

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

Not Restricted

S ECI 2020 00373

WILDLIFE OF THE CENTRAL HIGHLANDS INC

Plaintiff

-v-

VICFORESTS

Defendant

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JUDGE: McMillan J  
WHERE HELD: Melbourne  
DATE OF HEARING: 29 January 2020  
DATE OF RULING: 29 January 2020  
CASE MAY BE CITED AS: Wildlife of the Central Highlands Inc v VicForests  
MEDIUM NEUTRAL CITATION: [2020] VSC 10

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PRACTICE AND PROCEDURE – Interim injunction – Whether serious question to be tried – Whether balance of convenience favours granting injunction – Timber harvesting of State forests – Whether bushfires affect application of Code of Practice – Threatened species of Greater Glider, Powerful Owl, Sooty Owl and Smoky Mouse – *Conservation, Forests and Lands Act 1987 (Vic)* – *Flora and Fauna Guarantee Act 1988 (Vic)* – *Sustainable Forests (Timber) Act 2004 (Vic)* – *Environment East Gippsland Inc v VicForests* [2009] VSC 386 – *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms KE Foley and Ms J Watson	Environmental Justice Australia
For the Defendant	Mr H Redd	Baker McKenzie

HER HONOUR:

- 1 By generally indorsed writ filed 28 January 2020, the plaintiff seeks an urgent interim injunction to prevent the defendant from harvesting timber in ten forest coupes in Victoria ('the coupes'). It is the plaintiff's case that the coupes contain, or are likely to contain, bushfire-affected threatened species or the habitat of bushfire-affected threatened species. The plaintiff seeks an interim injunction pending the hearing of an application for an interlocutory injunction.
- 2 The plaintiff's application is supported by an affidavit of Ms Danya Jacobs, solicitor, which exhibits some 1,800 pages of documentary material. Due to the urgent application, the defendant has not yet filed any evidence in response.
- 3 The plaintiff alleges that it is unlawful for the defendant to harvest timber in coupes known to the defendant or the Department of Environment, Land, Water and Planning to contain or be likely to contain a species identifies as threatened pursuant to the *Flora and Fauna Guarantee Act 1988* ('the FFG Act') and affected by the recent bushfires, or habitat of such species. The plaintiff submits that there are currently underway State and Commonwealth bushfire biodiversity responses, the findings of which will be relevant to the defendant's actions as they relate to threatened species, and that those responses have not yet concluded. The plaintiff submits that, by continuing to harvest timber in the coupes, the defendant is not able to act consistently with its obligations to consider any relevant findings when planning and conducting harvesting operations.

### **Legal Principles**

- 4 The legal principles regarding interim and interlocutory injunctions are well-established.<sup>1</sup>

### **Plaintiff's standing**

- 5 The plaintiff is an association incorporated under the *Associations Incorporation Reform*

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<sup>1</sup> See, eg, *Environment East Gippsland Inc v VicForests* [2009] VSC 386; *Beecham Group Ltd v Bristol Laboratories* (1968) 118 CLR 618; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

*Act 2012*. It conducts citizen science in Victoria's forests to document and report on the presence of biodiversity values that attract protection from logging under the State regulatory scheme. Ms Jacobs deposes that the plaintiff has conducted hundreds of surveys to document and report on the presence of biodiversity values and submitted more than 150 reports to government since about 2015, some of which have resulted in the protection of areas of forest otherwise scheduled for timber harvesting.

6 It is clear, on at least a prima facie basis, that the plaintiff has standing to bring this application as its interest goes beyond mere intellectual or emotional concern,<sup>2</sup> and it has a specific involvement in these regions.

### **Serious question to be tried**

7 The plaintiff must establish the existence of a serious question to be tried.

### *The plaintiff*

8 The plaintiff grounds its application in the obligations imposed by s 46(a) of the *Sustainable Forests (Timber) Act 2004* ('the SFT Act') upon the defendant to comply with any relevant Code of Practice relating to timber harvesting. The relevant Code of Practice is the *Code of Practice for Timber Production 2014* ('the Code'), which was published under pt 5 of the *Conservation, Forest and Lands Act 1987*. The plaintiff submits that the defendant is in breach of two sections of the Code, and therefore in breach of the SFT Act.

9 Section 2.2.2.2 of the Code requires, under the heading of 'Mandatory Actions':

The **precautionary principle** must be applied to the conservation of biodiversity values. The application of the precautionary principle will be consistent with the relevant monitoring and research that has improved the understanding of the effects of forest management on forest ecology and conservation values.

10 The Code defines the 'precautionary principle' as follows:

when contemplating decisions that will affect the environment, careful evaluation of management options be undertaken to wherever practical avoid

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<sup>2</sup> *Environment East Gippsland Inc v VicForests* [2009] VSC 386, [64]-[71] (Forrest J), citing *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492

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.

11 Section 2.2.2.3 of the Code requires, similarly under the heading of 'Mandatory Actions':

The advice of relevant experts and relevant research in conservation biology and flora and fauna management must be considered when planning and conducting timber harvesting operations.

12 Ms Jacobs deposes that there are four species present in the coupes that have all be listed as 'threatened' under the FFG Act. Those species are the Greater Glider, the Powerful Owl, the Sooty Owl and the Smoky Mouse (collectively, 'the threatened species'). Section 11(1) of the FFG Act provides that a species is eligible to be so listed 'if it is in a demonstrable state of decline which is likely to result in extinction or if it is significantly prone to future threats which are likely to result in extinction'.

13 Ms Jacobs exhibited a report published by the State government entitled *Victoria's bushfire emergency; Biodiversity response and recovery, Preliminary report – Version 1* ('the State report'), which identifies all of the threatened species as species of 'most immediate concern'. The State report further states experts have identified that the key actions necessary for immediate and short-term implementation include '[p]rotection and management of key unburn areas and populations' and that 'mitigation will increasingly include options beyond the fire areas'.

14 The plaintiff further referred to a Commonwealth government bushfire recovery process ('the Commonwealth response'), which includes convening an expert panel and will address impacts on threatened species and appropriate emergency actions and responses.

15 Neither the State report nor the Commonwealth response is complete.

16 Specifically in relation to the Greater Glider, Ms Jacobs exhibits an Action Statement published by the Victorian Government in November 2019, which states, inter alia,

that 26 per cent of the Greater Glider's modelled habitat in Victoria is within the current fire extent, and 47 per cent is within the projected impact area.

17 In summary, the plaintiff submits:

- (a) A decision to harvest timber in a coupe that is known to contain or known to be likely to contain threatened species (or habitat of the same) is a management decision that will affect the environment, thereby engaging the precautionary principle.
- (b) The recent bushfires have had a devastating impact on flora and fauna, yet the full extent of the impact (including on threatened species) is not yet understood.
- (c) Governmental responses to date have indicated a high level of concern about the impact on threatened species. The species at issue in this proceeding have been identified by government as species of 'most immediate concern'.
- (d) Given the above, 'careful evaluation' of management options by the defendant when contemplating harvesting timber in the coupes requires a 'wait and see' approach. In light of these events and the uncertainty of the impact, it is simply not presently possible for the defendant to say there will be no serious or irreversible damage caused by the timber harvesting.
- (e) To continue to harvest timber without waiting to understand the full impact of the bushfires and the recommendations made by government and experts cannot meet the 'careful evaluation' and 'proper assessment' requirements of the precautionary principle. This is a breach of s 2.2.2.2 of the Code, and therefore of s 46(a) of the SFT Act.
- (f) In circumstances where relevant expert advice and research is being given in the context of the ongoing governmental responses, but is not yet finalised, s 2.2.2.3 of the Code similarly requires a 'wait and see' response from the defendant, so it can properly consider the relevant advice and research in final

form before taking any further steps.

*The defendant*

- 18 The defendant submits that the application is a transparent attempt to use legal process to achieve a political outcome and that the precautionary principle in the Code has never been construed so broadly so as to permit the relief sought in the writ.
- 19 It is submitted that the management of dynamic State forests with competing demands upon them is a matter of policy for the executive branch of the Victorian Government. To this end, the defendant refers to observations made by Osborn JA in *MyEnvironment Inc v VicForests* that 'the issue ultimately involves questions of policy judgment which are not the province of the Court'.<sup>3</sup>
- 20 The defendant further submits that s 70 the SFT Act provides for an authorised officer to direct the defendant to take regulatory action in respect of the coupes, and that no such direction has been made.

*Consideration*

- 21 It is not in dispute that s 46(a) of the SFT Act requires the defendant to comply with the Code. It is also established law that the precautionary principle imposes enforceable obligations on the defendant.<sup>4</sup>
- 22 The defendant submits that the ultimate question is one of policy properly left to the executive, rather than a justiciable matter for the Court. That argument is rejected. In the defendant's own submission, the issue raised is the proper construction of the relevant provisions of the Code. What follows from this is consideration of their application to the facts. These are matters inherently suited to the judiciary.
- 23 The defendant's submission regarding s 70 of the SFT Act does not assist the Court. The existence of other mechanisms by which regulatory limitations may be imposed

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<sup>3</sup> [2012] VSC 91, [310].

<sup>4</sup> *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1, 7 [15]–[16], 82–88 [582]–[605] (Osborn J); *MyEnvironment Inc v VicForests* [2012] VSC 91, [263] (Osborn JA).

on the defendant does not bear upon the proper construction and application of the Code.

24 The plaintiff largely accepted the defendant's submission that the proceeding called for an unprecedented expansion of the construction and application of the Code. In so doing, the plaintiff submitted that the severity of the bushfires and their impact is unprecedented, and that it is appropriate for the legal landscape to change alongside the geographical landscape. At the prima facie stage, the Court accepts that the proper construction of the relevant provisions of the Code may reasonably allow for their application in the way sought by the plaintiff.

### **Balance of Convenience**

25 The plaintiff must establish that the balance of convenience favours the grant of the injunction.

#### *The plaintiff*

26 The plaintiff submits that the Court granted an injunction against timber harvesting in similar circumstances in *Environment East Gippsland Inc v VicForests*.<sup>5</sup> It points to the following similar and relevant circumstances:

- (a) Although some financial loss will be caused, the asset will be retained and can be harvested at a later date.
- (b) Other coupes can be harvested – the Timber Release Plan contains in excess of 2500 coupes, more than 800 of which are in the Central Highlands Area, only ten of which are subject to this application.<sup>6</sup>
- (c) Preservation of threatened fauna is a paramount consideration in the regulatory regime, and accordingly the limited assets of the plaintiff is not a

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<sup>5</sup> [2009] VSC 386, [98]–[106] (Forrest J).

<sup>6</sup> The defendant submitted that these figures were either misleading or incorrect and provided lower figures from the bar table. The plaintiff did not object to the lower figures but submitted that they were not so much lower as to affect the plaintiff's submission.

reason not to grant the injunction.

- (d) Timber harvesting causes irreparable damage to the habitat of fire-affected threatened species.

27 By contrast, any timber harvesting that occurs in the coupes will cause irreversible damage to the remaining habitat of the fire-affected threatened species, in circumstances where those species have been recognised by the State and Commonwealth governments as being on a path to extinction. An award of damages plainly cannot compensate for such damage.

*The defendant*

28 The defendant submits that, due to the plaintiff's haste in issuing proceedings, it has not been able to file any evidence in opposition to the application, particularly in regards to the financial implications of an injunction. Nevertheless, it asks the Court to take judicial notice that injunctive relief will:

- (a) disrupt the defendant's operations;
- (b) adversely impact the defendant's ability to meet its contractual obligations; and
- (c) potentially affect third parties (such as customers and harvest and haulage operators).

29 It is submitted that the impact would be all the more acute in the context of the bushfires, which have burnt areas of timber that might otherwise have been available for harvest.

30 During the hearing, the defendant informed the Court that only three of the ten coupes are currently being harvested. Harvesting on the other coupes is either not scheduled, not commenced, or commenced but on hold. It is unfortunate that the parties were unable to exchange this information before the hearing and tailor their submissions accordingly.



*Consideration*

31 The defendant is at a disadvantage, not having had a proper opportunity to file evidence as to the loss it submits it will suffer should injunctive relief be granted. The Court is satisfied, and it is not a matter in dispute, that some financial loss is likely.

32 However, the plaintiff has established, prima facie, that there is a real threat of serious or irreversible damage to the threatened species and their habitat should harvesting operations continue in the coupes. The recent bushfires have caused extensive environmental damage, the severity of which is only beginning to be understood. In the circumstances, the Court is satisfied that the balance of convenience favours the grant of an interim injunction. The injunction is limited to the three coupes on which harvesting is currently active, there being no reason to injunct the defendant in relation to all ten coupes in question.

**Undertaking**

33 The plaintiff stated that it is prepared to make an undertaking as to damages.

**Conclusion**

34 The Court will grant an interim injunction in relation to the three coupes.

35 The hearing of the interlocutory application will be listed for 18 February 2020. The parties are to forward a proposed minute of orders in respect of the interim injunction and for the filing of any further affidavits and submissions.

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**CERTIFICATE**

I certify that this and the 7 preceding pages are a true copy of the reasons for ruling of the Honourable Justice McMillan of the Supreme Court of Victoria delivered on 29 January 2020.

DATED this twenty-ninth day of January 2020.

