

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

Not Restricted

S ECI 2020 00373

WOTCH Inc

Plaintiff

v

VicForests

Defendant

JUDGE: Keogh J
WHERE HELD: Melbourne
DATE OF HEARING: 10 July 2020
DATE OF RULING: 16 July 2020
CASE MAY BE CITED AS: WOTCH Inc v VicForests (No 4)
MEDIUM NEUTRAL CITATION: [2020] VSC 433

PRACTICE AND PROCEDURE – Interim injunction – Whether serious question to be tried – Whether balance of convenience favours granting injunction – Timber harvesting of State forests – Application of the precautionary principle – Protection of threatened species following 2019/20 Victorian bushfires – *Flora and Fauna Guarantee Act 1988 (Vic)* – *Sustainable Forests (Timber) Act 2004 (Vic)* – *Code of Practice for Timber Production 2014*.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	K Foley and C Mintz	Environmental Justice Australia
For the Defendant	D Collins QC and F Hudgson	Russell Kennedy Lawyers



HIS HONOUR:

- 1 The plaintiff is an incorporated association which (among other things) conducts surveys in Victoria's forests to document and report on the presence of biodiversity values that attract protection from timber harvesting under the State regulatory scheme. The defendant, VicForests, is a State body which conducts timber harvesting in State forests in Victoria.
- 2 Bushfires which occurred during the 2019/20 fire season ('the bushfires') caused significant loss of flora and fauna in Victoria, including losses to species listed as threatened under the *Flora and Fauna Guarantee Act 1988* (Vic). State and Commonwealth bushfire biodiversity responses are currently underway, but are not complete.
- 3 This proceeding, commenced by writ filed on 28 January 2020, concerns VicForests' harvesting of timber following the bushfires in coupes which the plaintiff alleges contain, or are likely to contain, threatened species. The proceeding is fixed for trial on 7 October 2020.
- 4 The plaintiff alleges the State and Commonwealth bushfire responses will contain information and make findings which VicForests must take into account in planning and conducting its timber harvesting operations, and that it is unlawful for VicForests to harvest timber in coupes known by it or the Department of Land, Environment, Water and Planning ('DELWP') to contain or to be likely to contain threatened species or the habitat of threatened species affected by the bushfires until the impact of the bushfires on those species is fully understood.
- 5 This is the fourth application by the plaintiff for interim or interlocutory injunctive relief to restrain VicForests from harvesting timber in identified native forest coupes. McMillan J made orders granting an interim injunction in relation to three coupes on 29 January 2020,¹ an interlocutory injunction covering those three coupes and a further 10 coupes on 5 March,² and on 29 April an interlocutory injunction in relation to a

¹ *Wildlife of Central Highlands Inc v VicForests* [2020] VSC 10.

² *WOTCH v VicForests (No 2)* [2020] VSC 99 ('*WOTCH (No 2)*').

further 13 coupes.³

6 Orders made by McMillan J on 13 May provided a mechanism by which the plaintiff could identify further coupes planned for harvesting by VicForests in the period prior to trial.

7 The current application relates to a further 28 coupes in the Central Highlands forest management area ('FMA') in which harvesting is planned before trial and in respect of which the plaintiff alleges there is evidence of the presence of threatened species that have been affected by the bushfires, namely the Greater Glider, Powerful Owl and Sooty Owl.

8 The parties agreed that only interim relief should be considered at the hearing on 10 July 2020, and that the application should be listed in early August for determination of interlocutory relief. VicForests foreshadowed that at the interlocutory hearing in August it would apply to revoke current orders in the proceeding granting injunctive relief.

Background

9 I will adopt without restatement the relevant background in relation to matters including the forest management regime in Victoria, bushfire response and threatened species set out in the previous rulings by McMillan J to which I have referred. Some matters of particular relevance are briefly summarised.

10 In planning for or conducting timber harvesting operations VicForests is obliged to comply with the *Code of Practice for Timber Production 2014* ('the Code').⁴

11 The Code imposes mandatory actions on VicForests, which include:

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

³ *WOTCH v VicForests (No 3)* [2020] VSC 220 ('*WOTCH (No 3)*').

⁴ *Sustainable Forests (Timber) Act 2004* (Vic) ('*SFT Act*'), s 46(a).



ecology and conservation values.

2.2.2.3 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 The Code defines ‘precautionary principle’ 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.

13 There are prescriptions contained in the Code, and in certain standards which apply to timber harvesting conducted by VicForests, directed to the protection of threatened species. Further, there is a reserve system which results in areas of State forest being set aside from timber harvesting to provide habitat and protection for threatened species.

14 In the aftermath of the bushfires, the Commonwealth and Victorian State governments announced biodiversity responses to address the loss of flora and fauna. In Victoria, that loss was concentrated in the East Gippsland FMA, and the bushfires had little direct impact on the Central Highlands FMA. Neither bushfire biodiversity response is complete.

New matters

15 The further evidence filed on this application is:

(a) plaintiff affidavits:

(i) Danya Jacobs, solicitor for the plaintiff, affirmed 7 July and 8 July;

(ii) Philip Marshall affirmed 6 July;

(iii) Blake Nisbet affirmed 6 July and 10 July;

(iv) Jake McKenzie affirmed 6 July;

(v) Hayley Forster affirmed 7 July.

(b) defendant affidavits:

(i) James Gunn affirmed 9 July and 10 July.

16 The evidence raises new matters which have arisen since the ruling by McMillan J in *WOTCH (No 3)* including:

(a) evidence from the Commonwealth Wildlife and Threatened Species Bushfire Recovery Expert Panel;

(b) an Office of Conservation Regulator ('OCR') position statement entitled 'Precautionary measures in timber harvesting post the 2019/20 Victorian bushfires' dated May 2020 ('the OCR position statement');

(c) a precautionary principle analysis of the consequences of the impacts of the bushfires undertaken by VicForests between March and June 2020 ('the PPA'); and

(d) some additional evidence as to the balance of convenience.

The coupes

17 This application relates to a further 28 coupes, which can be divided into the following groups:

(a) Blue Streak coupe, in which harvesting is complete;

(b) Jokes, Barcelona, Pats Corner, Highlander and Charmander, in which logging operations are currently active;

(c) Skydiver, Squirtle, Vicuna, Updownies and Bungalow, scheduled for harvest in July;

(d) the remaining 17 coupes.

It appears harvesting will not occur in some of these coupes before trial.



Fauna detections

18 The plaintiff has filed evidence of detections of Greater Gliders, Powerful Owls and Sooty Owls in each of the subject coupes. In the five coupes currently being harvested detections were as follows:

Jokes 7 Greater Gliders in March 2020 by the plaintiff, and 8 Greater Gliders and 2 Sooty Owls detected and recorded in the forest protection survey program ('FPSP').

Barcelona 2 Greater Gliders during a first survey, and 11 Greater Gliders during a second survey by the plaintiff, both conducted in early June 2020. The FPSP detected 12 Greater Gliders and 1 Sooty Owl.

Pats Corner The plaintiff detected 2 Sooty Owls in April 2020.

Highlander The plaintiff detected 5 Greater Gliders in March 2020.

Charmander The FPSP detected 5 Greater Gliders.

For the purposes of this application VicForests does not contest the fauna detections.

Serious question to be tried

The PPA

19 In an affidavit filed in relation to an earlier application William Paul, Manager, Environmental Performance at VicForests, said in relation to a biodiversity risk assessment being performed by VicForests for the Central Highlands FMA in response to the bushfires:

Based on my knowledge of the assessment as it currently stands, the result of that biodiversity assessment is expected to show little to no threat to Greater Glider, Powerful Owl and Sooty Owl in the Central Highlands [Regional Forest Agreement] Area. That is because the area was not affected by the fires in East Gippsland, and the existing prescriptions are adequate to protect the populations of those species in the Central Highlands [Regional Forest Agreement] Area where they are found.

The biodiversity risk assessment to which Mr Paul referred had not been completed



at the time of the earlier applications before McMillan J. On those earlier applications VicForests largely relied on prescriptions directed to protection of fauna which were in place before the bushfires.

20 In *WOTCH (No 2)*, McMillan J concluded:

On the whole, Mr Paul's affidavit fails to address the thrust of the plaintiff's case, which is that the current prescriptions were made pre-fires and therefore the foundations on which those prescriptions were made have now changed fundamentally. His affidavit contains no evidence that the defendant has considered the impact of the bushfires on threatened species or factored that information into how to manage detections in coupes that are to be harvested. The affidavit does not refer to the State preliminary report, the Commonwealth preliminary analysis or the Commonwealth preliminary report, either in relation to completed or anticipated planning of coupes.⁵

21 James Gunn, who is responsible for maintaining VicForests' forest management system and its practical implementation, states that the PPA was completed between March and June 2020. The PPA includes the biodiversity risk assessment to which Mr Paul referred.

22 Mr Gunn explained that the way in which VicForests undertakes a precautionary principle analysis in compliance with the Code is set out in the October 2019 version of the Forest Management Plan produced by it, which states:

Operating in accordance with the *precautionary principle*, VicForests applies a risk assessment approach to ensure its actions are proportionate to the threat of severe and irreversible damage to biodiversity and other values. VicForests applies the principle when an assessment of planned or active operational areas proves:

- a) there is a threat of serious or irreversible damage to the environment; and
- b) the threat is attended by material scientific uncertainty as to the damage to the environment.

If both a) and b) are present, timber harvesting in the area of concern are put on hold and cannot commence or resume until all of the following apply:

1. the threat of serious or irreversible damage to the environment is low;
2. the threat of serious or irreversible damage to the environment can be addressed by *adaptive management*, and

⁵ *WOTCH (No 2)* (n 2) [97].

3. the measure(s) to be implemented is proportionate to the threat.

23 The PPA overview states:

The following risk assessment descriptions outline the process undertaken. Assessment undertaken as a result of the 2019–20 Bushfires has been split into two assessments.

1. Forest management areas (FMAs) with a large area impacted by fire including East Gippsland (EG), Tambo (TB) and North East (NE).
2. FMAs with no/or small area impacted by fire including Benalla–Mansfield (BM), Central Gippsland (CG), Central (CT) and Dandenong (DD).

24 The PPA states that from July 2019 VicForests introduced further adaptive management measures, additional to prescriptions to protect the threatened species in the Code, and other forest management documents, which prioritised retention of hollow-bearing habitat trees.

25 In relation to unburnt or low-fire impact FMAs, including Central Highlands, the PPA states:

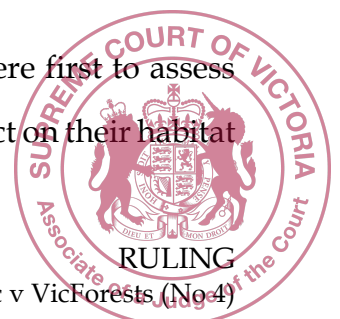
Consideration of these questions when assessing whether areas planned for harvest are conducted in a manner that is consistent with the precautionary principle is central to VicForests High Conservation Value (HCV) management framework.

VicForests developed the HCV management framework to supplement and build upon the existing regulations in place for timber harvesting operations. This framework considers each of the questions above.

If there remains any residual risk of irreversible damage to the environment, after the Victorian regulatory regime and applicable Commonwealth laws have been followed, VicForests' policy is to take further measures to ensure there is a proportionate adaptive management response.

26 The PPA states VicForests took an immediate precautionary response to the bushfires by ceasing harvesting in the fire affected FMAs pending further assessment, and that a risk-weighted assessment of the planned harvesting program in non-fire-affected FMAs had been undertaken.

27 Mr Gunn explained that the steps in the risk assessment process were first to assess fire impacts on each of the species of concern by reference to the impact on their habitat



both in reserves and areas of State forest which are available for timber harvesting; and second, to evaluate the vulnerability of the species to timber harvesting at both a State-wide and FMA level.

28 Mr Gunn states, in terms of the mandatory requirement in s 2.2.2.3 of the Code, that the PPA considered the advice of relevant experts and relevant research, which included –

- (a) information on the habitat of threatened species contained in models developed for DELWP by the Arthur Rylah Institute for Environmental Research;
- (b) information on observations of threatened species contained in the Victorian biodiversity atlas and VicForests' species observations; and
- (c) information from the DELWP Biodiversity Division concerning their assessment of species which were impacted by both bushfires and timber harvesting.

Mr Gunn states the PPA was informed by a VicForests/DELWP working group which met weekly from March 2020. He notes that on 11 May 2020 the OCR provided VicForests with the OCR position statement, which includes recommendations as to prescriptions to be applied to timber harvesting in areas outside the top 20% habitat for all species of concern, and that the OCR prescriptions are materially similar to the adaptive management measures VicForests had in place prior to the bushfires, save in relation to the Greater Glider where a requirement to preserve 40% of the basal area of eucalypts was triggered on the OCR recommendation when three Greater Gliders per spotlight kilometre are observed, rather than five Greater Gliders on the prescription applied by VicForests. Mr Gunn makes no reference to any other material difference between the OCR position statement to the adaptive management measures adopted by VicForests.



The OCR position statement

29 The purpose of the position statement is

to provide practical guidance to VicForests on how Victoria's Conservation Regulator interprets Clause 2.2.2.2 of the *Code of Practice for Timber Production (2014)* (the Code) in relation to the precautionary principle and its application to the conservation of biodiversity values, following the 2019/20 Victorian bushfires.

In this document, the Conservation Regulator is putting forward a proposition for a package of integrated precautionary measures for VicForests' consideration. The Conservation Regulator expects that VicForests will consider this advice and its obligations to implement the precautionary principle, and either adopt the integrated precautionary measures proposed here or demonstrate how VicForests will adopt equivalent measures to comply with the requirements of the precautionary principle .

30 In relation to the trigger for its preparation, the OCR position statement reads:

The impact of the fires is pertinent to the operation of the precautionary principle under the Code. In particular:

- The distribution and viability of flora and fauna populations has been impacted by the 2019/20 bushfires, and many of those species are also vulnerable to impacts from timber harvesting activities.
- There is high scientific uncertainty about the impacts of the bushfires on Victoria's biodiversity, the current distribution and viability of significantly fire impacted flora and fauna populations, and their ability to withstand future adverse impacts (whether from future fires, timber harvesting or other factors).

The Conservation Regulator believes that the precautionary principle is currently triggered by risks of serious and irreversible damage to Victoria's biodiversity posed by timber harvesting operations in light of the 2019/20 Victorian bushfires, and the significant scientific uncertainty about the status of Victoria's biodiversity from these operations in this context. The Conservation Regulator believes that VicForests is therefore required by law to implement precautionary measures in response.

31 The position statement applies directly to VicForests.

32 The position statement describes the significance of the bushfires for application of the Code to include:

- The 34 identified priority species that are at higher risk of harm from timber harvesting in each FMA, based on an assessment of the increase in relative importance of that FMA for the species and the proportion of state-wide distribution within that FMA available for timber harvesting.
- The relative value of areas of habitat for 34 identified priority species across



eastern Victoria has changed (indicated through an integrated (zonation) analysis which considers the habitat value of an area for a 'basket' of all 34 species); as the relative value of burnt areas has declined, so the relative value of unburnt areas has increased, including within, adjacent to and distant from the burnt areas.

- These impacts (which are based on modelled habitat and therefore subject to some scientific uncertainty) create the situation where (without suitable precautionary measures) timber harvesting operations could create a threat of serious or irreversible environmental damage to identified priority forest dependant species which have experienced significant fire impacts on their range, habitat and potentially on their population viability.

33 The OCR position statement refers to a biodiversity analysis conducted by DELWP to understand the impacts of the bushfires. A basket of 34 species whose range and potential viability are likely to have been significantly impacted by the bushfires includes the Greater Glider, Sooty Owl and Powerful Owl. The most valuable 20% of habitat for the basket of species is mapped across the FMAs. This appears to be an analysis of habitat pre-bushfires.

34 DELWP biodiversity has also analysed and mapped the top 20% post-fire habitat for each individual species in each FMA.

35 One of the plaintiff's witnesses, Mr Nisbet, has mapped the location of the subject coupes against the DELWP biodiversity habitat analysis to demonstrate that each coupe is located in the top 20% post-fire habitat for individual species, and that some of the coupes may also fall within the top 20% habitat for all species.

36 The DELWP biodiversity habitat analysis is based on mapping, not on-the-ground surveys.

37 The OCR states:

The Conservation Regulator expects that VicForests will consider this advice and its obligations to implement the precautionary principle, and either adopt the integrated precautionary measures proposed here, or demonstrate how VicForests will adopt equivalent measures to comply with the requirements of the precautionary principle.

38 In the position statement the OCR recommends a package of integrated precautionary measures with three major components:



1. Continued postponement of harvesting in East Gippsland FMA
2. Postpone harvesting in areas of highest value habitat for the 'basket' of 34 identified priority species
3. Survey and mitigate if harvesting in the best habitat for identified priority species

39 In relation to component 2 of its recommendation:

Excluding the East Gippsland FMA, implementation of component 2 by postponing harvesting [in] areas of highest value habitat for the 'basket' of 34 identified priority species would represent postponed harvesting in 25% of the current Timber Release Plan area.

40 In relation to component 3 of the recommendation:

As component 3 of the package of integrated precautionary measures to meet VicForests' obligations under the precautionary principle, the Conservation Regulator advises to avoid timber harvesting in these locations where possible.

Where timber harvesting is proposed in these locations, VicForests should:

1. ensure that each proposed timber harvesting coupe is surveyed to assess the presence of the identified priority species for that FMA (see Table 2 above), and
2. modify any timber harvesting activity at that site to avoid or mitigate adverse impacts on the identified priority species and (where appropriate) their habitat requirements.

...

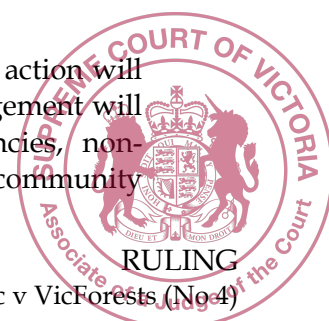
Excluding the East Gippsland FMA, implementation of component 3 by postponing or modifying harvesting in the top 20% of the highest value habitat for individual identified priority species would apply to the conduct of timber harvesting in 48% of the current Timber Release Plan area.

Commonwealth Wildlife and Threatened Species Bushfire Recovery Expert Panel

41 The Expert Panel records that the bushfires have had severe impacts on many animal species:

Some species were considered threatened before the fires, and the fires have now likely increased their risk of extinction. Many other fire-affected animal species were considered secure and not threatened before the fires, but have now lost much of their habitat and may be imperiled.

To support protection and recovery of these species, conservation action will be needed for many species, at many sites. Such informed management will need to be supported by a wide range of government agencies, non-government conservation organisations, university researchers, community



groups and the public.

42 In relation to actions needed for high priority species, the Expert Panel states:

Two priority actions should be carried out for all high priority species: 1) Rapid on-ground surveys to establish extent of population loss and provide a baseline for ongoing monitoring. 2) Protecting unburnt areas within or adjacent to recently burnt ground that provide refuge, as well as unburnt areas that are not adjacent to burnt areas, especially from extensive, intense fire.

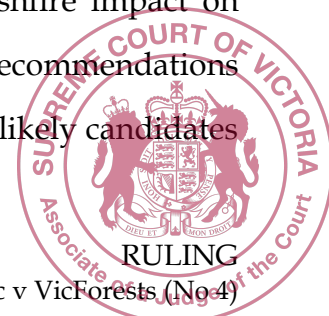
Other interventions required for each species are best informed by species experts, and a detailed suite of actions at local and regional scales should be developed – in many cases, planning and action by state agencies and other land managers is already underway.

Submissions

Plaintiff

43 The plaintiff submits first that the evidence of Mr Gunn and VicForests' submissions show that it is continuing to plan and conduct timber harvesting activities in the Central Highlands on the basis of prescriptions that were in place in 2019, and are therefore based on pre-bushfire knowledge and pre-bushfire information. VicForests' evidence and submissions do not address the heart of the plaintiff's case, which is that the landscape has been so changed by the bushfires that the pre-bushfire prescriptions can no longer be safely relied upon as affording protection.

44 Second, there are the following responses to the PPA. Clauses 2.2.2.2 and 2.2.2.3 of the Code require VicForests to wait for the outcome of the Commonwealth and State responses to the bushfires before logging in coupes in which the presence of threatened species has been confirmed. The quality of expert information and advice resulting from the Commonwealth and State responses will be unprecedented and directly relevant to the work VicForests needs to do in these coupes. VicForests' argument that the subject coupes are in the Central Highlands, which is not bushfire affected, so that it does not have to wait before proceeding with timber harvesting, should be rejected because it ignores the fact that analysis of bushfire impact on threatened species in bushfire-affected areas will inevitably lead to recommendations and governmental action to protect the species that are left, and the likely candidates



for such protection will be in unburnt areas, such as unburnt coupes in the Central Highlands FMA.

45 The plaintiff further submits that the PPA proceeds on a misunderstanding of the way in which the precautionary principle operates, that it is triggered by two preconditions, first, the threat of irreversible damage and, second, a substantial degree of scientific uncertainty. That argument was recently rejected by Mortimer J in *Friends of Leadbeater's Possum Inc v VicForests (No 4)*.⁶ Further, VicForests' submissions seek to advance a position that the precautionary principle is a matter of process rather than outcome, which is a flawed approach.

46 The evidence reveals VicForests is acting against the advice of the Conservation Regulator, so little comfort can be taken from its assertion that it has taken into account advice of relevant experts and considered the most up-to-date information. All of the subject coupes are in areas identified by the OCR as highest value habitat for threatened species in respect of which it recommended either postponing, or avoiding where possible, timber harvesting activity. Mr Gunn's affidavit records that it is not the OCR's role to dictate conclusions which should be reached by VicForests as to harvesting activities, but is otherwise silent as to why VicForests is proceeding with harvesting activity in a manner inconsistent with the OCR recommendations. In circumstances where VicForests is not following the expert advice of the OCR, and makes no attempt to explain why, the court should have little confidence in its assertion that it has applied the precautionary principle.

47 For all the pages of documents produced by VicForests in relation to its PPA, the plaintiff contends there has been very little change on the ground to what is actually being planned and done in terms of timber harvesting of coupes in which there are threatened species. Given the impact of the bushfires on those threatened species, the lack of change is surprising to say the least, particularly in the light of what the OCR has recommended.

⁶ [2020] FCA 704 ('Possums').

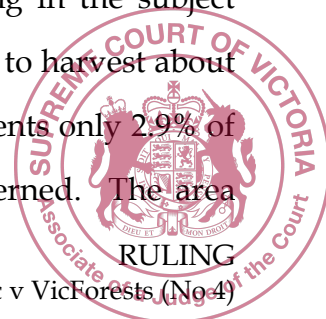
48 The precautionary principle requires that careful evaluation of management options be undertaken wherever practical to avoid serious or irreversible damage to the environment, and that there be a proper assessment of the risk-weighted consequences of various options. In that context VicForests has not explained how it has evaluated or considered or taken into account the OCR recommendations. Therefore the court cannot be satisfied VicForests has complied with the precautionary principle. It is not that VicForests was obliged to follow the OCR recommendations, but they had to engage with those recommendations so that they were evaluated and considered.

49 The plaintiff relies on direct evidence of on-the-ground observations that, despite the asserted adaptive management measures, hollow-bearing trees are nevertheless being felled or pushed over by VicForests' operations. The plaintiff is challenging VicForests' approach to the precautionary principle in terms of both process and outcome.

Defendant

50 The plaintiff's submissions do not address why it is unlawful to proceed with timber harvesting in these particular coupes, given the adaptive management measures adopted which are designed, irrespective of the bushfires, to protect the preservation of the threatened species in the area of the coupes. The precautionary principle does not dictate inaction where there is uncertainty. The effect of the adaptive management measures applied by VicForests is to retain hollow-bearing tree habitat and other areas of vegetation to ensure connectivity and to protect threatened species. There is nothing in the material to suggest that these adaptive management measures are ineffective.

51 Given the total area of suitable habitat available to set aside for reserves for further preservation of the threatened species, the risk attached to logging in the subject coupes is negligible. Mr Gunn deposes that VicForests is proposing to harvest about 35,000 hectares of native forest over the next 10 years, which represents only 2.9% of the area identified as the top 20% of habitat for the species concerned. The area



planned for harvesting over the next six months is estimated to be 0.1% of that habitat area.

52 The question is what response is called for in areas remote to the fire-affected areas as a consequence to the aggravation of risks to threatened species from the loss of populations and habitat in areas impacted by the bushfires. There is no material to suggest in respect of this question that VicForests did not properly conduct a review of its adaptive management measures. The evidence establishes that VicForests considered the OCR recommendations, but it does not follow that it was obliged to adopt them. The consideration as to the percentage of habitat involved set out in Mr Gunn's affidavit demonstrates an appropriate response to the OCR recommendations. The OCR is just one voice amongst many voices to be taken into account in the synthesis of all the information by VicForests in making decisions about responsible harvesting in accordance with the precautionary principle.

53 It is misleading to address the response of VicForests only by reference to the subject coupes, rather than to focus on the total response to the impact of the bushfires. The most critical response is in the fire-affected areas to postpone timber harvesting activity. Further protection of habitat close to the fire-affected areas is going to be most important to address restoration and preservation of the population of these threatened species.

54 The adaptive management measures ensure the activities undertaken by VicForests are consistent with the OCR recommendation. If the OCR considered VicForests was acting contrary to OCR's recommendations in a way which seriously threatened the extinction of species then it would have power to give a direction under s 70 of the *SFT Act*. The OCR is aware of what has been done and has not considered it necessary or appropriate to take that step.

55 There is nothing in the material to make good a proposition that VicForests has not applied the precautionary principle as set out by Osborn JA in *MyEnvironment Inc v*



VicForests.⁷ The relevant risk is the serious or irreversible risk of extinction of species, and there was nothing in the materials to suggest that logging in the subject coupes undertaken in accordance with the adaptive management measures was not an appropriately cautious approach to ensure the preservation of the species in those locations.

56 If the plaintiff's position were accepted, the only appropriate response could be to stop logging anywhere which contained habitat of the threatened species, and that would be inconsistent with adopting a proportionate and balanced approach, accepting that a cautious approach is required.

Analysis

57 Mr Gunn states that of the 28 coupes which are the subject of this application:

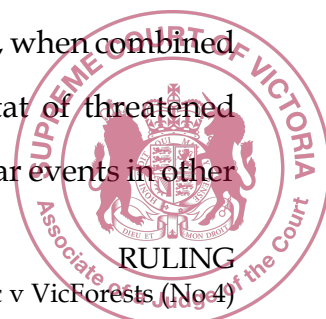
- (a) five are currently being harvested: Jokes (297-504-0003), Barcelona (313-503-0002), Pats Corner (345-511-0004), Highlander (282-512-0007) and Charmander (282-512-0007); and
- (b) five coupes are scheduled for timber harvesting in July: Skydiver (282-507-0003), Squirtle (282-511-0007), Vicuna (282-512-0013), Updownies (297-507-0002) and Bungalow (300-503-0008).

58 According to Mr Gunn, harvesting in coupes will be undertaken in accordance with the Code and other standards which apply, and the adaptive management measures implemented by VicForests in mid-2019 to provide additional protection to threatened species. Mr Gunn has set out details of how the adaptive management measures are being implemented in the five coupes in which harvesting is currently taking place. The adaptive management measures were in place before the bushfires. As I understand his evidence, Mr Gunn does not point to any change by VicForests in the Central Highlands FMA, or the subject coupes in particular, which is a response to the risk represented by the bushfires.

⁷ [2012] VSC 91, [260]-[262] (*'MyEnvironment'*).

59 Mr Gunn states VicForests is proposing to harvest around 35,000 ha of forest over the next 10 years. If this were all within the area identified by DELWP as the top 20% of habitat for species of concern, this would represent only 2.9% of the total 1,192,000 ha identified habitat. Over the next six months, the total area of timber harvesting is estimated to be 0.1% of the habitat area. On the basis of this evidence VicForests contends that there is a significant area of forest containing high quality habitat which will not be affected by logging available to DELWP to create additional species reserves if necessary. This evidence is not particularly illuminating. The area of habitat identified by DELWP does not take account of the effect of the bushfires. Further, I understand the area to include national parks which would not be available to create additional reserves. Finally, analysis at this macro level may not take account of the level of risk to threatened species or the increased value of habitat in non-fire-affected areas identified in the OCR position statement.

60 There are differences in terms of both process and outcome between the OCR position statement and the PPA. Arguably one material difference relates to the consideration and assessment of risk. The OCR recommendation clearly states that the value of habitat remaining in non-fire-affected FMAs, such as Central Highlands, is increased by the destruction of populations and habitat of threatened species in fire-affected FMAs, such as East Gippsland. This means that the threat to a species present in coupes in Central Highlands is increased by the destruction of populations and habitat in East Gippsland by the bushfires. Arguably, VicForests has taken a more compartmentalised approach by proceeding on the basis that Central Highlands was not affected by the bushfires, and therefore the threat to a species present in coupes in Central Highlands has not been increased by the bushfires. It is not for me to determine on this interim application the degree and consequences of any difference in approach to risk. The risk to a species that must be considered is the risk from all sources, not simply timber harvesting. While the harvesting planned by VicForests may not, by itself, materially increase the risk to a species it may do so, when combined with other risks, such as the destruction of populations and habitat of threatened species in FMAs affected by the bushfires, and the possibility of similar events in other



FMAAs in future.

- 61 The OCR position statement reflects a scaled approach to the identified risk: postpone logging in the top 20% habitat for all species; avoid logging in the top 20% habitat for any threatened species; if proceeding with logging, apply additional measures. This response to risk is based on mapped habitat. It may be inferred that where threatened species have actually been detected greater caution is required.
- 62 It is not clear what level of protection is afforded by the adaptive management measures, or what damage to populations and habitat and populations is caused by harvesting when these methods are adopted.
- 63 There is a question of the difference, if any, between the theoretical or planned application of current prescriptions and the adaptive management measures to timber harvesting by VicForests, and the actual outcome of operations conducted in coupes. Evidence of observations by witnesses for the plaintiff, such as Mr McKenzie, suggests either that the outcome of timber harvesting is not consistent with application of the adaptive management measures, or that even when applied the measures do not effectively reduce the threat to species.
- 64 The parties agree that VicForests is not required by ss 2.2.2.2 and 2.2.2.3 of the Code to adopt and apply the OCR recommendations. However, the OCR recommendations state VicForests must demonstrate how alternative measures actually adopted by it achieve the same outcome, that is, protection of threatened species in the context of the bushfires. The evidence of Mr Gunn does not demonstrate how VicForests has engaged with the OCR recommendations, particularly as to the postponement or avoidance of harvesting in areas of greatest habitat value, or how its adaptive management measures will achieve the same level of species protection.
- 65 I am satisfied that the plaintiff demonstrated a prima facie case in relation to the subject coupes.

Balance of convenience

Submissions

Plaintiff

66 The plaintiff submitted evidence given by Mr Gunn as to balance of convenience was thin. There was no supporting material or figures in relation to the financial impact of the injunctions on VicForests or timber mills supplied by it, and no identification of the source of evidence Mr Gunn gives on information and belief. Most importantly, the evidence does not address the fact that the subject coupes, and other coupes already subject to injunctive relief, together comprise only 3% of the total number of harvestable coupes. In his first affidavit affirmed 6 July 2020, Mr Nisbet identifies that there are 1,756 coupes on the current Timber Release Plan ('TRP') available to VicForests for ordinary commercial timber supply purposes.

67 Damages cannot compensate for the irreversible environmental damage caused to the habitat of fire-affected threatened species by timber harvesting activities. Whilst some financial loss will be caused if the injunctive relief is granted, the timber assets will be retained and, subject to compliance with relevant prescriptions, can be harvested at a later date.

Defendant

68 Mr Gunn's evidence demonstrates how unrealistic it is to say there are a lot of other coupes available that you could divert to if harvesting is prevented in the subject coupes. Planning and preparation are required before harvesting can commence. There are other restrictions which must be taken into account, including the need to protect threatened species, in terms of the suitability and availability of coupes for harvesting. Mr Gunn states that all contingency coupes in the Central Highlands, which are coupes which would otherwise be available to move up the schedule for harvest, have already been enjoined save for one coupe. Therefore there are no other coupes that can be harvested over the winter period, including no coupes with the requisite type of timber.



69 In two of the five active coupes it is the contractor's last harvest for the season, and they will not be scheduled to resume until after winter.

70 It is a significant thing to stop logging, which will impact the available supply of timber to sawmills. VicForests' statutory purposes are to manage harvesting of timber in a way that takes into account and protects the environment, and also supply timber in a sustainable way to support industry, including sawmills. The effect of injunctive relief would be to prohibit VicForests from performing its statutory function. The operational and financial viability of timber mills in East Gippsland has already been severely impacted by the bushfires.

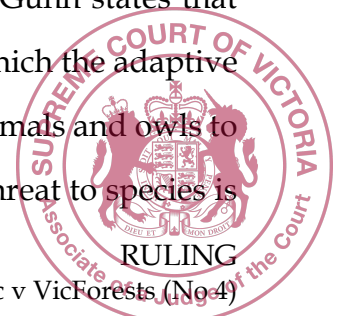
Analysis

71 The plaintiff must establish that the balance of convenience favours the grant of the injunctive relief.

72 There will be a cost to VicForests if the injunction is granted. Mr Gunn's evidence as to the limited availability of contingency coupes is unchallenged. However, I note that evidence is limited to the Central Highlands FMA. It is not clear whether there is capacity to bring forward coupes in other FMAs to replace timber which would otherwise be supplied from the subject coupes. Further, VicForests has been put on notice of the need to consider adjusting coupe planning by the bushfires, this proceeding and the previous applications, and the OCR position statement. It is not clear what steps if any VicForests has taken in response, or when those steps were taken.

73 The cost and inconvenience to VicForests is likely to be greatest in respect of coupes in which harvesting is already underway.

74 Application of the adaptive management measures to timber harvesting in the coupes will, on Mr Gunn's evidence, ameliorate the threat to species. Mr Gunn states that preliminary post-harvest surveys on a select number of coupes to which the adaptive management measures have been applied have found arboreal mammals and owls to persist. However, Mr Gunn's evidence does not establish that the threat to species is

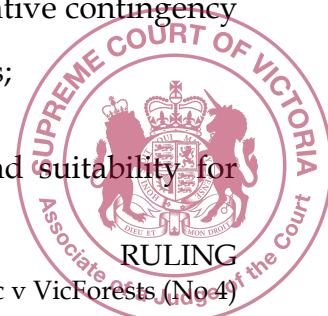


rendered negligible by application of the adaptive management measures. Further, the plaintiff relies on evidence of observations by Mr McKenzie of timber harvesting activities undertaken by VicForests in three of the subject coupes, Tense, Blue Streak and Barcelona, each of which was harvested by VicForests on the basis that threatened species were present. Mr McKenzie deposes that VicForests' coupe plans did not map the location of threatened species, the WOTCH and FPSP protections were in some cases in areas of the coupe which were intensively logged, there were examples of retained trees which were scattered and not in corridors or effectively connected, in some cases many of the retained trees were unlikely to contain hollows, and there were examples of large hollow-bearing trees felled. Such evidence does call into question how effective VicForests' adaptive management measures will be in responding to the risk identified in the OCR position statement.

75 The number of coupes which Mr Nisbet says are on the TRP and available for harvesting seems unlikely to reflect coupes actually currently available for harvesting. The TRP covers all FMAs, including those significantly impacted by the bushfires such as East Gippsland. One response to the bushfires has been postponement of timber harvesting in some areas, including the East Gippsland FMA. It is unclear how many of the coupes to which Mr Nisbet refers are affected. There are likely to be other coupes which are unavailable because of relevant prescriptions, or because of practical considerations.

76 Given the volume and incomplete state of the evidence assessing where the balance of convenience lies is a difficult task. A number of issues warrant further investigation prior to the interlocutory hearing of this application, including:

- (a) on-the-ground evidence of timber harvesting operations conducted by VicForests in the subject coupes and other relevant coupes;
- (b) the efforts of VicForests to identify and bring forward alternative contingency coupes, whether in the Central Highlands FMA or other areas;
- (c) a more precise or granular examination of the location and suitability for



harvesting of coupes on the TRP; and

- (d) actual evidence as to the financial and operational impact of injunctive relief on VicForests and sawmills which it supplies.

77 In *WOTCH (No 3)*, McMillan J drew attention to the cumulative effect of interim and interlocutory injunctions restraining timber harvesting in coupes on the defendant's operations.

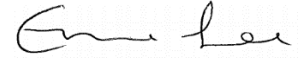
78 I am not satisfied that the plaintiff has established on this interim application that the balance of convenience favours the grant of injunctive relief in relation to the five coupes in which harvesting is already underway. I come to this conclusion with hesitation having regard to the amelioration of risk to threatened species represented by adoption of the adaptive management measures set out by Mr Gunn in relation to these coupes, the limited number of coupes in question, and the cost and inconvenience to VicForests if the interim injunction were granted. With equal hesitation I conclude that the balance of convenience does favour granting injunctive relief in respect of coupes planned for harvest in July where operations have not commenced. I do so on the basis of the detections of species in the coupes, the degree of risk expressed in the OCR position statement, the short time to the interlocutory hearing, the number of coupes involved, and the other matters to which I have referred above. I emphasise this conclusion in no way predetermines the issue of where the balance of convenience lies for the purposes of the interlocutory hearing, when I expect further relevant evidence will be available.

79 I will hear from the parties as to the form of orders which should be made in respect of the interim injunction, and the timetable to an interlocutory hearing in early August.

CERTIFICATE

I certify that the 22 preceding pages are a true copy of the reasons for ruling of Justice Keogh of the Supreme Court of Victoria delivered on 16 July 2020.

DATED this sixteenth day of July 2020.



Associate

