

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

No. S CI 00503 of 2016

BETWEEN

ENVIRONMENT EAST GIPPSLAND INC

Plaintiff

and

VICFORESTS

Defendant

AMENDED STATEMENT OF CLAIM

(filed pursuant to the Orders of Justice Emerton made on 12 September 2016)

Date of document:	18 March 2016 12 September 2016
Filed on behalf of:	Plaintiff
Environmental Justice Australia	Ph: (03) 8341 3100
Level 3, 60 Leicester Street	Fx: (03) 8341 3111
CARLTON VIC 3053	Code: CR009995
Email: danya.jacobs@envirojustice.org.au	Ref: Danya Jacobs

Parties

1. The Plaintiff (**EEG**) is an association incorporated under the *Associations Incorporation Reform Act 2012* (Vic).
2. The Defendant (**VicForests**):
 - (a) is a State body under s 14 of the *State Owned Enterprises Act 1992* (Vic);
 - (b) was declared to be a State business corporation on 28 October 2003;
 - (c) is a body corporate capable of being sued in its own name;
 - (d) has a function to undertake the sale and supply of timber resources in Victorian State forests on a commercial basis;

- (b) produced newsletters, articles, and other written information about the environment of East Gippsland particularly forests;
 - (c) made submissions to Government in relation to land use and management, particularly native forests and forest-dependant species;
 - (d) responded to invitations by the Governments of Victoria and of the Commonwealth to provide comments and submissions on environment-related matters;
 - (e) been represented on committees established by the Victorian Government concerned with the environment, particularly forests, including the Regional Forest Agreement Consultative Committee and the East Gippsland Fire Roundtable; and
 - (f) conducted guided walking tours and camps in the forest in East Gippsland, including in rainforest.
5. Accordingly, EEG has a special interest in the subject matter of this proceeding, including but not limited to the preservation of environmental values in East Gippsland's forests and the enforcement of the statutory framework governing timber harvesting operations in East Gippsland (including the compliance by VicForests with applicable legislative requirements and standards), and has standing to bring this application.

The Allocation Order

6. On or about 1 October 2013, the Minister for Agriculture made an allocation order (the **Allocation Order**) under s 13 of the *Sustainable Forests (Timber) Act 2004* (**SFT Act**).

PARTICULARS

Victoria Government Gazette, No S343, 1 October 2013.

7. On or about 30 October 2014, the Minister amended the Allocation Order.

PARTICULARS

Victoria Government Gazette, No S405, 30 October 2014.

12. The Timber Release Plan identifies by map, schedule and coupe number the areas of forest in the East Gippsland FMA that were the subject of release.

12A. Section 38(1) of the SFT Act requires that a plan prepared under s 37 of that Act must include the matters specified in that subsection.

13. Contrary to s 38(1)(b) of the SFT Act, the Timber Release Plan prepared by VicForests failed to detail the approximate timing of timber harvesting in the identified coupes.

14. The Timber Release Plan designated coupe numbers 830-507-0020, 830-507-0021 and 830-507-0023 at Kuark Forest for timber harvesting (the **Kuark forestry coupes**).

15. VicForests:

- (a) commenced timber harvesting operations in coupe 830-507-0023 in or about January 2016 and prior to 13 January 2016;
- (b) commenced timber harvesting operations in coupe 830-507-0020 in late January or early February 2016 and prior to 8 February 2016;
- (c) published a notice on its website stating as at 12 February 2016 (or earlier) that coupe 830-507-0021 had a harvest status of "In Progress".

PARTICULARS

VicForests' Notice of Timber Harvesting Safety Zones, accessed via VicForests' website on or about 12 February 2016.

The East Gippsland Forest Management Plan and Forest Management Zoning System

16. In or about December 1995, the Secretary of the Department of Environment, Land, Water and Planning (the **Secretary**) made a working plan for the East Gippsland FMA under s 22 of the Forests Act (the **East Gippsland FMP**).

17. The Kuark forestry coupes are:

- (a) located in the East Gippsland FMA; and

- (e) requires that VicForests:
 - i. plan and manage timber harvesting operations in compliance with relevant biodiversity conservation measures specified within the Management Procedures;
 - ii. identify biodiversity values listed in the Management Procedures prior to roading and harvesting and address risks to these values through management actions consistent with the Management Procedures during planning for forestry operations;
 - iii. protect areas excluded from harvesting from the impacts of timber harvesting operations.

The Management Procedures and Planning Standards

23. The Management Procedures:

- (a) provide detailed mandatory operational instructions, including region specific instructions for timber harvesting;
- (b) apply to all commercial timber harvesting operations conducted in Victoria's State forests where the Code applies;
- (c) include the *Planning Standards for timber harvesting operations in Victoria's State forests 2014* (the **Planning Standards**);
- (d) require that VicForests:
 - i. apply the management actions for rare and threatened fauna and flora identified within areas affected by timber harvesting operations as outlined in Tables 13 and 14 of Appendix 3;

- (a) is a threatened species listed under s 16 of the FFG Act;
- (b) is, or is likely to be, present in all or some of the Kuark forestry coupes;
- (c) uses, or is likely to use, all or some of the Kuark forestry coupes for foraging and feeding; and
- (d) traverses, or is likely to traverse, all or some of the Kuark forestry coupes as part of its territory, or to travel from one part of its territory to another part.

PARTICULARS

A VicForests Pre-Logging Fauna Survey, conducted in 2014, identified evidence of the presence of a Long-Footed Potoroo in coupe 820-507-0020.

Coupe 820-507-0021 is immediately adjacent to coupe 820-507-0020.

The VicForests Long-Footed Potoroo Special Management Plan for the coupe 820-507-0023 dated 12 January 2016 records a third party sighting of a Long-Footed Potoroo in that coupe.

Andrew Lincoln of Fauna and Flora Research Collective Inc detected a Long-footed Potoroo in coupe 830-507-0023 between about 29 December 2016 and 5 January 2016.

Further particulars may be provided.

Failure to comply with the Code and the Management Procedures

28. The Management Procedures:

- (a) list the Long-Footed Potoroo as a rare or threatened fauna species; and
- (b) specify managements actions which must be applied and adhered to if a Long-Footed Potoroo is detected.

29. The management actions for the Long-Footed Potoroo require:

- (a) establishment of a 150 ha SMZ for each detection site; and

- (f) failed to address risks to the Long-footed Potoroo through management actions consistent with the Management Procedures prior to commencing timber harvesting operations in some or all of the Kuark forestry coupes.

31. Accordingly, the timber harvesting operations conducted and proposed to be conducted in the Kuark forestry coupes are or will be unlawful.

Breach of the precautionary principle

32. At all relevant times, VicForests knew, or ought to have known, that the Long-Footed Potoroo was likely to be present in the Kuark forestry coupes.

PARTICULARS

The Plaintiff refers to and repeats the Particulars to paragraph 27 above.

The Kuark forestry coupes fall within the known distributional range of the Long-footed Potoroo and include forest types preferred by the Long-footed Potoroo.

Further particulars may be provided.

33. In order to comply with the precautionary principle, VicForests was required:
- (a) wherever practical to avoid serious or irreversible damage to the Long-Footed Potoroo;
 - (b) properly to assess the risk-weighted consequences of various management options for to the Long-Footed Potoroo.
34. The East Gippsland FMP requires that:
- (a) 400-500 hectares around confirmed sites of Long-footed Potoroo will be protected;
 - (b) the protected area will comprise suitable habitat;
 - (c) timber harvesting and new roading will be excluded; and
 - (d) once 17,500 hectares around confirmed sites has been protected new Long-footed Potoroo records may be used to adjust the FMZ scheme.

Procedures in some or all of the Kuark forestry coupes prior to commencing timber harvesting operations in those coupes;

- (h) failed to act, or to act proportionately and appropriately, on reports that the Long-footed Potoroo is present in or around the Kuark forestry coupes.

36. Accordingly, VicForests:

- (a) has breached the precautionary principle in its planning and conduct of timber harvesting operations in the Kuark forestry coupes; and
- (b) will, unless restrained, fail to comply with the precautionary principle in the conduct of timber harvesting operations in the Kuark forestry coupes.

Breaches relating to the East Gippsland Galaxias

37. The East Gippsland Galaxias (**Galaxias**):

- (a) is a species within the Mountain Galaxias (*Galaxias olidus*) species complex; and
- (b) is listed as a threatened species under s 16 of the FFG Act;
- (c) is present in streams and waterways within 1 km upstream or downstream of some or all of the Kuark forestry coupes.
- (d) is likely to be present in streams and waterways in or adjacent to all or some of the Kuark forestry coupes;
- (e) is likely to be present in streams and waterways within 1 km upstream or downstream of some or all of the Kuark forestry coupes.

PARTICULARS

The watercourses within the Kuark forestry coupes are within the Arte and/or Little Arte rivers in the headwater catchment of the upper Arte river.

Galaxias range is described as comprising 2 small adjacent streams (the Arte and Little Arte rivers) in a headwater catchment of the upper Arte river in the

including that referred to at paragraph 37 above, and contrary to the SFT Act, the Code, the Management Procedures and the Planning Standards, VicForests:

- (a) did not apply to the Secretary to establish a SPZ or SPZs as required by the Management Procedures;
 - (b) alternatively, made an application or applications to the Secretary which did not conform with the requirements of the Management Procedures;
 - (c) commenced timber harvesting operations in the Kuark forestry coupes, either without making an application or applications as required by Management Procedures or without awaiting the determination of the application or applications that were made;
 - (d) alternatively, applied a management action inconsistent with the requirements of the Management Procedures;
 - (e) failed to address risks to the Galaxias through management actions consistent with the Management Procedures prior to commencing timber harvesting operations in some or all of the Kuark forestry coupes; and
 - (f) failed to apply or adhere to the management action for the Galaxias consistent with the Management Procedures.
42. Accordingly, the timber harvesting operations conducted and proposed to be conducted in the Kuark forestry coupes are or will be unlawful.

Breach of the precautionary principle

43. At all relevant times, VicForests knew or ought to have known that Galaxias were likely to be present in the watercourses in, adjacent to, or within 1 km upstream or downstream, of some or all of the Kuark forestry coupes.

PARTICULARS

- (e) await DELWP's verification of the reports of Galaxias referred to in paragraph 37 above prior to commencing timber harvesting operations in some or all of the Kuark forestry coupes;
- (f) await the establishment of an SPZ consistent with the Management Procedures for the Galaxias prior to commencing timber harvesting operations in some or all of the Kuark forestry coupes; and
- (g) failed to act, or to act proportionately and appropriately, on reports that the Galaxias is present in or around the Kuark forestry coupes.

46. Accordingly, VicForests:

- (a) has breached the precautionary principle in its planning and conduct of timber harvesting operations in the Kuark forestry coupes; and
- (b) will, unless restrained, fail to comply with the precautionary principle in the conduct of timber harvesting operations in the Kuark forestry coupes.

Failure to have regard to scientific information

47. Prior to the commencement of, or during, timber harvesting operations in the Kuark forestry coupes, VicForests and DELWP were provided with evidence of the detection of the Galaxias in the Arte river system within 1 kilometer upstream or downstream of some or all of the Kuark forestry coupes.

PARTICULARS

VicForests and DELWP were provided with evidence of the Galaxias presence by the Fauna and Flora Research Collective Inc and the Goongerah Environmental Centre by several emails commencing on 8 January 2016.

Further particulars may be provided.

53. Accordingly, in breach of the Code, VicForests failed to consider, adequately or at all, the advice of relevant experts and relevant research when planning and conducting its timber harvesting operations.

Breaches relating to the Yellow-Bellied Glider

54. The Yellow-bellied Glider (**Glider**):

- (a) is present in high densities (within the meaning of the Management Procedures) in and around all or some of the Kuark forestry coupes;
- (b) is present in high densities in parts of all or some of the Kuark forestry coupes;
- (c) is likely to be present in high densities in all or some of the Kuark forestry coupes;
- (d) uses, or is likely to use, all or some of the Kuark forestry coupes for denning, nesting, breeding, foraging and feeding;
- (e) traverses, or is likely to traverse, all or some of the Kuark forestry coupes as part of its territory, or to travel from one part of its territory to another part.

PARTICULARS

Gliders were detected by surveys carried out by Goongerah Environment Centre and reported to the DELWP on about 8 February 2016 and 25 February 2016.

Gliders were detected by a survey carried out by the DELWP on about 19 February 2016.

Both surveys identify the Glider as being present in and around all or some of the Kuark forestry coupes at densities exceeding 0.2 per hectare.

The Plaintiff's lawyers wrote to VicForests on 25 January 2016 providing evidence that Gliders were present within and proximate to some or all of the Kuark forestry coupes.

Further particulars may be provided.

55. All or some of the Kuark forestry coupes:

- (a) contain suitable habitat for Gliders;

- (c) failed to address risks to the Glider through management actions consistent with the Management Procedures prior to commencing or continuing timber harvesting operations in some or all of the Kuark forestry coupes;
- (d) failed to apply or adhere to the management action for the Glider consistent with the Management Procedures;
- (e) commenced or continued timber harvesting operations in some or all of the Kuark forestry coupes prior to DELWP's verification of the detections detailed in the report dated 8 February 2016 referred to in the particulars to paragraph 54 above.

60. Accordingly, the timber harvesting operations conducted and proposed to be conducted in the Kuark forestry coupes are or will be unlawful.

Breach of the precautionary principle

61. At all relevant times, VicForests knew, or ought to have known, that:

- (a) the Glider was likely to be present in and around the Kuark forestry coupes at high densities; and
- (b) the Kuark forestry coupes contained suitable or high quality habitat for the Glider.

PARTICULARS

The Plaintiff refers to and repeats the Particulars to paragraph 54 above.

The Kuark forestry coupes fall within the known distributional range of the Glider and include forest types preferred by the Glider.

All or some of the Kuark forestry coupes contain high densities of hollow-bearing trees and suitable habitat for the Glider.

Further particulars may be provided.

62. In order to comply with the precautionary principle, VicForests was required:

- (a) wherever practical to avoid serious or irreversible damage to the Glider;

continuing timber harvesting operations in some or all of the Kuark forestry coupes;

- (f) address risks to the Glider through management actions consistent with the Management Procedures prior to commencing or continuing timber harvesting operations in some or all of the Kuark forestry coupes; or
- (g) act, or to act proportionately and appropriately, on reports that the Glider is present in or around the Kuark forestry coupes.

65. Accordingly, VicForests:

- (a) has breached the precautionary principle in its planning and conduct of timber harvesting operations in the Kuark forestry coupes; and
- (b) will, unless restrained, fail to comply with the precautionary principle in the conduct of timber harvesting operations in the Kuark forestry coupes.

Failure to have regard to scientific information

66. Prior to the commencement of, and during, timber harvesting operations in the Kuark forestry coupes, VicForests was made aware of the presence of the Glider in and around the Kuark forestry coupes, including in a high density.

PARTICULARS

The Plaintiff refers to and repeats the particulars to paragraph 54 above.

Further particulars may be provided.

67. Notwithstanding paragraph 66, VicForests did not:

- (a) conduct, or intend or plan to conduct, surveys to determine the presence, and extent of the presence of the Glider, prior to commencing or continuing timber harvesting operations; and

The Plaintiff's lawyers provided VicForests with details of the location of some Blackfellow's Hemp in and adjacent to coupe 830-507-0020 and 830-507-0021 by letter and map dated 10 February 2016.

The Plaintiff's lawyers provided VicForests and DELWP with details of locations of Blackfellow's Hemp proximate to some or all of the Kuark forestry coupes by letter dated 25 January 2016, with enclosed map and photographs.

Andrew Lincoln of Fauna and Flora Research Collective Inc detected Blackfellow's Hemp within and proximate to some or all of the Kuark forestry coupes on about 24 January 2016, 26 January 2016, 13 February 2016 and 18 February 2016.

Some of the Blackfellow's Hemp plants detected by Mr Lincoln on 13 February 2016 were damaged or destroyed.

Jill Redwood of the Plaintiff detected a Blackfellow's Hemp plant within or proximate to coupe 830-507-0020 on or about 22 February 2016. This plant was damaged or destroyed.

Further particulars may be provided.

Failure to comply with the Code and the Management Procedures

70. The Management Procedures:

- (a) list Blackfellow's Hemp as a rare or threatened flora species; and
- (b) specify management action which must be applied if Blackfellow's Hemp is detected.

71. Clause 4.5.2 of the Planning Standards requires the following rules be applied to detected flora species in the East Gippsland FMA:

- (a) include all verified populations of species regarded as threatened at a State or national level in the SPZ or SMZ;
- (b) include substantial representative populations of species that are rare in Victoria, and poorly known, have few records or are at the edge of their range in East Gippsland in the SPZ or SMZ;

the Kuark forestry coupes prior to commencing or continuing timber harvesting operations;

- (d) commenced or continued timber harvesting operations in the Kuark forestry coupes, either without making an application as required by Management Procedures or without awaiting the determination of the application that was made;
- (e) failed to address risks to the Blackfellow's Hemp through management actions consistent with the Management Procedures prior to commencing or continuing timber harvesting operations in some or all of the Kuark forestry coupes;
- (f) failed to apply or adhere to the management action for the Blackfellow's Hemp consistent with the Management Procedures;
- (g) commenced or continued timber harvesting operations prior to DELWP's verification of Blackfellow's Hemp detections referred to in the particulars to paragraph 69 above;
- (h) damaged or destroyed Blackfellow's Hemp in or adjacent to coupe 830-507-0020.

75. Accordingly, the timber harvesting operations conducted and proposed to be conducted in the Kuark forestry coupes are and will be unlawful.

Breach of the precautionary principle

76. At all relevant times, VicForests knew, or ought to have known, that Blackfellow's Hemp:

- (a) was present in, and within 250 m of, the Kuark forestry coupes; and
- (b) was likely to be present within the Kuark forestry coupes.

PARTICULARS

The Plaintiff refers to and repeats the Particulars to paragraph 69 above.

- (d) did not await DELWP's establishment of SMZs, site inspection and detailed planning consistent with the Management Procedures for the Blackfellow's Hemp prior to commencing or continuing timber harvesting operations in some or all of the Kuark forestry coupes;
- (e) failed to address risks to the Blackfellow's Hemp through management actions consistent with the Management Procedures prior to commencing or continuing timber harvesting operations in some or all of the Kuark forestry coupes;
- (f) failed to act, or to act proportionately and appropriately, on reports that the Blackfellow's Hemp is present in or around the Kuark forestry coupes;
- (g) damaged or destroyed Blackfellow's Hemp in or adjacent to coupe 830-507-0020.

79. Accordingly, VicForests:

- (a) has breached the precautionary principle in its planning and conduct of timber harvesting operations in the Kuark forestry coupes; and
- (b) will, unless restrained, fail to comply with the precautionary principle in the conduct of timber harvesting operations in the Kuark forestry coupes.

Failure to have regard to scientific information

80. VicForests was informed of the presence of Blackfellow's Hemp:

- (a) within less than 250 meters of coupe 830-507-0023 on about 25 January 2016;
- (b) within about 500 m of coupes 830-507-0020 and 830-507-0021 on about 25 January 2016;
- (c) within and adjacent to coupes 830-507-0020 and 830-507-0021 on about 8 February 2016.

- (e) likely to be present within 250 m of all or some of the Kuark forestry coupes.

PARTICULARS

The Plaintiff's lawyers provided VicForests with details of locations of Slender Tree Fern proximate to some or all of the Kuark forestry coupes by letter dated 25 January 2016, with enclosed map and photographs.

Andrew Lincoln of Fauna and Flora Research Collective Inc detected Slender Tree Fern proximate to some or all of the Kuark forestry coupes on about 24 January 2016.

Further particulars may be provided.

Failure to comply with the Code and the Management Procedures

84. The Management Procedures:

- (a) list the Slender Tree-Fern as a rare or threatened flora species; and
- (b) specify management action which must be applied if the Slender Tree-Fern is detected.

85. The Plaintiff refers to and repeats paragraph 71 above.

86. The management actions for the Slender Tree-Fern require:

- (a) establishment of a SMZ of 250 m radius over verified populations;
- (b) a site inspection and detailed planning to be conducted in consultation with DEPI (now DELWP) to ensure the species is adequately protected during timber harvesting operations.

87. Notwithstanding the presence, and likely presence, of Slender Tree Fern in or within 250 meters of the Kuark forestry coupes, and contrary to the SFT Act, the Code, the Management Procedures and the Planning Standards, VicForests:

- (a) failed to identify, or take steps to identify, the Slender Tree Fern during planning and prior to commencing timber harvesting operations in some or all of the Kuark forestry coupe as required by the Code;

- (b) failed to act, or to act proportionately and appropriately, on reports that the Slender Tree Fern is present in or around the Kuark forestry coupes
- (c) failed to address risks to the Slender Tree Fern through management actions consistent with the Management Procedures prior to commencing or continuing timber harvesting operations in some or all of the Kuark forestry coupes.

92. Accordingly, VicForests:

- (a) has breached the precautionary principle in its planning and conduct of timber harvesting operations in the Kuark forestry coupes; and
- (b) will, unless restrained, fail to comply with the precautionary principle in the conduct of timber harvesting operations in the Kuark forestry coupes.

Failure to have regard to scientific information

93. VicForests was informed of the presence of Slender Tree Fern proximate to the Kuark forestry coupes on 25 January 2016.

PARTICULARS

The Plaintiff refers to and repeats the particulars to paragraph 83 above.

94. Notwithstanding paragraph 93, VicForests did not conduct surveys to determine the presence, and extent of the presence of Slender Tree Fern, prior to commencing timber harvesting operations in coupe 830-507-0020.
95. Accordingly, in breach of the Code, VicForests failed to consider, adequately or at all, the advice of relevant experts and relevant research when planning and conducting its timber harvesting operations.

Breaches in relation to rainforest

96. The Code contains the following definition of “rainforest”:

101. Section 4.4.9 of the Management Procedures requires that rainforest be protected from timber harvesting operations through the implementation of the following specific measures:

- (a) the exclusion of non linear stands that are 0.1 ha or more in size but less than 0.4 ha from timber harvesting operations.
- (b) the exclusion of linear stands that are at least 0.1 ha but are less than 0.2 ha from timber harvesting operations.
- (c) the exclusion of linear stands that are at least 0.2 ha but are less than 0.4 ha from timber harvesting operations, and protection of these stands with a 20 m buffer;
- (d) the exclusion of all rainforest stands (including non-linear and linear stands) equal to or exceeding 0.4 ha from timber harvesting operations, and protection of these stands with a 40 m buffer; and
- (e) the distribution of slash away from retained rainforest stands or buffers.

102. Despite the presence and likely presence of an area or areas of rainforest in and proximate to coupe 830-507-0020, and contrary to the Code and the Management Procedures, VicForests:

- (a) failed to identify, or take adequate steps to identify, some or all of the rainforest in the Kuark forestry coupes prior to commencing timber harvesting operations in coupe 830-507-0020;
- (b) failed to exclude some or all of the rainforest greater than 0.1 ha from timber harvesting operations prior to commencing timber harvesting operations in coupe 830-507-0020;

Breaches in relation to Euastacus crayfish

108. On about 24 January 2016, a new species of Euastacus crayfish (**Crayfish**), forming part of the East Gippsland Cray species complex, was discovered in the Arte river system on a stream within 1 km upstream or downstream of coupe 830-507-0023, and within about 1 km of coupe 830-507-0020 and 830-507-0021.

109. The Crayfish:

- (a) is likely to be present in all or some of the Kuark forestry coupes;
- (b) uses or is likely to use all or some of the Kuark forestry coupes for feeding;
- (c) is present on a watercourse within about one kilometre of all or some of the Kuark forestry coupes;
- (d) is likely to be present on a watercourse, within one kilometre upstream or downstream of all or some of the Kuark forestry coupes;
- (e) is present on a watercourse, within one kilometre upstream or downstream of all or some of the Kuark forestry coupes.

PARTICULARS

On or about 9 January 2016, 24 January 2016 and 16 March 2016, Andrew Lincoln of the Fauna and Flora Research Collective Inc detected undescribed species of Euastacus crayfish within 1 kilometer upstream or downstream of some or all of the Kuark forestry coupes.

On or about 12 or 13 March 2016, 28 May 2016 and 29 May 2016, Robert McCormack of Australian Aquatic Biological Pty Ltd detected undescribed species of Euastacus crayfish within 1 kilometer upstream or downstream of some or all of the Kuark forestry coupes.

Breach of the precautionary principle

110. On 25 January 2016, VicForests was advised of the existence of the Crayfish and its presence as set out at paragraph 108 above.

115. Accordingly, VicForests:

- (a) has breached the precautionary principle in its planning and conduct of timber harvesting operations in the Kuark forestry coupes; and
- (b) will, unless restrained, fail to comply with the precautionary principle in the conduct of timber harvesting operations in the Kuark forestry coupes.

Failure to have regard to scientific information

116. By reasons of the facts alleged in paragraphs 108 to 114, in breach of the Code, VicForests failed to have regard to the advice of relevant experts and relevant research in planning and conducting its timber harvesting operations.

Breaches in relation to Burrowing Crayfish

116A. Most species of *Engaeus* crayfish in Australia are endangered or critically endangered.

116B. On about 28 or 29 May 2016, a species of burrowing crayfish suspected to be a new, undescribed *Engaeus* species (**Burrowing Crayfish**) was detected in coupe 830-507-0020.

PARTICULARS

On about 28 or 29 May 2016, Robert McCormack of Australian Aquatic Biological Pty Ltd, detected a burrowing crayfish in coupe 830-507-0020 that he suspected to be a new, undescribed *Engaeus* crayfish.

116C. The Burrowing Crayfish:

- (a) is present in all or some of the Kuark forestry coupes;
- (b) is likely to be present in all or some of the Kuark forestry coupes;
- (c) uses or is likely to use all or some of the Kuark forestry coupes for feeding.

116D. On 2 August 2016, VicForests was advised of the discovery of the Burrowing Crayfish in coupe 830-507-0020.

- (b) has not conducted, and does not intend or plan to conduct, any or any adequate surveys to determine the presence and the extent of the Burrowing Crayfish in and around the Kuark forestry coupes;
- (c) has not applied, and does not intend or plan to apply, any management action for the Burrowing Crayfish;
- (d) has not applied, and does not intend or plan to apply, proportionate and appropriate management actions to protect the Burrowing Crayfish in the Kuark forestry coupes;
- (e) has not applied for, and does not intend to apply or await for DELWP to establish management zones to adequately protect the Burrowing Crayfish found in the Kuark forestry coupes;
- (f) has not applied for, and does not intend to apply or await for DELWP's verification of the reports of Burrowing Crayfish detections referred to at paragraph 116D;
- (g) does not intend to await for DELWP or third parties to undertake adequate surveys or studies to investigate or determine the species or conservation status of Burrowing Crayfish in coupe 830-507-0020.

116I. Accordingly, VicForests:

- (a) has breached the precautionary principle in its planning and conduct of timber harvesting operations in the Kuark forestry coupes; and
- (b) will, unless restrained, fail to comply with the precautionary principle in the conduct of timber harvesting operations in the Kuark forestry coupes.

Failure to have regard to scientific information

116J. By reasons of the facts alleged in paragraphs 116A to 116H, in breach of the Code,

VicForests:

- (b) as far as possible, the SPZ boundaries should follow recognizable landscape features such as ridges, spurs, watercourses or roads but must not be less than 300 m wide at any point.

Failure to comply with the Code

- 121. Notwithstanding the likely presence of Large Brown Tree Frog in the Kuark forestry coupes, VicForests failed to identify, or take steps to identify, the Large Brown Tree Frog during planning and prior to commencing timber harvesting operations in some or all of the Kuark forestry coupe as required by the Code.

Failure to comply with precautionary principle

- 122. Contrary to the purpose and terms of the Code, the management action in the Action Statement for the Large Brown Tree Frog has not been included in the Management Procedures.
- 123. The absence of a management action in the Management Procedures for the Large Brown Tree Frog requires a precautionary approach to be taken by VicForests in timber harvesting operations to be conducted in areas which are potential habitat for the Large Brown Tree Frog.
- 124. In order to comply with the precautionary principle, VicForests was required:
 - (a) wherever practical to avoid serious or irreversible damage to the Large Brown Tree Frog;
 - (b) properly to assess the risk-weighted consequences of various management options for the Large Brown Tree Frog.
- 125. In breach of the precautionary principle, VicForests has failed to take a precautionary approach or to comply with the precautionary principle in its timber harvesting

127. Prior to commencing timber harvesting operations in some or all of the Kuark forestry coupes, and despite the presence or likely presence in some or all of the Kuark forestry coupes of:

- (a) Long-Footed Potoroo;
- (b) Galaxias;
- (c) the Glider;
- (d) Blackfellow's Hemp;
- (e) Slender Tree-Fern;
- (f) Large Brown Tree Frog; and
- (g) Rainforest,

VicForests failed to prepare a Forest Coupe Plan for some or all of the Kuark forestry coupes that clearly and accurately identifies areas within some or all of the Kuark forestry coupes that are to be excluded from harvesting and associated activities or to which prescribed management actions apply, or alternatively failed to prepare a Forest Coupe Plan for some or all of the Kuark forestry coupes that identifies and describes management actions consistent with the Management Procedures.

128. By reason of s 4(1) and (2) of the FFG Act, in the planning and conduct of its timber harvesting operations in the Kuark forestry coupes, VicForests is obliged to have regard to the following objectives:

- (a) guaranteeing that the listed threatened species referred to above, ~~and~~ the Crayfish and the Burrowing Crayfish can survive and flourish and retain their potential for evolutionary development in the wild;

B. the prescribed management actions set out in the East Gippsland FMP
for rare and threatened cray species;

iv. surveys and studies are completed to determine the species and conservation
status of the Burrowing Crayfish detected in coupe 830-507-0020;

v. proportionate and appropriate management action is applied and adhered to
in order to protect the Burrowing Crayfish, the Crayfish and the Galaxias in
and proximate to the Kuark forestry coupes.

- (c) An order in the nature of mandamus requiring VicForests to identify and make
publicly available the approximate timing of timber harvesting operations in the
coupes included on the Timber Release Plan.
- (d) Such further or other orders as the Court sees fit.

DATED ~~18 March 2016~~ 12 September 2016

Chris Horan

Nicola Collingwood

Rupert Watters

Environmental Justice Australia

Environmental Justice Australia

Solicitors for the Plaintiff