



FORM 5A

Rule 5.02(1)

WRIT

Case: S ECI 2020 00373

Filed on: 28/01/2020 12:38 PM

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

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BETWEEN

WILDLIFE OF THE CENTRAL HIGHLANDS INC

Plaintiff

and

VICFORESTS

Defendant

Date of document:	28 January 2020	
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
Em: danya.jacobs@envirojustice.org.au		Ref: Danya Jacobs

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

THE PROPER TIME TO FILE AN APPEARANCE is as follows—

- (a) where you are served with the writ in Victoria, within 10 days after service;

- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the writ.

FILED

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

INDORSEMENT PURSUANT TO RULE 5.04(2)(b)

Parties

1. The Plaintiff:
 - (a) is an Association incorporated under the *Associations Incorporation Reform Act 2012* (Vic); and
 - (b) is capable of suing in its own name.
2. The Defendant (**VicForests**):
 - (a) is established as a State body under s 14 of the *State Owned Enterprises Act 1992* (Vic); and
 - (b) is a body corporate capable of being sued in its own name.

VicForests conducts timber harvesting

3. On or about 24 December 2019, VicForests published a timber release plan (**TRP**) comprising a schedule and online map of coupes selected for timber harvesting by VicForests from 2019 to 2024.

Obligations to comply with the Code

4. VicForests is required by s 46(a) of the *Sustainable (Forests) Timber Act 2004* (Vic) (**SFT Act**) to comply with any relevant Code of Practice relating to timber harvesting.

The Code

5. In 2014, the Department of Environment and Primary Industries published a Code of Practice under Part 5 of the *Conservation, Forest and Lands Act 1987* (Vic) (the **CFL Act**), styled “Code of Practice for Timber Production 2014” (the **Code**).
6. Section 2.2.2.2 of the Code requires, as a “mandatory action”, application of the “precautionary principle” (as defined in the Code) to the conservation of biodiversity

values, consistent with relevant monitoring and research that has improved the understanding of the effects of forest management on forest ecology and conservation values.

7. The “precautionary principle” is defined in the Code as follows: “when contemplating decisions that will affect the environment, careful evaluation of management options be undertaken to wherever practical avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various options. When dealing with 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”.
8. Section 2.2.2.3 of the Code requires, as a “mandatory action”, consideration of the advice of relevant experts and relevant research in conservation biology and flora and fauna management when planning and conducting timber harvesting operations.

2019/2020 Bushfires

9. In the 2019/2020 fire season, Victoria experienced catastrophic bushfires (the **Bushfires**).
10. On 3 January 2020, the Premier of Victoria declared a State of Disaster in respect of part of the State, arising from the Bushfires.
11. The Bushfires have caused (and are continuing to cause) significant losses of flora and fauna throughout Victoria, including losses of species listed as threatened under Part 3 of the *Flora and Fauna Guarantee Act 1988* (Vic) (**fire-affected threatened species**) and loss of the habitat of such species.

VicForests is continuing to log in habitat of fire-affected threatened species

12. Notwithstanding the Bushfires, VicForests is continuing to conduct timber harvesting operations in Victorian forests.

Particulars

By letter of 22 January 2020, VicForests advised the plaintiff’s solicitor that logging was continuing and that 34 coupes were “presently active”.

A copy of the 22 January 2020 letter is in the possession of the plaintiff's solicitors and available for inspection upon request.

13. Of the coupes scheduled for harvesting in the TRP, VicForests has commenced logging (or is proposing to imminently commence logging) in coupes that contain or are likely to contain fire-affected threatened species; or habitat of fire-affected threatened species.

Particulars

- (a) Coupe 298-516-0003 (**Mount Despair Pony Coupe**) is presently active and contains Greater Glider and its habitat.
- (b) Coupe 298-516-0002 (**Mount Despair Brumby Coupe**) is presently active or intended to commence in January or February 2020 and contains Greater Glider and its habitat.
- (c) Coupe 297-501-0005 (**Castella Hills Coupe**) is presently active or intended to commence in February 2020 and contains Greater Glider and its habitat.
- (d) Coupe 297-501-0006 (**Castella East Coupe**) is presently active or intended to commence in February 2020 and contains Greater Glider and its habitat.
- (e) Coupe 298-504-0001 (Propeller) (**Mount Klondyke Coupe**) is presently active and contains:
 - i. Greater Glider and its habitat;
 - ii. Powerful Owl and/or its habitat.
- (f) Coupe 312-510-0012 (Kumba) (**Big River Coupe**) is presently active and contains
 - i. Greater Glider and its habitat;
 - ii. Powerful Owl and/or its habitat;
 - iii. Sooty Owl and/or its habitat;
 - iv. Smoky Mouse and its habitat.
- (g) Coupe 458-501-0010 (Rock a Rhyme) (**Upper Thompson Coupe**) is presently active and contains Greater Glider and its habitat.
- (h) Coupe 349-502-0014 (**LaTrobe Coupe**) is presently active and contains:

- i. Greater Glider and its habitat;
- ii. Sooty Owl and/or its habitat;
- (i) Coupe 347-518-0005 (Dowse) (**Learmonth Creek Coupe**) is presently active and contains Greater Glider and its habitat.
- (j) Coupe 345-528-0001 (Apu) (**Big Pats Creek Coupe**) is presently active or intended to commence in February 2020 and contains Greater Glider and its habitat.
- (k) Greater Glider, Sooty Owl, Powerful Owl and Smoky Mouse are fire-affected threatened species.

The reference to “threatened species” is a reference to species identified as threatened pursuant to the *Flora and Fauna Guarantee Act 1988* (Vic).

Further particulars may be provided

Non-compliance with the Code; contravention of s 46 of the SFT Act

- 14. By planning and conducting timber harvesting operations following the Bushfires in coupes containing fire-affected threatened species or likely to contain such species, or containing habitat of fire-affected threatened species, VicForests has failed, and will fail, to comply with s 2.2.2.2 and/or s 2.2.2.3 of the Code.

Particulars

- (a) From about early 2020, the Victorian Department of Environment, Land, Water and Planning (**DELWP**) commenced planning a biodiversity response to the Bushfires (the **State bushfire biodiversity response**).

A copy of DELWP’s report titled ‘Victoria’s bushfire emergency: Biodiversity response and recovery preliminary report – Version 1’ dated 20 January 2020 is in the possession of the plaintiff’s solicitors and available for inspection.

- (b) From about early 2020, the Commonwealth Department of Environment and Energy commenced a wildlife and threatened species bushfire recovery process, including convening an Expert Panel (the **Commonwealth bushfire biodiversity response**).

A copy of the ‘Wildlife and threatened species bushfire recovery expert panel communique’ dated 15 January 2020 is in the possession of the plaintiff’s solicitors and available for inspection.

- (c) Neither the State nor Commonwealth bushfire biodiversity response is yet complete.
- (d) The State and Commonwealth bushfire biodiversity responses have included (by way of published preliminary results) and are likely to include advice of relevant experts and relevant research in conservation biology and flora and fauna management which must be considered by VicForests when planning and conducting timber harvesting operations under s 2.2.2.3 of the Code.
- (e) Because VicForests is continuing to conduct timber harvesting operations without waiting for completion of the State and Commonwealth bushfire biodiversity responses, VicForests has failed, is failing, and will fail to properly consider the advice at (d) in planning and conducting timber harvesting operations in coupes containing detections or habitat of fire-affected threatened species.
- (f) The State and Commonwealth bushfire biodiversity responses have included (by way of published preliminary results) and are likely to include relevant monitoring and research that improves the understanding of the effects of forest management on forest ecology and conservation values, with which VicForests must apply the precautionary principle consistently to the conservation of biodiversity values under s 2.2.2.2 of the Code.
- (g) In about November 2019, DELWP published a document titled Action Statement for Greater Glider, which included an “indicative” map of 96,000ha designated as an “Immediate Protection Areas” for the species.
- (h) The boundaries of the Immediate Protection Areas are yet to be finalised.
- (i) Between December 2019 and January 2020, a substantial proportion of the indicative Immediate Protection Areas for the Greater Glider was burnt and otherwise impacted by the Bushfires.
- (j) The Action Statements for each of the Powerful and Sooty Owl intend to establish and maintain a reserve system containing good quality habitat for 500 breeding pairs of each species across Victoria.
- (k) Between December 2019 and January 2020, the Sooty and Powerful Owl reserve system was impacted by the Bushfires.
- (l) It was and remains probable or seriously possible that timber harvesting in coupes that contain fire-affected threatened species detections or habitat, posed and continues to pose a threat of serious or irreversible damage to fire-affected threatened species and there was and remains scientific uncertainty as to that threat.

- (m) VicForests has failed, is failing, and will fail to apply the precautionary principle to the conservation of biodiversity values at all, or consistent with relevant monitoring and research, by
 - i. planning and conducting timber harvesting operations in coupes containing detections or habitat of fire-affected threatened species prior to the conclusion of the State and Commonwealth bushfire/biodiversity response.
 - ii. planning and conducting timber harvesting operations in coupes containing detections or habitat of fire-affected threatened species prior to the conclusion of the relevant advice, monitoring and research components of the State and Commonwealth bushfire/biodiversity response.
 - iii. failing to develop and implement timber harvesting prescriptions to protect fire-affected threatened species, wherever practical, that:
 - A. have regard to the bushfire crisis;
 - B. are proportionate to the threat posed by timber harvesting operations to fire-affected threatened species.
 - iv. failing to carefully evaluate management options for fire-affected threatened species.
 - v. failing to properly assess the risk-weighted consequences for fire-affected threatened species of various options.
- (o) planning and conducting timber harvesting operations in coupes containing detections or habitat of Greater Glider since the Bushfires and prior to the finalisation of the Immediate Protection Area.

- 15. Any breach of the Code by VicForests (whether of s 2.2.2.2 or s 2.2.2.3) is a breach of its obligation under s 46 of the SFT Act to comply with relevant Codes of Practice.
- 16. VicForests will, unless restrained, fail to take a precautionary approach and/or breach s 2.2.2.3 of the Code in conducting timber harvesting operations in coupes that contain or are likely to contain fire-affected threatened species or habitat of fire-affected threatened species.

AND THE PLAINTIFF CLAIMS AGAINST THE DEFENDANT

- A. A declaration that the timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* (Vic) in the coupes particularised in paragraph 13 above are unlawful.
- B. A declaration that it is unlawful for VicForests to conduct timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* (Vic) in any coupe known to VicForests or DELWP to contain or be likely to contain a species identified as threatened pursuant to the *Flora and Fauna Guarantee Act 1988* (Vic) and affected by the Bushfires (as defined in paragraph 9 above), or habitat of such species, unless and until:
- a. the State and Commonwealth bushfire biodiversity response (as defined in the particulars to paragraph 14 above) has concluded; and
 - b. VicForests has developed and implemented timber harvesting prescriptions to protect fire-affected threatened species in light of the State and Commonwealth bushfire biodiversity response.
- C. Injunctions, both interlocutory and final, to restrain the Defendant (whether by itself, its officers, its employees, agents, contractors or howsoever otherwise) from carrying out timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* (Vic) in the following coupes: 298-516-0003 (Pony), 298-516-0002 (Brumby), 297-501-0005 (Castella Hills), 297-501-0006 (Castella East), 298-504-0001 (Propeller), 312-510-0012 (Kumba), 458-501-0010 (Rock a Rhyme), 349-502-0014 (LaTrobe), 347-518-0005 (Dowse) and 345-528-0001 (Apu).
- D. A final injunction to restrain the Defendant (whether by itself, its officers, its employees, agents, contractors or howsoever otherwise) from carrying out timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* (Vic) in any coupe known to VicForests or DELWP to contain or be likely to contain a species identified as threatened pursuant to the *Flora and Fauna Guarantee Act 1988* (Vic) and affected by the Bushfires, or habitat of such species, unless and until:
- a. the State and Commonwealth bushfire biodiversity response (as defined in the particulars to paragraph 14 above) has concluded; and

- b. VicForests has developed and implemented timber harvesting prescriptions to protect fire-affected threatened species in light of the State and Commonwealth bushfire biodiversity response.
- E. A final injunction to restrain the Defendant (whether by itself, its officers, its employees, agents, contractors or howsoever otherwise) from carrying out timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* (Vic) in any coupe known to VicForests or DELWP to contain or be likely to contain Greater Glider or its habitat, unless and until the boundaries of the Immediate Protection Area for the Greater Glider are finalised.
- F. Such further or other orders as the Court sees fit.

DATED 28 January 2020

Environmental Justice Australia
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Environmental Justice Australia
Solicitors for the Plaintiff

1. Place of trial—
Melbourne
2. Mode of trial—
before a Judge of the Court sitting alone
3. This writ was filed—
for the plaintiff by Environmental Justice Australia, solicitor, of Level 3, 60 Leicester Street CARLTON VIC 3053
4. The address of the plaintiff is—
Unit 4, 5 Church Street, Healesville VIC 3777
5. The address for service of the plaintiff is—
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VIC 3053
danya.jacobs@envirojustice.org.au
6. The address of the defendant is —
Level 12, 461 Bourke Street, Melbourne 3000