

20 July 2023

Rami Greiss
Executive General Manager
Consumer and Fair Trading Division
Australian Competition and Consumer Commission
23 Marcus Clarke St
CANBERRA ACT 2601

Dear Mr Greiss,

Complaint about potential greenwashing by VicForests

1. We act for the Victorian Forest Alliance (**the VFA**).
2. The VFA was established in November 2021 and is an alliance of over 38 well-established grassroots not-for-profit forest groups with a shared mission of protecting and restoring native forests in Victoria.
3. We are writing on behalf of the VFA to ask that you investigate statements made by Victoria's state-owned logging agency, VicForests, on its website: <https://www.vicforests.com.au/>. Specifically, the VFA is concerned that the statements identified in this Complaint may be false and/or misleading statements within the meaning in sections 18 and 29 in the Australian Consumer Law¹ (**ACL**). The particular statements of concern are identified at paragraph 38 of this Complaint.
4. The VFA refers to the Australian Competition and Consumer Commission's (**ACCC**) Compliance and Enforcement Priorities for 2022-2023² and 2023-2024³, which include consumer and fair trading issues in relation to environmental claims and sustainability. The VFA also notes the statement made by ACCC Chair Gina Cass-Gottlieb in an address at the National Consumer Congress Conference in June 2022 that "this priority is aimed at addressing concerns that businesses are falsely promoting environmental or green credentials to unfairly capitalise on increasing consumer demand for products or services with these benefits."⁴
5. All of the claims identified in this Complaint are assertions as to the environmental credentials and impacts of VicForests' practices and products made with Victorian native timber. The VFA is concerned that the claims may amount to greenwashing, to the extent that they are likely to induce

¹ *Competition and Consumer Act 2010* (Cth), Schedule 2.

² ACCC, '2022-23 Compliance and Enforcement Priorities' (Web Page) <<https://www.accc.gov.au/system/files/ce-priority.pdf>>.

³ ACCC, '2023-24 Compliance and Enforcement Priorities' (Web Page) <https://www.accc.gov.au/system/files/2023-24%20Compliance%20and%20Enforcement%20Priorities_0.pdf>.

⁴ Gina Cass-Gottlieb, 'ACCC Product Safety Priorities announced at National Consumer Congress speech' (Speech, National Consumer Congress, 16 June 2022) <<https://www.accc.gov.au/about-us/media/speeches/accc-product-safety-priorities-announced-at-national-consumer-congress-speech>>.

consumers to incorrectly conclude that the native timber industry in Victoria is environmentally sustainable.

VicForests

6. VicForests is a State-owned business operating in Victoria, established by the Governor in Council under section 14 of the *State-Owned Enterprises Act 1992 (Vic)* by Order published in the Victorian Government Gazette on 28 October 2003.⁵
7. A state body established under section 14 of that Act:
 - (a) is a body corporate with perpetual succession;
 - (b) shall have an official seal;
 - (c) may sue and be sued;
 - (d) may acquire, hold and dispose of real and personal property;
 - (e) may do and suffer all things that a body corporate may by law do and suffer.⁶
8. On the same date, VicForests was declared to be a State business corporation pursuant to section 17 of the *State-Owned Enterprises Act 1992 (Vic)*.
9. A State business corporation is required to operate its business as efficiently as possible, consistent with prudent commercial practice, and to maximise its economic contribution to the State. The State business corporation form is suitable for entities where there is a commercial focus and where a skills-based Board is required to navigate through and make decisions on a range of complex infrastructure, commercial, legal, environmental or other issues.⁷
10. VicForests is responsible for managing the harvest, sale and regrowth of timber from Victorian state forests on a commercial basis, on behalf of the Victorian Government. The functions of VicForests are to:
 - (a) undertake the sale and supply of timber resources in Victorian State forests, and related management activities, as agreed by the Treasurer and the Minister, on a commercial basis;
 - (b) develop and manage an open and competitive sales system for timber resources; and
 - (c) pursue other commercial activities as agreed by the Treasurer and the Minister.⁸

Application of the ACL to VicForests

11. The ACL applies to VicForests whether or not VicForests is considered, in this context, to be the Crown.
12. The scope of the application of the ACL in Victoria is set out in section 12 of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)*. It provides that the ACL applies to:
 - (a) persons carrying on business within this jurisdiction; or
 - (b) bodies corporate incorporated or registered under the law of this jurisdiction; or
 - (c) persons ordinarily resident in this jurisdiction; or

⁵ Victorian Government, 'State-owned Enterprises (State Body – VicForests) Order 2003', *Victorian Government Gazette*, No. S 198, 28 October 2003.

⁶ *State-Owned Enterprises Act 1992 (Vic)*, s 14(3).

⁷ Public Sector Commission, 'Legal Form and Governance Arrangements for Public Entities' (Web Page, 11 October 2022) <<https://vpssc.vic.gov.au/governance/public-entity-types-features-and-functions/employment-arrangements-for-public-entities/legal-form-and-governance-arrangements-for-public-entities/>>.

⁸ Victorian Government, 'State-owned Enterprises (State Body – VicForests) Order 2003', *Victorian Government Gazette*, No. S 198, 28 October 2003, [3].

- (d) persons otherwise connected with this jurisdiction.
13. Some specific provisions in Commonwealth and State legislation permit conduct that would normally contravene the *Competition and Consumer Act 2010* (Cth) (**the CC Act**).⁹ Pursuant to section 86A of the *State-Owned Enterprises Act 1992* (Vic) and section 51 of the CC Act, VicForests is expressly exempt from certain provisions in the CC Act, namely the provisions in Part IV relating to restricted trade practices provisions, in respect of conduct engaged in before 1 July 2015. Such express exemption implies that the ACL otherwise applies to VicForests.
 14. Whilst VicForests is a public entity and, in some legislative contexts, bears the same responsibilities as the Crown¹⁰, the VFA contends that it is not the Crown for the purposes of the ACL. This inference can be drawn having regard to the express exemption in the *State-Owned Enterprises Act 1992* (Vic).
 15. However, even if VicForests is the Crown for the purposes of the ACL, the relevant provisions still apply.
 16. Victoria has legislated to bind the Crown in its various manifestations to the ACL so far as the Crown "carries on a business", either directly or by an authority of the jurisdiction concerned.¹¹ "Authority" is defined narrowly as an authority established under the *Business Licences Authority Act 1998* (Vic) and therefore does not include VicForests. It must instead be established that, via VicForests, the Crown is directly carrying on a business.
 17. Section 18 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) provides that certain activities do not amount to the Crown carrying on a business, for the purposes of sections 16 and 17, including the acquisition of primary products by a government body under legislation. The term "primary products" is defined in that section to include:
 - (a) agricultural or horticultural produce¹²; or
 - (b) crops, whether on or attached to the land or not; or
 - (c) animals (whether dead or alive); or
 - (d) the bodily produce (including natural increase) of animals.
 18. Accordingly, the Crown is not exempt under section 18 from the application of the ACL so far as it carries on a business for the purposes of the management and sale of timber resources in Victoria.
 19. The term "business" is not defined under the ACL, except to the extent that it includes not-for-profit businesses.¹³ Australian Courts have observed that the term business "should be construed widely but will find its ultimate meaning in the context in which it is found"¹⁴.
 20. In *Murphy v Victoria (No 2)*¹⁵, the Victorian Court of Appeal considered the meaning of "carrying on a business" in the context of the Crown, noting that there is a distinction between those functions of government that are purely governmental or regulatory and those that entail carrying on a business.¹⁶ The Court observed that the carrying out of a function of government in the

⁹ ACCC, 'Exceptions Under Commonwealth State and Territory Legislation' (Web Page) <<https://www.accc.gov.au/about-us/accc-role-and-structure/legislation-we-enforce/exceptions-under-commonwealth-state-and-territory-legislation>>.

¹⁰ For example, any applicable responsibilities under the *Public Administration Act 2004* (Vic).

¹¹ *Australian Consumer Law and Fair Trading Act 2012* (Vic), s 16.

¹² Defined in *Competition and Consumer (Industry Codes – Horticulture) Regulations 2017* (Cth) to exclude trees, shrubs, plants, seeds, bulbs and non-edible tubers, which are classified as "nursery products".

¹³ ACL, s 2(1).

¹⁴ *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 184 (per Chief Justice Gibbs).

¹⁵ [2014] VSC 404.

¹⁶ *Ibid* [51(d)].

interests of the community, such as the performance of a statutory function, is not the carrying on of a business.

21. In that case, the Court found that carrying on a business may include the following:¹⁷
- (a) Activities constituting trade, commercial transactions, or engagements.
 - (b) The performance of a succession of acts with system and regularity, not the effecting of a solitary transaction.
 - (c) However, mere repetitiveness without the presence of a system and regularity might exclude the possibility of a business being carried out.
 - (d) Actions and activities that extend beyond the systems of government and concern the carrying on of a business.
 - (e) The carrying out of a function of government/governmental services in the interest of the community is not the carrying on of a business in the relevant sense.
 - (f) An element of commerce or trade 'such as a private citizen or trader might undertake.'
22. The Order establishing VicForests states that "VicForests must be commercially focused and deliver efficient, sustainable and value for money services."¹⁸ The activities of VicForests can be characterised as constituting repeated commercial transactions, with an accompanying system of regulation and regularity. Additionally, its activities are most akin to those a private citizen or trader might undertake. Further, the harvesting, sale and regrowth of timber in Victoria goes beyond the ordinary functions and services of government and constitutes the activities of a business itself.
23. Although VicForests is a State-owned business, it is carrying out commercial practices rather than functions of government in the interests of community. Accordingly, the VFA considers that, even if the ACCC formed the view that VicForests is the Crown for the purposes of the ACL, the relevant provisions continue to apply by virtue of section 18 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).
24. Whilst VFA considers that VicForests is not the Crown for the purposes of the ACL, it is a State-owned corporation effectively operating with a monopoly in Victoria. It follows that a higher standard of transparency and accuracy in public-facing communications may be expected by consumers and the broader community. Accordingly, access to accurate information on VicForests' website is critical and strongly in the public interest.

Misleading or deceptive conduct

25. The relevant provisions of the ACL provide that a person must not, in trade or commerce:
- (a) "engage in conduct that is misleading or deceptive or is likely to mislead or deceive" (section 18);
 - (b) "in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services: (a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

¹⁷ Ibid [51].

¹⁸ Victorian Government, 'State-owned Enterprises (State Body – VicForests) Order 2003', *Victorian Government Gazette*, No. S 198, 28 October 2003, [3(6)].

(b) make a false or misleading representation that services are of a particular standard, quality, value or grade; [...]" (section 29).

26. Conduct is misleading or deceptive or likely to mislead or deceive if "the impugned conduct viewed as a whole has a tendency to lead a person into error".¹⁹

Relevant test

27. As you are aware, the following elements must be established in order to make a claim for misleading or deceptive conduct:
- (a) The conduct was engaged in "in trade or commerce"²⁰; and
 - (b) The conduct must have been misleading or deceptive or likely to mislead or deceive.²¹
28. The standard applied by Australian Courts in determining whether a claim is false, misleading or deceptive involves firstly identifying what the ordinary consumer would conclude or will understand the claim to mean.²² Importantly, it is not necessary to demonstrate actual deception to establish a contravention of section 18 of the ACL.²³
29. Where the conduct is directed at the public or a section of the public, it is necessary to identify the class of consumers likely to be affected by the conduct and assess whether the hypothetical representative, the ordinary or reasonable member of that class, would be misled or deceived. In *Telstra Corporation Ltd v Singtel Optus Pty Ltd*²⁴, the Court confirmed that the number of reasonable persons who might be misled is irrelevant to the test under the ACL.²⁵
30. In the case of VicForests, due to its status as a State-owned business with exclusive rights to operate and manage timber harvesting operations in vast areas of State forest in Victoria²⁶, and the range of wood and pulp products produced with that timber, the potential consumer-base is broad.
31. VicForests' direct consumers are mills, which create products including packaging, paper, building supplies and furniture consumed domestically and internationally. In its Annual Report for the 2021/22 financial year, VicForests reported sales of 341,121 m³ of sawlog, 577,127 m³ of pullog and 36,749 m³ of firewood, generating \$88.36 million in gross sales revenue.²⁷ Approximately half of the pullog volume sold (265,000 m³) is guaranteed to Maryvale Mill, operated by Opal Australian Paper, a subsidiary of Japanese-owned Nippon Paper Group, under the *Forests (Wood Pulp Agreement) Act 1996* (Vic). Opal Australian Paper manufacture paper and packaging products.²⁸
32. One of VicForests' other key customers is Pentarch Group, who own Dormit Pty Ltd, the largest manufacturer of wooden pallets in Australia. Pentarch purchase sawlogs to manufacture CHEP

¹⁹ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 319 [25] (French CJ).

²⁰ Defined in s 4, *Competition and Consumer Act 2010* (Cth) to mean trade or commerce within Australia or between Australia and places outside Australia.

²¹ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199 (Gibbs CJ).

²² *Google Inc v ACCC* (2013) 249 CLR 435; *Telstra Corporation Limited v Singtel Optus Pty Ltd* [2020] FCA 1372; ACCC, 'False and Misleading Claims' (Web Page) <<https://www.accc.gov.au/business/selling-products-and-services/small-business-education-program/country-of-origin-labelling/false-and-misleading-claims>>.

²³ *Google Inc v ACCC* (2013) 249 CLR 435, [6]-[9].

²⁴ [2020] FCA 1372.

²⁵ *Telstra Corporation Limited v Singtel Optus Pty Ltd* [2020] FCA 1372.

²⁶ Specifically, areas allocated to VicForests via an Allocation Order made pursuant to s 14, *Sustainable Forests (Timber) Act 2004* (Vic), comprising approximately 1.8 million hectares of State forest in eastern Victoria.

²⁷ VicForests, *Annual Report VicForests 2021 – 22* (Report, 2 December 2022) 18

<<https://www.vicforests.com.au/static/uploads/files/vf-annual-report-2022-final-201222-wfjdjhwojpk.pdf>>.

²⁸ Opal, 'Opal Australian Paper' (Web Page) <<https://opalanz.com/divisions/opal-australian-paper/>>.

pallets²⁹, which are used at major supermarkets, including Coles, Woolworths and Aldi. In 2021, it was reported that Pentarch indicated that in order to meet its customer requirements of approximately 3,200 pallets per day, it requires around 166,320m³ of sawlogs per year, of which VicForests is estimated to provide approximately 145,000 tonnes.³⁰ Many businesses that stock these products have their own sustainability policies and guarantees.

33. The ordinary consumer may identify as either a company or a member of the public within, or outside of, Australia.
34. It is likely that the claims made on VicForests website would lead a company or member of the public (a consumer), in Victoria or elsewhere, to believe that VicForests' logging practices and/or timber products are sustainable. Such a conclusion may influence buying behaviour, as consumers are "now, more than ever, making purchasing decisions on environmental grounds"³¹.
35. There have been recent examples of buying behaviour having been influenced by the environmental impact of timber harvesting operations undertaken by VicForests. For example, in 2020 following a decision of the Victorian Supreme Court relating to VicForests' timber harvesting activities (discussed below), a decision was made by Bunnings to end its contract with VicForests.³² Specifically, Bunnings' Director of Marketing and Merchandise, Clive Duncan said of the decision that "we believe customers and team members have the right to expect that timber is sourced from well managed forestry operations."³³ This decision was consistent with Bunnings' Timber Policy and commitment to sustainable timber procurement.³⁴
36. In the same year, Officeworks also announced its commitment to source paper products from only Forest Stewardship Council (**FSC**) certified suppliers or 100% recycled content.³⁵
37. VicForests has been denied membership with the FSC of Australia on the basis that it does not satisfy the requirements to meet the Controlled Wood Standard.³⁶ FSC is the "most-trusted"

²⁹ Industry Edge, 'Pallets: moving the nation and turning a few heads right now' (Web Page, 20 June 2023) <<https://industryedge.com.au/pallets-moving-the-nation-and-turning-a-few-heads-right-now/>>.

³⁰ Nillumbik Friends of the Great Forest (NFGF), 'Chaotic transition to 100% plantation industry: Nillumbik Friends of the Great Forest', *Australian Rural & Regional News* (online, 3 October 2022) <<https://arr.news/2022/10/03/chaotic-transition-to-100-plantation-industry-nillumbik-friends-of-the-great-forest/>>; The Wilderness Society, 'Ethical packaging: a guide' (Web Page) <<https://www.wilderness.org.au/iconic-places/victorias-forests/ethical-packaging-a-guide>>.

³¹ ACCC, 'ACCC 'Greenwashing' Internet Sweep Unearths Widespread Concerning Claims' (Media Release, 2 March 2023) <<https://www.accc.gov.au/media-release/accc-greenwashing-internet-sweep-unearths-widespread-concerning-claims>>.

³² Mike Foley, 'Bunnings Ends VicForests Timber Contract Over Logging Breaches', *The Sydney Morning Herald* (online, 1 July 2020) <<https://www.smh.com.au/environment/sustainability/bunnings-ends-vicforests-timber-contract-over-logging-breaches-20200701-p5581g.html>>; Lisa Cox, 'Bunnings Stops Selling Timber Logged by VicForests after Court Ruling' *The Guardian* (online, 1 July 2020) <<https://www.theguardian.com/environment/2020/jul/01/bunnings-stops-selling-timber-logged-vicforests-court-ruling>>.

³³ Stephanie Anderson 'Bunnings, Officeworks will Dump Victorian Native Timber in Two Years Unless Sustainability Proven', *ABC News* (online, 17 September 2018) <<https://www.abc.net.au/news/2018-09-17/vic-forestry-industry-at-risk-of-collapse/10255128>>.

³⁴ Bunnings, 'Bunnings and Timber' (Web Page) <<https://www.bunnings.com.au/about-us/sustainability/bunnings-and-timber>>.

³⁵ Officeworks, 'Officeworks Makes Progress on Goal to Achieve FSC Certified or 100% Recycled Content on all Paper Products by End of 2020' (Media Release, April 2020) <https://www.officeworks.com.au/resources/pdfs/media-centre/OFFICEWORKS_MAKES_PROGRESS_ON_GOAL_TO_ACHIEVE_FSC_CERTIFIED_OR_100_RECYCLED_CONTENT_ON_ALL_PAPER_PRODUCTS_BY_END_OF_2020.pdf>.

³⁶ VicForests, 'VicForests Accepts Forest Stewardship Council's Advice that it is Not Currently Eligible for Membership' (Media Release, 16 April 2020) <<https://www.vicforests.com.au/latest-news-1/vicforests-accepts-forest-stewardship-councils-advice-that-it-is-not-currently-e>>; VicForests, 'VicForests' Postponement of FSC Controlled Wood Standard', (Media Release, 12 August 2020) <<https://www.vicforests.com.au/publications-media/latest-news/vicforests-postponement-of-fsc-controlled-wood-standard>>.

international forest certification scheme³⁷ and the requirements for members include compliance with all applicable laws, maintaining, conserving and/or restoring the ecosystem services and environmental values of managed forests, and also avoiding, repairing or mitigating negative environmental impacts.³⁸ The VFA asserts that the issues raised in this Complaint are unchanged by any other certification VicForests has previously obtained and currently holds.

Claims on VicForests' website

38. VicForests, via its website, makes assertions regarding its processes for, and management of, timber harvesting activities that it conducts. The following specific claims made on VicForests' website are of concern to the VFA for their potential inaccuracy and potential to mislead consumers:

- (1) "Sustainability is at the heart of everything we do at VicForests. We ensure that any forest we harvest is regenerated for the future enjoyment of generations to come."³⁹ (**Claim 1**) (**Annexure A**)
- (2) "Every tree we harvest is replanted with seed collected from harvesting area. The regrown area is closely monitored to ensure future enjoyment of the forest."⁴⁰ (**Claim 2**) (**Annexure B**)
- (3) "We used a risk based approach for every coupe to determine what and when forest values are to be surveyed for, and the most appropriate survey methods. These surveys tell us which prescriptions are needed to protect important environmental and cultural values specific to each area or coupe, such as retaining hollow-bearing trees to protect species that live and dwell within them."⁴¹ (**Claim 3**) (**Annexure C**)
- (4) "Not a single tree is harvested without extensive pre-planning. We consult with scientists, stakeholders and government to ensure we harvest and regrow with care."⁴² (**Claim 4**) (**Annexure D**)
- (5) "All VicForests' timber harvesting and regeneration operations are conducted in line with Victoria's environmental regulations [...]. Prior to harvesting, coupes are assessed and surveyed to ensure they meet all timber harvesting and biodiversity requirements [...]. This is then overlaid with our own harvesting practices aimed at protecting key habitat, in particular hollow-bearing trees, which are above and beyond the regulated requirements."⁴³ (**Claim 5**) (**Annexure E**)
- (6) "Multiple field assessments are conducted prior to harvesting. These may include initial assessments to help identify potentially suitable areas to harvest, field verification of values identified in the computer-based assessments or via other sources, and detailed

³⁷ Chris McLaren and Forest Stewardship Council, 'FSC: The Most Trusted Mark in Responsible Forest Management', *Sustainable Brands* (Web Page, 13 February 2020)

<<https://sustainablebrands.com/read/community-update/fsc-the-most-trusted-mark-in-responsible-forest-management>>

³⁸ FSC, 'FSC Standards – Setting the Bar for Responsible Forestry' (Web Page) <<https://fsc.org/en/fsc-standards>>.

³⁹ 'VicForests' (Web Page) <<https://www.vicforests.com.au/>>.

⁴⁰ Ibid.

⁴¹ VicForests, 'Identifying and Managing Forest Values' (Web Page) <<https://www.vicforests.com.au/vicforest-forest-management/managing-forest-values/idvalues>>.

⁴² 'VicForests' (Web Page) <<https://www.vicforests.com.au/>>.

⁴³ VicForests, 'Forest facts: Q&A' (Web Page) <<https://www.vicforests.com.au/publications-media/forest-facts/qanda>>.

transects and surveys to identify other values that may not be mapped.”⁴⁴ (**Claim 6**) (**Annexure F**)

(7) “Taking care of Victorian native forests is our life. Timber is natural, durable, renewable and stores carbon for life.”⁴⁵ (**Claim 7**) (**Annexure G**)

(8) “The process of harvesting and regenerating forests for wood products helps store more carbon than a carbon sequestration model that involves no forest harvesting at all. For example, Victorian ash forests conserve 522 tonnes of carbon per hectare. This increases to 835 tonnes per hectare when sustainably harvested. This is because wood products retain carbon and harvested forests are regrown.”⁴⁶ [includes footnotes] (**Claim 8**) (**Annexure H**)

39. The eight claims identified above fall within three broad categories:

- (1) Statements relating to the regrowth and regeneration of Victorian state forests after harvesting by VicForests (**Claims 1 & 2**).
- (2) Statements relating to surveying techniques used in Victorian state forests prior to harvesting by VicForests (**Claims 3, 4, 5 and 6**).
- (3) Statements relating to carbon stores and sequestration in Victorian forests in connection with timber harvesting by VicForests (**Claims 7 and 8**).

Claims 1 and 2

40. The VFA are concerned that Claims 1 and 2 (**the Regeneration Claims**) may be false and/or misleading because they are likely to lead an ordinary consumer to believe that all areas of state forest harvested by VicForests are subsequently regrown and regenerated and therefore VicForests’ operations are sustainable, within the ordinary meaning of that word.

41. The ordinary meanings of “sustainable” and “sustainability” include:

- the degree to which a process or enterprise is able to be maintained or continued while avoiding the long-term depletion of natural resources.⁴⁷
- causing, or made in a way that causes, little or no damage to the environment and therefore is able to continue for a long time.⁴⁸
- meeting the needs of the present generation without compromising the ability of future generations to meet their own needs.⁴⁹

42. An ordinary consumer would likely interpret the Regeneration Claims to mean that timber harvesting operations conducted by VicForests do not damage the environment or deplete natural resources for future generations because forests are regenerated and restored. The VFA is concerned that the Regeneration Claims may be misleading for the following reasons:

⁴⁴ VicForests, ‘State of the Environment Report and Native Forest Harvesting in Victoria’ (Web Page) <<https://www.vicforests.com.au/publications-media/forest-facts/soe-harvesting-victoria>>.

⁴⁵ VicForests (Web Page) <<https://www.vicforests.com.au/>>.

⁴⁶ VicForests, ‘State of the Environment Report and Native Forest Harvesting in Victoria’ (Web Page) <<https://www.vicforests.com.au/publications-media/forest-facts/soe-harvesting-victoria>>.

⁴⁷ *Oxford English Dictionary* (online at 26 June 2023) ‘sustainability’.

⁴⁸ *Cambridge Dictionary* (online at 26 June 2023) ‘sustainable’.

⁴⁹ Ozge Aydogan, Eleonora Bonaccorsi and Trine Schmidt, ‘Placing Future Generations at the Heart of Sustainable Development’, *International Institute for Sustainable Development* (Web Page, 15 March 2023) <[8](https://sdg.iisd.org/commentary/policy-briefs/placing-future-generations-at-the-heart-of-sustainable-development/#:~:text=It%20defines%20sustainable%20development%20as,needs%E2%80%9D%20(emphasis%20added)>.</p></div><div data-bbox=)

- (a) The benchmarks used by VicForests to measure regeneration in logged forests provide an inadequate basis to support those claims.
- (b) In any event, VicForests is consistently not meeting its own benchmarks used to measure regeneration success in logged coupes.
- (c) There is credible evidence of failed regeneration after VicForests ceases monitoring logged coupes.
- (d) Logged forests have decreased biodiversity and are more vulnerable to frequent and intense bushfire.

Evidence

- 43. The Victorian Code of Practice for Timber Production 2014 (as amended) (**the Code**) is the primary instrument for regulating logging and other timber harvesting operations in Victoria's publicly owned State forests, private native forests and plantations.⁵⁰
- 44. The Code defines regeneration as an event rather than a process; it is “the renewal or re-establishment of native forest flora by natural or artificial means following disturbance such as timber harvesting operations or fire”⁵¹. The Code provides that action must be taken to secure the regeneration of harvested coupes except in certain circumstances⁵² and that the Operational Goals include:
 - “harvested areas of native forest are successfully regenerated”.⁵³
 - “[t]he productive capacity and other values of the forest are **maintained or enhanced** by appropriate tending of stands.”⁵⁴ [emphasis added]
- 45. The Management Standards and Procedures in Schedule 1 to the Code set out specific prescriptions applicable to regeneration.⁵⁵
- 46. VicForests measures regeneration success according to a three-year benchmark.⁵⁶ After logging is completed, this allows three years for regeneration treatment (usually by burning, seedfall or sowing), germination and the appraisal of regeneration through surveys of seedlings.
- 47. VicForests deems regeneration successful “at first attempt” if a seedling survey carried out at the required time records eucalypt seedlings or sprouts at or above a stipulated minimum density or stocking rate.⁵⁷ Areas of one hectare or more that are not adequately stocked must be re-treated, which extends the time before the coupe is considered regenerated. VicForests deems a coupe as regenerated (or “finalised”) when a seedling survey shows they have regenerated successfully according to these criteria.⁵⁸ Once coupes are deemed finalised according to the standards, there are no ongoing obligations on VicForests or the Department of Environment, Energy and Climate Action (**DEECA**) to monitor their condition.⁵⁹

⁵⁰ *Code of Practice for Timber Production 2014 (as amended 2022)* 3 (*‘the Code’*).

⁵¹ *Ibid* 18 (Glossary).

⁵² *Ibid* section 3.5.

⁵³ *Ibid* cl 2.6.1 (Operational Goal).

⁵⁴ *Ibid* cl 2.6.2 (Operational Goal).

⁵⁵ *Ibid* section 9 (Forest Regeneration and Management).

⁵⁶ *Ibid* cl 3.5.2.1.

⁵⁷ Margaret Blakers, *After the logging* (Report, November 2021) 14 [2.4] (*‘After the logging report’*); *Code of Practice for Timber Production 2014 (as amended)*, definition of ‘regeneration’ in relation to a growth stage of trees, cl 3.5.1.1(iii).

⁵⁸ *After the logging report* (n 57) 14 [2.4].

⁵⁹ *Ibid* 16 [3.3].

48. Based on this approach, various sources state that VicForests successfully regenerates at least 85% of coupes within three years. For example, VicForests' annual reports for 2019/20⁶⁰, 2020/21⁶¹ and 2021/22⁶² placed the long-term average extent of the regenerated areas needing retreatment in any one year at 5–6%. This number likely measures the actual area requiring retreatment as a percentage of the net area logged rather than the percentage of coupes requiring retreatment.⁶³
49. In a 2018 Audit report, the Victorian Auditor-General stated that the condition of the forest should be as good as, or better than, it was at the end of the proposed 20-year harvest schedule.⁶⁴ The Auditor General also noted that VicForests does not test whether its proposed harvest schedule is likely to maintain values such as biodiversity and carbon storage in regrown forest. In response, VicForests stated that “harvesting regulations, regeneration standards it needs to meet under the timber harvesting regulations and past studies collectively provide sufficient reason to assume this is occurring”⁶⁵. The VFA is concerned that this assumption is insufficient to support the broad claims VicForests makes via its website about regeneration.
50. A 2021 report authored by conservationist Margaret Blakers, and co-published by 19 environmental groups, disclosed the results of regeneration ground checks in harvested coupes compared to data held by DEECA and VicForests obtained under Freedom of Information laws.⁶⁶
51. The report revealed that approximately 30% of logging coupes are failing to regenerate within three years⁶⁷ and that the three-year benchmark applies not to the regrowth of forests but to eucalypt seedlings. In Mountain Ash forests, the failure rate was found to be even higher, at over 50%.⁶⁸
52. Drone footage and surveys showed that logging coupes that have passed the test for successful regeneration are failing to grow into forests with their original species and age mix⁶⁹, resulting in weed-infested grasslands, blackberry patches and stands of wattles in harvested areas that had been deemed to be finalised, and therefore should have the same species mix as it did pre-logging. The report detailed case studies of specific coupes that had failed to regenerate.⁷⁰

⁶⁰ VicForests, *Annual Report 2019/20* (Report, 2020) 62.

⁶¹ VicForests, *Annual Report 2020/21* (Report, 2021) 60.

⁶² VicForests, *Annual Report 2021/22* (Report, 2022) 66.

⁶³ *After the logging report* (n 57) 14 [2.5].

⁶⁴ Victorian Auditor-General, *Follow up of selected 2012/13 and 2013/14 performance audits* (Report, June 2018) 32 <<https://www.audit.vic.gov.au/report/follow-selected-2012-13-and-2013-14-performance-audits?section=32868--2-managing-victoria-s-native-forest-timber-resources&show-sections=1#32868--2-managing-victoria-s-native-forest-timber-resources>>.

⁶⁵ *Ibid.*

⁶⁶ *After the logging report* (n 57) 8; Michael Slezak and Mark Doman, ‘The Disappearing Forests’ *ABC News* (online, 30 November 2021) <<https://www.abc.net.au/news/2021-11-30/vicforests-accused-of-failing-to-regenerate-logged-forests/100652148>>.

⁶⁷ *After the logging report* (n 57) 16.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid* 19-25.

53. In addition to failed regeneration, the claims by VicForests do not appear to reflect the impacts logging has on habitat loss and fragmentation and bushfire risk.⁷¹ Best available science shows that young forests regenerating after logging are particularly susceptible to very high severity fire for various reasons including the drying of soil, loss of mesic (moisture) elements, the presence of debris and fewer fire-resistant old growth trees.⁷² This further weakens the Regeneration Claims, as the resilience of forests is decreased and regrowth is made even less likely with increased fire risk.
54. The loss of biodiversity and reduced habitat availability and connectivity are also consequences of logging and regenerating forests⁷³, and such long-term consequences do not appear to be reflected in the Regeneration Claims. For example, hollow-bearing trees which are critical habitat for many fauna species, including endangered Greater Gliders and Leadbeater's Possums, take over 120 years to form and are therefore not present in young, newly regenerated forests.⁷⁴
55. The VFA requests that the ACCC investigate the Regeneration Claims and, in particular, consider whether they reflect the long-term on-ground impacts of logging on the condition of the forest and biodiversity and provide accurate information to consumers.

Claims 3, 4, 5 and 6

56. The VFA are concerned that Claims 3, 4, 5 and 6 (**the Surveying Claims**) may be false and/or misleading in that they are likely to lead an ordinary consumer to erroneously conclude that VicForests' approach to planning and pre-harvest surveying of flora and fauna is comprehensive and complies with environmental regulations.
57. Specifically, the VFA are concerned about the following assertions within the Surveying Claims:
- "Not a single tree is harvested without extensive pre-planning."
 - "All VicForests' timber harvesting and regeneration operations are conducted in line with Victoria's environmental regulations [...]."
 - "Prior to harvesting, coupes are assessed and surveyed to ensure they meet all timber harvesting and biodiversity requirements [...]."
 - "Multiple field assessments are conducted prior to harvesting."

⁷¹ Australian National University, 'Logging Increases Risk of Severe Fire' (Web Page, 16 August 2021) <<https://science.anu.edu.au/news-events/news/logging-increases-risk-severe-fire>>; David Lindenmayer, Chris Taylor and Wade Blanchard, 'Empirical Analyses of the Factors Influencing Fire Severity in Southeastern Australia' (2021) 12(8) *Ecosphere* <<https://esajournals.onlinelibrary.wiley.com/doi/10.1002/ecs2.3721>>; David Lindenmayer et al., 'Recent Australian Wildfires Made Worse by Logging and Associated Forest Management', [2020] (4) *Nature Ecology and Evolution* 898-900; Philip Zylstra et al., 'Native Forest Logging Makes Bushfires Worse - and to Say Otherwise Ignores the Facts', *The Conversation* (online, 20 May 2021) <<https://theconversation.com/native-forest-logging-makes-bushfires-worse-and-to-say-otherwise-ignores-the-facts-161177#:~:text=Taking%20timber%20from%20forests%20dramatically,during%20and%20after%20the%20disaster.>>

⁷² David Lindenmayer, Chris Taylor and Wade Blanchard, 'Empirical Analyses of the Factors Influencing Fire Severity in Southeastern Australia' (2021) 12(8) *Ecosphere* 12-13 <<https://esajournals.onlinelibrary.wiley.com/doi/10.1002/ecs2.3721>>.

⁷³ David Lindenmayer, 'Integrating forest biodiversity conservation and restoration ecology principles to recover natural forest ecosystems' (2019) 1(6) *New Forests* 50, 169, 1-13 <<https://www.nespthreatenedspecies.edu.au/media/s3bdzybx/3-3-integrating-forest-biodiversity-conservation-restoration-ecology-principles-to-recover-natural-forest-ecosystems.pdf>>.

⁷⁴ David Lindenmayer et al, 'Relationships Between Tree Size and Occupancy by Cavity-Dependent Arboreal Marsupials' (2017) 391 *Forest Ecology and Management* 221 <<https://www.sciencedirect.com/science/article/abs/pii/S0378112716312294?via%3Dihub>>.

58. The Surveying Claims may be false and/or misleading because they appear to be directly contradicted by recent Court findings in relation to the adequacy VicForests' surveying methods and compliance with relevant regulatory instruments and laws in the following cases:
- (a) *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704 (**the Possums case**).
 - (b) *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668 (4 November 2022) (**the EEG and KFF case**).⁷⁵
 - (c) *Warburton Environment v VicForests (No 5)* [2022] VSC 633 (25 October 2022) (**the Warburton Environment case**).

Evidence

59. Recent court decisions confirm that VicForests has repeatedly breached prescriptions and obligations in the Code, including the precautionary principle.
60. The precautionary principle stands for the proposition that, where 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.⁷⁶ In conducting its timber harvesting operations, VicForests is legally required to apply the precautionary principle to the conservation of biodiversity values in Victoria's state forests pursuant to clause 2.2.2.2 of the Code.
61. Biodiversity values include nationally threatened⁷⁷ fauna species that are routinely detected within logging areas in Victoria, such as the Leadbeater's Possum (Critically Endangered), Greater Glider (Endangered) and Yellow-bellied Glider (Vulnerable).⁷⁸ Federal Conservation advises identify native forest logging as a threat to these species. For example, the Commonwealth Government has identified timber harvesting as a "known current" threat to the Central Highlands' endemic Leadbeater's Possum and a "major" threat posing a "very high risk" to populations of the Greater Glider and Yellow-bellied Glider in Victoria every year.⁷⁹ In July 2022, Greater Gliders were uplisted from vulnerable to endangered.⁸⁰
62. In the Possums case, the Federal Court found that:
- "In undertaking forestry operations in the Logged [Greater] Glider Coupes, VicForests did not apply the precautionary principle to the conservation of biodiversity values in those coupes, as it was required to do by cl 2.2.2.2 of [the Code]. Specifically, on the applicant's

⁷⁵ Joint proceeding brought by Environment East Gippsland Inc. and Kinglake Friends of the Forest Inc.

⁷⁶ *Rio Declaration on Environment and Development 1992*, UN Doc A/CONF.151/26 (Vol 1) (12 August 1992) annex I principle 15.

⁷⁷ Listed under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁷⁸ Department of Energy, Environment and Climate Action, 'Forest Protection Survey Program – Survey Results' *DEECA* (Web Page, 27 April 2023) <<https://www.forestsandreserves.vic.gov.au/forest-management/forest-protection-survey-program1/forest-protection-survey-program>> (results table is searchable); Fauna and Flora Research Collective Inc, 'Reports (2009 – 2019)' (Web Page) <<https://faunaandfloraresearchcollective.wordpress.com/reports-2009-2019/>>; Wildlife of the Central Highlands, 'Reports – Formal Threatened Species Reports Submitted to the Victorian Government Environment Department' (Web Page) <<https://www.wotch.org.au/reports>>.

⁷⁹ Threatened Species Scientific Committee, *Conservation Advice for *Gymnobelideus leadbeateri** (Conservation Advice 273, 2019) (Leadbeater's Possum Conservation Advice) 5, Department of Climate Change, Energy, the Environment and Water, *Conservation Advice for *Petauroides volans** (Conservation Advice 254, 2022) (Greater Glider Conservation Advice) 17, Department of Climate Change, Energy, the Environment and Water, *Conservation Advice for *Petaurus australis australis** (Conservation Advice 87600, 2022) (Yellow-bellied Glider Conservation Advice) 16.

⁸⁰ Department of Climate Change, Energy, the Environment and Water, *Conservation Advice for *Petauroides volans** (Conservation Advice 254, 2022).

case, VicForests did not apply the precautionary principle to the conservation of the Greater Glider as a threatened species present in, and using, the forest in those coupes.⁸¹

63. In the EEG and KFF case, the Court referred to the “damning” precautionary principle findings against VicForests in the Possums case, which were upheld on appeal⁸² and observed that it was “concerning” that VicForests’ approach to its legal obligations some two years later was “strikingly similar”⁸³. It confirmed that “VicForests’ current approach to detecting greater gliders and yellow-bellied gliders is considerably less than s 2.2.2.2 [the precautionary principle] of [the Code] requires.”⁸⁴
64. The Court found that VicForests’ approach to timber harvesting fell “well short” of what the precautionary principle requires.⁸⁵ The evidence was that Greater Gliders and Yellow-bellied Gliders that “live in coupes that are harvested in accordance with VicForests’ current practices will probably die as a result of the harvesting operations.”⁸⁶
65. Relevantly, the Court found as follows:
 - (a) “At present VicForests does not survey all of a coupe before harvesting, and so it plans and undertakes timber harvesting operations without knowing where gliders live within the coupe and which parts of the coupe should be retained for their habitat. In order to comply with s 2.2.2.2 of the Code, VicForests needs to undertake much more thorough pre-harvest surveys for greater gliders and yellow-bellied gliders.”⁸⁷
 - (b) “In order to apply the precautionary principle to the conservation of greater gliders and yellow-bellied gliders, VicForests must survey the whole of any coupe proposed for harvest which may contain glider habitat. It must do so using a survey method that is likely to detect any gliders that may be present in the coupe, so as to locate the gliders’ home ranges wherever practicable. This is necessary in order that their essential habitat can be excluded from timber harvesting operations, as the precautionary principle requires [...]”⁸⁸
 - (c) “VicForests’ current approach to detecting greater gliders and yellow-bellied gliders is considerably less than the precautionary principle requires. The ecologists agreed — and VicForests accepted — that to plan properly for habitat retention and appropriate silvicultural methods, it is necessary to know where in a coupe gliders occur. VicForests’ practice of limiting the survey effort to a one kilometre transect in a coupe, often from an existing road or track, is inadequate for this purpose. It leaves most parts of a coupe unsurveyed, with the result that VicForests plans and conducts timber harvesting operations without knowing whether gliders live in those parts of the coupe and, if so, the location of their habitat — the home ranges of greater gliders and the feed trees and hollow-bearing den trees used by yellow-bellied gliders. Without that knowledge, it is not possible for VicForests to retain the habitat that is essential for the conservation of those gliders. This knowledge gap is most concerning in relation to greater gliders, which have small home ranges and disperse poorly across hostile habitat, and are very likely to die as a result of intensive logging in and around their home ranges.”⁸⁹

⁸¹ *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704, [6].

⁸² *VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66, [163]-[197].

⁸³ *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668, [374].

⁸⁴ *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668, [7(9)].

⁸⁵ *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668, [228], [374].

⁸⁶ *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668, [228], [257].

⁸⁷ *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668, [7].

⁸⁸ *Ibid.*

⁸⁹ *Ibid* [270].

66. In the EEG and KFF case, Her Honour found that there were “exceptional circumstances” justifying the granting of injunctions “to restrain threatened failures to comply with ss 2.2.2.2 and 2.2.2.4 of the Code” including:⁹⁰:

“VicForests’ current survey practice and its ‘almost universal’ use of variable retention harvesting fall well short of what the precautionary principle requires for the conservation of greater gliders. In particular, VicForests still does not thoroughly survey coupes for greater gliders when planning timber harvesting operations. It still plans to harvest areas of forest that greater gliders are known to inhabit, in the face of scientific opinion that this is likely to cause the destruction of those gliders. It still maintains that variable retention harvesting is a less intensive method that meets its obligation to apply the precautionary principle, when the evidence is that it is not effective to conserve greater gliders.”⁹¹

67. In the Warburton Case, the Court was critical of VicForests’ approach to surveying for Tree Geebung specimens as required under the Code. Tree Geebung is a shrub or small tree that is endemic to the Central Highlands of Victoria and is listed as endangered under the *Flora and Fauna Guarantee Act 1988 (Vic)*, threatened predominantly by fire and forestry operations.⁹² In particular, the Court found that:

- “The evidence is compelling and uncontested that the past practices of VicForests and its contractors have led to the loss of many Tree Geebungs in the harvestable areas of coupes. While it may be that in one or more individual instances the protection of Tree Geebungs was not reasonably practicable, no attempt was made by VicForests to show that it was not reasonably practicable to protect the significant number of Tree Geebungs which have been destroyed in harvested areas through the use of bulldozers and mechanical equipment or by regeneration burning.”⁹³
- “The deficiencies in past practices identified in the evidence include:
 - (a) the failure to conduct targeted surveys to detect and locate mature Tree Geebungs in coupes prior to harvesting;
 - (b) the failure to provide sufficient, or any, buffers to protect mature Tree Geebungs during harvesting or from the later effects of windthrow; and
 - (c) the failure to protect mature Tree Geebungs from the impacts of regeneration burning in coupes following harvesting.”⁹⁴
- “The evidence clearly demonstrates that unless these matters are addressed, Tree Geebungs will not be protected and will continue to be lost in considerable numbers during coupe harvesting and regeneration burning and by the subsequent effects of exposure and windthrow. Given the evidence as to the past harvesting and burning practices of VicForests, it is highly likely that significant numbers of mature Tree Geebungs have been lost in the Central Highlands in the past through harvesting and regeneration burning. The precise extent of the loss will never be known, but on the basis of recent records is likely to amount to many hundreds or even thousands of mature trees.”⁹⁵

⁹⁰ Ibid [374].

⁹¹ Ibid.

⁹² *Warburton Environment v VicForests (No 5)* [2022] VSC 633, [9].

⁹³ Ibid [401].

⁹⁴ Ibid [402].

⁹⁵ Ibid [403].

68. Consistent with the final orders made in the EEG and KFF case, in the Warburton Environment case, His Honour found that injunctive relief was necessary to ensure VicForests' future compliance with the Code and Standards.⁹⁶
69. On 26 June 2023, the Victorian Court of Appeal handed down its decision in the EEG and KFF case and upheld the findings of the Supreme Court in the first instance.⁹⁷ The Victorian Court of Appeal observed that Her Honour's reasons in the first instance "were commendably thorough and detailed, and clearly demonstrated the path by which she concluded that the respondents were entitled to the injunctive relief that was the subject of the orders."⁹⁸ The Court of Appeal noted that in the context of Her Honour's findings in relation to VicForests' current survey practices and application of the precautionary principle, it was "well open" to Her Honour to make the injunctions that she did.⁹⁹
70. The Court observed that:
- "The respondents, who have a special interest in the preservation of the forests that are subject to harvesting, submitted that VicForests' harvesting methods overall were manifestly inadequate to protect and conserve the gliders. The expert evidence strongly supported that proposition."¹⁰⁰
71. VicForests is currently facing three further cases brought by environment groups alleging similar conduct and noncompliance with the Code and precautionary principle.¹⁰¹
72. The VFA is concerned that the Surveying Claims on VicForests' website appear to be inconsistent with the findings of the Federal Court and Victorian Supreme Court in the cases discussed above. The Courts have repeatedly concluded that VicForests' approach to surveying and the conservation of biodiversity values, including threatened fauna and flora species, has breached the Code and fallen below what the legal standards require. In the circumstances, the VFA queries the accuracy of claims on VicForests' website that its operations comply with environmental regulations and go "above and beyond" what is required. Such claims are capable of influencing the buying behaviour of potential consumers of timber and products made with timber harvested by VicForests.
73. The VFA requests that the ACCC investigate the Surveying Claims and consider their accuracy in light of recent Court rulings.

Claims 7 and 8

74. The VFA is concerned that Claims 7 and 8 (**the Carbon Claims**) may be misleading due to their potential to lead an ordinary consumer to incorrectly conclude that all or most of the timber harvested by VicForests is used to make timber products that store carbon long-term, and that logging practices increase the carbon sequestration of Victoria's state forests.
75. In particular, the VFA are concerned about the following statements within the Carbon Claims:
- "Timber is natural, durable, renewable and stores carbon for life."¹⁰²

⁹⁶ Ibid [462].

⁹⁷ *VicForests v Environment East Gippsland & anor* [2023] VSCA 159.

⁹⁸ Ibid [296].

⁹⁹ Ibid [217], [260]-[263].

¹⁰⁰ Ibid [218].

¹⁰¹ *Wildlife of the Central Highlands Inc (WOTCH) v VicForests* (S ECI 2020 00373); *Fauna and Flora Research Collective Inc (FFRC) v VicForests* (S CI 2017 04392) *Gippsland Environment Group Inc (GEG) v VicForests* (S ECI 2022 01719).

¹⁰² 'VicForests' (Web Page) <<https://www.vicforests.com.au/>>.

- “The process of harvesting and regenerating forests for wood products helps store more carbon than a carbon sequestration model that involves no forest harvesting at all. [...]”¹⁰³

76. Claim 7 refers to timber as being renewable. The ordinary meaning of “renewable” in this context includes:

- Substances that can be used and easily replaced.¹⁰⁴
- Resources that are capable of being replaced by natural ecological cycles or sound management procedures.¹⁰⁵

Evidence

77. Trees absorb carbon dioxide from the atmosphere and, if left undisturbed, continue to store and sequester carbon.¹⁰⁶ When forests are logged or cleared, most of the stored carbon is released into the atmosphere.¹⁰⁷

78. A report commissioned by VFA in 2022 investigated the impact of Victoria’s native forest industry on carbon emissions.¹⁰⁸ The report found that around 66% of a forest’s carbon is released within a few years of logging, and native forest logging in Victoria emitted approximately 3 million tonnes of carbon in 2021.¹⁰⁹

79. In the report, it was observed that “many people incorrectly assume that when a native forest is logged, most of the carbon gets stored in timber products. This is not the case.”¹¹⁰ The VFA is concerned that the Carbon Claims could contribute to the spread of misinformation and may mislead consumers accordingly.

80. The VFA report revealed that when a forest is logged in Victoria only 4% of the carbon is stored in long-term timber products, like building materials and furniture.¹¹¹ The remainder is used to produce short-term products such as paper and cardboard, as shown in Figure 1.¹¹² The average lifespan of paper and packaging products has previously been estimated to be three years¹¹³ with a 62.6% recovery rate¹¹⁴, while pallets in Australian supply chains are expected to last a maximum

¹⁰³ VicForests, ‘State of the Environment Report and Native Forest Harvesting in Victoria’ (Web Page) <<https://www.vicforests.com.au/publications-media/forest-facts/soe-harvesting-victoria>>.

¹⁰⁴ *Cambridge Dictionary* (online at 27 June 2023) ‘Renewable’.

¹⁰⁵ *Merriam-Webster Dictionary* (online at 27 June 2023) ‘Renewable’.

¹⁰⁶ Heather Keith et al, ‘Managing Temperate Forests for Carbon Storage: Impacts of Logging Versus Forest Protection on Carbon Stocks’ (2014) 5(6) *Ecosphere* 1, 2 <<https://esajournals.onlinelibrary.wiley.com/doi/epdf/10.1890/ES14-00051.1>>.

¹⁰⁷ *Ibid*.

¹⁰⁸ Victorian Forest Alliance, *Victoria’s Forest Carbon: An Opportunity for Action on Climate Change* (Report, October 2022) 6.

<https://assets.nationbuilder.com/victorianforestalliance/pages/29/attachments/original/1664943052/Victoria_carbon_report-_med_res_web.pdf?1664943052> (*‘Victoria’s Forest Carbon report’*).

¹⁰⁹ *Ibid* 1-2.

¹¹⁰ *Ibid* 6.

¹¹¹ *Ibid* 1.

¹¹² *Ibid* 6.

¹¹³ Australian Greenhouse Office, ‘Usage and Life Cycle of Wood Products – NCAS Technical Report No. 8 (Report, November 1999)

<<https://webarchive.nla.gov.au/awa/20040915151446/http://pandora.nla.gov.au/pan/23322/20020220-0000/www.greenhouse.gov.au/ncas/files/pdfs/tech08.pdf>>. See also David Lindenmayer and Chris Taylor, ‘Logged native forests mostly end up in landfill, not in buildings and furniture’, *The Conversation* (online, 23 April 2019) <<https://theconversation.com/logged-native-forests-mostly-end-up-in-landfill-not-in-buildings-and-furniture-115054>>.

¹¹⁴ Australian Packaging Covenant Organisation, ‘Australian Packaging Consumption Recovery Data 2020-21 (Executive Summary, April 2023) 6 <<https://documents.packagingcovenant.org.au/public-documents/Australian%20Packaging%20Consumption%20And%20Recovery%20Data%202020-21%20Executive%20Summary>>.

of seven years¹¹⁵. Products with lifetimes of 30 to 90 years account for approximately 4% of products made with Victorian native timber.¹¹⁶

81. The VFA is concerned that the claims made via VicForests' website may lead a consumer to conclude that carbon is stored in all or most native timber products "for life", when in fact the vast majority of timber taken from the forest is used to produce single-use products and pulp, while sequestered carbon is released into the atmosphere, as shown in Figure 2.¹¹⁷

Figure 1:



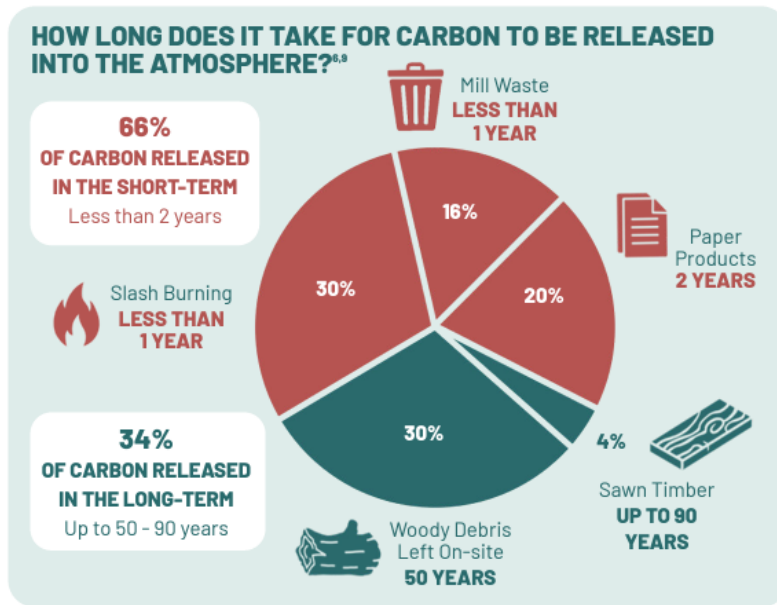
Source: Victorian Forest Alliance, *Victoria's Forest Carbon: An Opportunity for Action on Climate Change* (Report, October 2022) 6.

¹¹⁵ Deakin University, 'Australian Pallet Survey 2017 Report' (Report, August 2017) 19 <http://vta.com.au/wp-content/files_mf/1505108242PalletSurveyReport2017.pdf>.

¹¹⁶ Heather Keith et al, 'Managing Temperate Forests for Carbon Storage: Impacts of Logging Versus Forest Protection on Carbon Stocks' (2014) 5(6) *Ecosphere* 1,

¹¹⁷ *Victoria's Forest Carbon report* (n 108) 7.

Figure 2:



Source: Victorian Forest Alliance, *Victoria's Forest Carbon: An Opportunity for Action on Climate Change* (Report, October 2022) 7.

82. It is noted that assertions within Claim 8 include footnotes referencing external sources, however the assertions within Claim 8 may be misleading to the extent that they misrepresent the findings in the sources referred to in the footnotes and do not reflect best available science.
83. The following assertion in Claim 8 is footnoted with a reference to a report titled 'Forests, Wood and Australia's Carbon Balance' (**the FWPRDC report**):

"The process of harvesting and regenerating forests for wood products helps store more carbon than a carbon sequestration model that involves no forest harvesting at all."¹¹⁸
84. The FWPRDC report was published in 2006 and acknowledges that the analysis of carbon flows and the carbon balance between the atmosphere, forests, and wood and paper products is a "new branch of science" and the figures presented in the report were the "best available current estimates drawn from various sources based on realistic assumptions"¹¹⁹.
85. Further, these findings were predicated on assumptions that wood harvested from native forests is used to make products with long-term carbon storage, that forest biomass can be used to generate renewable energy and that forests are regrown.¹²⁰
86. The following statements in Claim 8 are footnoted with a reference to a report by Deloitte Access Economics titled 'The economic impact of VicForests on the Victorian community' (**the Deloitte report**)¹²¹:

¹¹⁸ Forest and Wood Products Research and Development Corporation and Cooperative Research Centre for Greenhouse Accounting, *Forests, Wood and Australia's Carbon Balance* (Report) <<https://www.firewood.asn.au/images/downloads/forestswoodcarbonbalance.pdf>>.

¹¹⁹ Ibid 1.

¹²⁰ Ibid 10-13.

¹²¹ Deloitte Access Economics, *The economic impact of VicForests on the Victorian community* (Report, September 2017) <<https://www.vicforests.com.au/static/uploads/files/report-vf-2017-deloitte-report-final-wfmrpbmtwu.pdf>>.

“For example, Victorian ash forests conserve 522 tonnes of carbon per hectare. This increases to 835 tonnes per hectare when sustainably harvested. This is because wood products retain carbon and harvested forests are regrown.”

87. The Deloitte report concluded that “as native timber is regularly harvested (rotation), the maximum amount of carbon stored in a regularly harvested forest may be less than in a forest that is allowed to grow continuously [...]”¹²² The Deloitte report states that “native forests store carbon, some of which is released during harvesting. Regrowth and products made from wood also store carbon. Whether the overall carbon balance is positive or negative is dependent on levels of timber substitution and where substitute timber is sourced from.”¹²³ The Deloitte report recognised that carbon sequestration is also increased by maintaining biodiversity¹²⁴
88. Currently, five out of six trees logged in Victoria come from plantations, sourced from plantation estates spanning approximately 382,600 hectares across the state.¹²⁵ This is expected to increase with the Victorian Government’s commitment of \$875 million to support the transition from native wood to plantation timber.¹²⁶ Nationally, plantations currently produce on average approximately 85% of the total logs harvested in Australia¹²⁷ and is considered to be a viable alternative to native timber.¹²⁸
89. The Deloitte report notes that the analysis presented reflected a number of specific assumptions, including:
- (a) “Forests are being regrown.”¹²⁹
 - (b) “Hardwood from Victorian plantations is not a suitable substitute”.¹³⁰
 - (c) “Only above-ground biomass carbon is considered.”¹³¹
90. The VFA is concerned that the Carbon Claims do not make clear the assumptions on which they are based and may mislead consumers. The VFA requests that the ACCC investigate the Carbon Claims accordingly.

Future matters

91. It is noted that companies may be liable for making misleading representations with respect to future matters if they do not have reasonable grounds for making the representation.¹³²
92. To the extent that VicForests may be liable for false and/or misleading claims as to future conduct, we refer to the Victorian Government’s recent announcement to end native logging by 1 January

¹²² Ibid 36.

¹²³ Ibid 42.

¹²⁴ Ibid 42.

¹²⁵ Department of Job, Skills, Industry and Regions, ‘Plantations’ (Web Page, 21 April 2023) <<https://djsir.vic.gov.au/forestry/managing-our-forests/plantations>>.

¹²⁶ Daniel Andrews, ‘Delivering Certainty for Timber Workers’ (Media Release, 23 May 2023) <<https://www.premier.vic.gov.au/delivering-certainty-timber-workers>>.

¹²⁷ Department of Agriculture, Fisheries and Forestry, ‘Australian plantation statistics 2022 update’ (Report, August 2022) 3 <https://daff.ent.sirsidynix.net.au/client/en_AU/search/asset/1033861/0>.

¹²⁸ Blueprint Institute, ‘Logging off: A cost-benefit analysis of land use options for the native forests of the Central Highlands, Victoria’ (Report, 15 November 2022) 4, 8 <https://www.blueprintinstitute.org.au/logging_off_forestry>; David Lindenmayer and Chris Taylor, ‘After the chainsaws, the quiet: Victoria’s rapid exit from native forest logging is welcome – and long overdue’, *The Conversation* (online, 23 May 2023) <<https://theconversation.com/after-the-chainsaws-the-quiet-victorias-rapid-exit-from-native-forest-logging-is-welcome-and-long-overdue-206181>>.

¹²⁹ Ibid 38.

¹³⁰ Ibid 41.

¹³¹ Ibid 38.

¹³² ACL, s 4.

2024¹³³ and the following comment made by the Treasurer of Victoria, the Hon Tim Pallas MP, on Wednesday 24 May 2023 at the Victorian Chamber of Commerce and Industry, as reported in the Australian newspaper on 24 May 2023¹³⁴ that: “Certainly the legal advice we got from the solicitor general is that there is no way that we can get to a point where there is certainty of being able to extract resources out of our native forests.” This statement is inconsistent with assertions made within Claims 1 to 8, to the effect that the native timber industry in Victoria industry is sustainable.

Effect of disclaimers

93. VicForests’ website includes a webpage titled ‘Legal: Terms of Use/access’, which contains broad disclaimers (**the Disclaimers**), as follows:¹³⁵

- “The content of VicForests’ website is provided for information purposes only.”
- “VicForests does not warrant, guarantee or make any representations regarding the currency, accuracy, correctness, reliability, usability, or any other aspect, of the material presented on this website [...]”.
- “Information published by VicForests is based on the best available data at the time of publication. Changes in circumstances after the time of publication may impact on the accuracy of this information and VicForests gives no assurance that any information or advice contained will be up-to-date at any point in time.”
- “The user accepts sole responsibility and all risk for using material presented on or accessed from this website.”
- “VicForests, its offices, employees or agents, does not accept any liability for any loss or damage which may be incurred as a result of using this website or any material presented on or accessed from this website.”
- “The information contained in this website is not to be displayed except in full screen format. No liability is accepted for any information that may appear in any other format.”

94. Australian Courts have observed that in most cases, businesses cannot rely on disclaimers as an excuse for engaging in misleading or deceptive conduct, however a disclaimer may sometimes be sufficient to overcome what would otherwise amount to misleading or deceptive conduct.¹³⁶

95. Each case will depend on its own facts and circumstances, including the terms, size, prominence and context of the disclaimer in question.¹³⁷ To be effective in limiting liability, a disclaimer must be “clear, detailed and prominent”.¹³⁸ The presentation of the disclaimer will be relevant, particularly if it sits “outside the sphere of such communication.”¹³⁹ The High Court of Australia has observed that:

¹³³ Daniel Andrews, ‘Delivering Certainty for Timber Workers’ (Media Release, 23 May 2023) <<https://www.premier.vic.gov.au/delivering-certainty-timber-workers>>.

¹³⁴ Angelica Snowden, ‘Legal fight mean no ‘certainty’ for Victorian logging industry’, *The Australian* (online, 24 May 2023) <https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fnation%2Flegal-fights-mean-no-certainty-for-victorian-logging-industry%2Fnews-story%2F38ded1e2b43609afb8377d828d5a7da0&memtype=anonymous&mode=premium&v21=dynamic-groupa-control-noscore&V21spcbehaviour=append>.

¹³⁵ VicForests, ‘Legal: Terms of Use/Access’ (Web Page) <<https://www.vicforests.com.au/aboutus/legal-3/terms-ofuse>>.

¹³⁶ *Butcher v Lachlan Realty Pty Limited* (2004) 218 CLR 592, [213]-[214].

¹³⁷ *Ibid* [212].

¹³⁸ *Ibid* [216].

¹³⁹ *Ibid* [205].

“at the very least, if a disclaimer is propounded to exempt a corporation engaged in trade or commerce in Australia from the important obligations of the [CC] Act, it is reasonable to demand that this be done clearly, emphatically and so as reasonably to impinge on the consciousness of persons who thereby lose protections enacted by the Parliament for their benefit”.¹⁴⁰

96. It is important to consider the relevant conduct in its entirety, including the effect of any disclaimers, in order to determine whether the conduct is likely to be misleading or deceptive.¹⁴¹ General words such as “any loss” or a reference to loss “howsoever caused” may not be sufficient.¹⁴² Additionally, depending on the relative bargaining power of the parties, Courts will generally construe clauses ‘contra proferentem’ if there is ambiguity, such that the Court will interpret a clause strictly and construe any ambiguity against the party seeking to rely on it.¹⁴³
97. It is generally accepted that acting as a ‘conduit’ for representations without endorsing or adopting the contents will usually not amount to misleading conduct.¹⁴⁴ The VFA submits that the Claims, which relate directly to the practices, procedures and products of VicForests, do not constitute a mere passing on of information such that this could be relied upon to limit any liability.
98. The VFA asserts that to be successful in limiting any liability for making false or misleading statements in the Claims identified in this Complaint, a disclaimer would need to be considerably more prominent and proximate to what it is seeking to cover. Further, the VFA submits that the Disclaimers in their current form are too broad to defeat important protections in the ACL and limit VicForests’ potential liability for the Claims.

Conclusion

99. Where it is alleged that a public statement is misleading or deceptive, or likely to mislead or deceive, the principal forms of relief typically sought are declarations as to contravention, and injunctions to prevent repetition.¹⁴⁵
100. Having regard to VicForests’ status as a State-owned company with broad powers to manage and conduct timber harvesting operations on behalf of the Victorian government in State forests, the VFA submits that the need for transparency and accuracy in this case is amplified.
101. The VFA asks that you investigate the claims made by VicForests on its website as to its environmental credentials and the sustainability of the industry and take appropriate action to remedy any false or misleading conduct likely to lead environmentally conscious consumers into error.

Yours sincerely,

Environmental Justice Australia on behalf of the Victorian Forest Alliance

¹⁴⁰ Ibid [213], citing J. L. R. Davies, Nicholas C. Seddon and Geoff Masel (eds), *The Laws of Australia: Contract* (Lawbook, 2003) 466-467 [85].

¹⁴¹ *Civoken Pty Ltd v Madden Grove Developments Pty Ltd* [2006] VSC 283, [489].

¹⁴² *Canada Steamship Lines v The King* [1952] AC 192.

¹⁴³ *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500; cf *Persimmon Homes Ltd v Ove Arup and Partners Ltd* [2017] EWCA Civ 373.

¹⁴⁴ *Civoken Pty Ltd v Madden Grove Developments Pty Ltd* [2006] VSC 283, [490]-[491].

¹⁴⁵ Graeme Clarke, ‘Misleading or Deceptive Conduct Cases in the Supreme Court of Victoria’ (2015) 89 *ALJ* 397 <<https://www.vicbar.com.au/sites/default/files/ALJ%20%282015%29%2089%20ALJ%20397.Misleading%20or%20deceptive%20conduct%20cases%20in%20the%20Supreme%20Court%20of%20Victoria.pdf>>.