

1 Revised)

2 (Richards J)

3 R U L I N G

4 HER HONOUR: VicForests applies by a summons filed 26 July 2022 to vary  
5 an interlocutory injunction granted in this proceeding on 22 December  
6 2021. On that day, I ordered that, from 23 December 2021 until further  
7 order, the defendant must not whether by itself, its servants, agents,  
8 contractors or howsoever otherwise conduct Timber Harvesting Operations  
9 in any coupe in the Central Highlands ñ and I have omitted definitional  
10 parts of that order ñ where there has been a sighting of a greater glider  
11 in or within 240 metres of that coupe known to the defendant.

12  
13 Order 2 provided an exception for felling or cutting trees or parts of  
14 trees in order to address a serious risk to human safety and removing  
15 and/or selling timber already felled as at 22 December 2021.

16  
17 Somewhat unusually, the application is made in circumstances  
18 where the trial of the proceeding has been heard and judgment is  
19 reserved. VicForests seeks three different categories of order.

20  
21 First, it seeks orders permitting harvesting in four  
22 specified coupes that are affected by the injunction in accordance with  
23 operations plans and maps that apply a 240 metre diameter exclusion zone  
24 around, or in one case in the vicinity of, known sightings of greater  
25 gliders in or within 240 metres of those coupes.

26  
27 The second category of orders sought is orders permitting  
28 roading into specified coupes, again, in accordance with operations plans  
29 and maps for those two coupes.

30  
31 The third order sought is to enlarge the exception in order 2  
32 of my orders of 22 December 2021, providing further exceptions to the  
33 injunction consistent with the exceptions ordered in a parallel  
34 proceeding brought by Gippsland Environment Group, for which I gave  
35 reasons in *Gippsland Environment Group Inc v VicForests* [2022] VSC 296.

36  
37 I have decided to grant the orders sought by VicForests to  
38 permit harvesting in three of the four coupes. That is, Caraway, Llama  
39 and Numel, but not in the fourth coupe, Wine River. I will also provide

1 an exception to permit the roading that VicForests wishes to undertake in  
2 Bomber and Glendale East coupes, and I will provide for the additional  
3 general exceptions to the injunction consistent with the ruling I made in  
4 Gippsland Environment Group at paragraphs 63 to 67.

5  
6 What follows are brief reasons for making those orders. I am  
7 grateful to the parties for indicating that oral reasons will suffice in  
8 the circumstances we are all in.

9  
10 There is a threshold issue as to whether VicForests should be  
11 able to bring the application it makes today at all. The plaintiff  
12 relied on what Justice Keogh said in a ruling in WOTCH Inc v VicForests  
13 (No.8) [2021] VSC 268 at paragraph 32, and the authorities that His  
14 Honour cited in that paragraph, to support the proposition that an  
15 interlocutory order may be varied only where there has been a material  
16 change of circumstances, so as to render the enforcement of the  
17 injunction unjust, and that an application is not a vehicle or an  
18 opportunity for a party to relitigate the original application.  
19 The authorities include the decision of Justice Young of the Federal  
20 Court in Paras v Public Service Body Head of the Department of  
21 Infrastructure (No 2) [2006] FCA 652, where his Honour surveys the  
22 authorities, and then states the general principle at paragraph 9, which  
23 is that circumstances must be demonstrated that make it appropriate to  
24 entertain the application and that it is not appropriate to allow a party  
25 to re-run an argument that it could have run better or on more complete  
26 evidence the first time.

27  
28 In this case, I am satisfied that it is appropriate to  
29 entertain VicForests' application both for the specified exceptions to  
30 the injunction and to enlarge the general exception to the injunction.  
31 To begin with, I am satisfied that there has been a material change to  
32 the balance of convenience in this case. And further, I am satisfied,  
33 having had the advantage of being the judge who heard that injunction  
34 application, that the question of the general carve out to what turned  
35 out to be a general injunction was just not litigated in December 2021  
36 before my orders of 22 December 2021 were made.

37  
38 And until that point, this litigation and the parallel  
39 proceeding brought by Environment East Gippsland had lurched from one

1 urgent interlocutory injunction application to another, generally in  
2 relation to specific coupes. With my encouragement and I think the  
3 encouragement of one or two other judges in the Common Law Division, the  
4 parties focused on the questions of general principle that linked each of  
5 those interlocutory injunction applications that applied to all coupes in  
6 the Central Highlands, and also in East Gippsland in the Environment East  
7 Gippsland proceeding, in relation the adequacy of VicForests' survey  
8 protocols and in relation to the measures that should be taken for the  
9 protection of greater gliders in coupes scheduled for harvest.

10  
11 That resulted in the injunction of general application granted on 22  
12 December last year. It is also relevant in my view that, as at 22  
13 December, it was contemplated that the injunction might only be an  
14 interim one because, at that point, VicForests was expressing an  
15 intention to put on more detailed evidence early in the new year in  
16 relation to balance of convenience. As the litigation unfolded, that is  
17 not the course it chose to take, opting instead for an early trial which  
18 we have been able to achieve.

19  
20 Turning now to the balance of convenience and my assessment  
21 of it in relation to the orders that I will make at the end of this  
22 hearing. I have set out previously my reasoning in relation to balance  
23 of convenience in *Environment East Gippsland Inc v VicForests (No.2)*  
24 [2021] VSC 869 at paragraphs 54 to 57, which contain my assessment of the  
25 balance of convenience as at the date I made the orders on 22 December  
26 last year. And then, more recently, in *Gippsland Environment Group Inc v*  
27 *VicForests* [2022] VSC 296 at paragraphs 52 to 62, I provided reasons why  
28 I considered that the balance of convenience favoured excepting some  
29 specified coupes, for which there were operations plans and maps  
30 providing protection for known greater glider detections, from the scope  
31 of the general injunction.

32  
33 My approach here is consistent with the reasoning that I set  
34 out in those two decisions. In relation to the three coupes Caraway,  
35 Llama and Numel, I consider the balance of convenience favours permitting  
36 logging in those coupes in accordance with the operations plans exhibited  
37 to Monique Dawson's affidavit of 26 July 2022 and also the revised  
38 operations maps exhibited to her affidavit of 8 August 2022. All three  
39 coupes have been surveyed for greater gliders by both VicForests and

1 Kinglake Friends of the Forest, albeit not as thoroughly as the plaintiff  
2 contends is necessary.

3  
4 No greater gliders have been detected within Caraway by any  
5 of those surveys, although there is one detection within 240 metres of  
6 the south-western boundary of Caraway within a neighbouring coupe, Guinea  
7 Spice. Greater gliders have been detected in both Llama and Numel  
8 coupes. The operations maps and the plans provided for each of those  
9 coupes provide for exclusion zones centred on the detections, consistent  
10 with the opinion of Associate Professor Wardell-Johnson which I set out  
11 at some length in my reasons in Gippsland Environment Group at paragraphs  
12 17 through to 26 and, in particular, at paragraph 24.

13  
14 There remains uncertainty whether there are greater gliders  
15 that have not been detected by either VicForests or Kinglake Friends of  
16 the Forest. If there are, Kinglake Friends of the Forest has established  
17 a strongly arguable case that logging in Caraway and Llama coupes is  
18 likely to prove fatal for any greater gliders that might be there but  
19 have not been detected as yet. There is very little, barely 8 hectares,  
20 of Numel coupe that would be logged under the orders that I will be  
21 making, and in that case, the fate of any undetected gliders is likely on  
22 the evidence, as I understand it, to be less dire.

23  
24 Against that uncertainty in relation to the possibility of  
25 the existence of greater gliders that have not been detected by any of  
26 the survey efforts undertaken to date, there is evidence that the  
27 injunction of 22 December 2021 has seriously constrained VicForests'  
28 operations in a way that is affecting not only its revenue, but also the  
29 businesses of its contractors and customers and the livelihoods of their  
30 workers.

31  
32 Coupes that were carved out of the initial injunction, and there were a  
33 fair number, have all been harvested to the extent possible, and the  
34 evidence of VicForests' Chief Executive is that at present, there are  
35 only 13 coupes that are available and ready for harvesting between now  
36 and the end of September. That is not only the result of the injunction.  
37 It is the result of a combination of circumstances including the fact  
38 that it is winter, and a wet winter at that, but that is the evidence as  
39 to the current position that VicForests is in.

1           In assessing the balance of convenience, I have placed no  
2 weight on the evidence that VicForests has estimated that it has a  
3 liability to pay compensation to customers for undersupply of timber  
4 products in the order of \$22.5 million for both the previous and the  
5 current financial year. There is no evidence that any such compensation  
6 has been paid or even claimed, and as the plaintiff points out,  
7 VicForests may well be able to take advantage of the force majeure  
8 clauses in the contracts it has in place with each of its customers.

9  
10 I do, however, give weight to the evidence of Ms Dawson that 16 out of 27  
11 crews that were available to work are not working as VicForests does not  
12 have coupes available to allocate to them, and that 17 out of 19  
13 customers have less than eight weeks of supply remaining - nine of these  
14 having two weeks or less supply as at 22 July 2022. If VicForests has no  
15 liability to pay compensation to these customers for not being able to  
16 supply the agreed timber, as the plaintiff contends is the case, any  
17 losses due to lack of supply or undersupply will be borne by those  
18 customers rather than by VicForests.

19  
20 It is still a matter that I take into account in weighing the balance of  
21 convenience.

22  
23 I accept that harvesting in the three coupes identified will ameliorate  
24 the impact to be borne by both contractors and customers and their  
25 workforce to some extent, although not entirely.

26  
27 Turning to Wine River coupe, it is clear that it would only be viable to  
28 harvest this coupe if the 240 metre protection area is not centred on the  
29 greater glider detections by both VicForests' surveyors and by the  
30 plaintiff's surveying team. Ms Dawson said in her affidavit that the  
31 protection areas had been positioned to cover the 'best available' glider  
32 habitat, but I could not discern any basis in her affidavit or in the  
33 operations documents exhibited to it on which that selection had been  
34 made.

35  
36 In fact, Kinglake Friends of the Forest, in its survey conducted within  
37 the last 10 days or so, sighted two greater gliders outside the  
38 protection areas that were initially proposed by VicForests, and that  
39 rather underscores the arbitrary nature of the selection that was made.

1 Associate Professor Wardell-Johnson's opinion was very clear that the  
2 protection areas set aside should be centred on known greater glider  
3 detections, and if that is done, as the second of the two maps of Wine  
4 River coupe annexed to Ms Dawson's affidavit of 8 August 2022  
5 demonstrates, none of Wine River coupe would be available for harvest.

6  
7 So, given that the protection that is supported by Associate Professor  
8 Wardell-Johnson cannot be put in place for the detected greater gliders  
9 in Wine River I do not consider that the balance of convenience would  
10 favour excepting that coupe from the injunction.

11  
12 The orders sought in relation to the roading coupes are not seriously  
13 opposed by Kinglake Friends of the Forest. It is not proposed that any  
14 trees be felled and, for the avoidance of doubt and to give certainty as  
15 to what is permitted, I will include those two coupes in the orders that  
16 I make.

17  
18 And as to the more extended exception from the injunction, my reasoning  
19 is as set out in my reasons in Gippsland Environment Group at paragraphs  
20 63 to 67 based on identical evidence.

## 21 22 ORDERS

23 So, the orders that I make are in the form sought by VicForests except  
24 that Wine River will be excluded from paragraph 1.

25  
26 So, the first order is that paragraph 1 of my orders dated 22 December  
27 2021 does not restrain the defendant from conducting Timber Harvesting  
28 Operations in each of Caraway, Llama, Numel, Bomber and Glendale East,  
29 generally in accordance with the operations plan and map that are  
30 specified in the orders.

31  
32 The second order is that paragraph 1 of my orders of 22 December 2021  
33 does not restrain the defendant from

34 (a) felling or cutting trees or parts of trees as otherwise advised,  
35 ordered or directed by a responsible authority, including the Department  
36 of Environment, Land, Water and Planning or Parks Victoria;

37 (b) felling trees or parts of trees for the maintenance of any road;

38 (c) cutting limbs of trees for the purposes of seed collection;

39 (d) regeneration activities after permitted logging or

1 (e) undertaking any work within a coupe to manage or prevent  
2 environmental degradation, whether on the instruction, recommendation or  
3 direction of the Department of Environment, Land, Water and Planning or  
4 as otherwise required to comply with the Code of Practice for Timber  
5 Production 2014 (2022 version).

6  
7 Then, by consent, orders to set aside the subpoenas issued to  
8 Buckett Earthmoving, Ironwood Wharf and Bridge Components, Longwarry  
9 Sawmilling, Radial Timber Australia, Reid Brothers Timber, Stafford  
10 Logging, Victorian Sustainable Products, North East Logging, Mectec Pty  
11 Ltd and Parkside Milling.

12  
13 Then a further order by consent that the court will return to  
14 the relevant addressee of a subpoena any documents produced by the  
15 addressees of the subpoena listed in paragraph 3.

16  
17 And then order 5 is that as soon as practicable, the defendant is to  
18 provide a copy of this order to the addressees that the subpoenas  
19 referred to in paragraph 3.

20  
21 And then to wrap up the orders I will make the order that I have to make  
22 under s42E(1) of the Evidence (Miscellaneous Provisions) Act for this  
23 hearing to have been conducted by audio visual link.

24  
25 I will reserve liberty to apply and I will reserve costs.