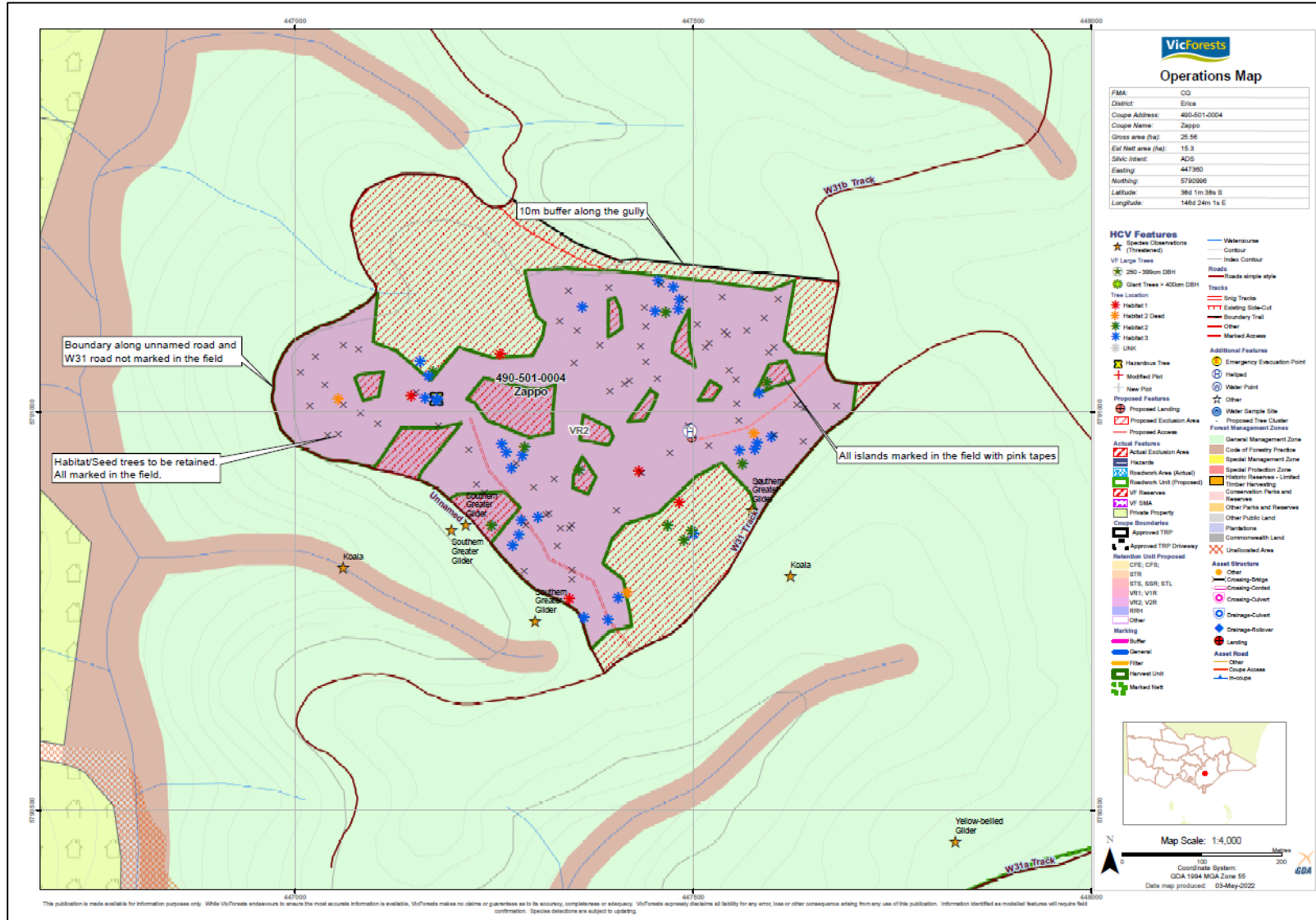
Annexure 2

Greater Glider Detections Map for Clarks coupe, at page 214 of Exhibit MD-1.



Annexure 4

Operations Map for Zappo coupe, at page 257 of Exhibit MD-1.



CERTIFICATE

I certify that this and the 28 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 3 June 2022.

DATED this third day of June 2022.



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Associate