



Summary of Judgment

VICFORESTS v ENVIRONMENT EAST GIPPSLAND INC & ANOR

[2023] VSCA 159

27 June 2023

Today, the Court of Appeal (Emerton P, Macaulay JA and Kaye JA) dismissed an appeal by VicForests against the decision of a judge in the Trial Division of the Supreme Court.

The respondents, Environment East Gippsland Inc (EEG) and Kinglake Friends of the Forest Inc (KFF), are incorporated associations that have a special interest in the preservation of the forests in East Gippsland and the Central Highlands respectively. EEG and KFF became concerned that VicForests' timber harvesting operations in those areas threatened the survival of two species of gliding mammals, the southern greater glider and the yellow-bellied glider. They brought proceedings in the Supreme Court seeking declarations and injunctions that, in substance, prevented VicForests from carrying out harvesting operations unless it took certain steps to comply with obligations under the regulatory framework, in particular the *Code of Practice for Timber Production 2014 (as amended)* ('Code').

The Code requires the application of the 'precautionary principle' during planning for harvesting, meaning 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'. It also requires the identification of biodiversity values during planning and prior to harvesting.

The trial judge found, among other things, that VicForests' timber harvesting operations did not comply with the precautionary principle and threatened the gliders' survival. The judge granted injunctions and made declarations which prevented VicForests from carrying out timber harvesting operations in East Gippsland and the Central Highlands unless certain steps were taken. These steps included using a reasonably practicable survey method likely to detect gliders present in a coupe targeted for harvesting and, when detected, undertaking specified actions including retaining 60% of the basal area of eucalypts in the harvested area of the coupe and implementing 'exclusion areas'.

The Court of Appeal held that the trial judge had correctly interpreted the requirements of the Code and that the declarations and injunctions were lawful. Contrary to VicForests' submissions, the precautionary principle does not merely require the adoption of a certain decision-making process when planning timber harvesting. Rather, the principle, as it is expressed in the Code, is directed to ensuring that proper measures are taken to prevent environmental degradation. The trial judge was correct to conclude that the conservation of biodiversity values is a substantive obligation imposed by the Code and to assess, on the expert ecological evidence before her, whether VicForests' harvesting operations sufficiently addressed the threats faced by the two glider species. Having done so, it was open to her Honour to determine what were the minimum measures necessary to protect against such threats.

The Court of Appeal also held that the trial judge was correct in deciding that EEG and KFF had established the necessary equity to attract the declaratory and injunctive relief that was ultimately granted.

Applications to cross-appeal by EEG and KFF concerning the ambit of the injunctions were refused.

NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.