



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

Case: S ECI 2020 00373

Filed on: 28/01/2020 07:42 PM
S ECI 2020 00373

BETWEEN

WILDLIFE OF THE CENTRAL HIGHLANDS INC

Plaintiff

and

VICFORESTS

Defendant

**APPLICATION FOR AN URGENT INTERIM INJUNCTION
APPLICANT'S SUBMISSIONS IN SUPPORT**

1. This is an application for an urgent interim injunction to prevent the Defendant (**VicForests**) from timber harvesting in 10 forest coupes in Victoria, each of which has been identified as containing or likely to contain fire-affected threatened species or habitat of fire-affected threatened species. The issue has arisen as a result of the impact on threatened species of the 2019/2020 bushfires (the **Bushfires**). In each coupe, VicForests has either commenced timber harvesting or is proposing to commence timber harvesting imminently.
2. The Plaintiff seeks an interim injunction to prevent timber harvesting in these coupes, pending the hearing and determination of the application for an interlocutory injunction.
3. The Plaintiff has today commenced a proceeding against VicForests by way of a generally indorsed writ. The Plaintiff alleges that it is unlawful for VicForests to harvest timber in coupes known to VicForests or the Department of Land, Environment, Water and Planning (**DELWP**) to contain or be likely to contain a species identified as threatened pursuant to the *Flora and Fauna Guarantee Act 1988* (Vic) (**FFG Act**) and affected by the Bushfires, or habitat of such species. That is because there are currently underway State and Commonwealth bushfire biodiversity responses, the findings of which will be relevant to VicForests' actions as they relate to threatened species, which have not yet concluded. By continuing to harvest timber in these coupes, VicForests is not able (as it must, consistently with its obligations) to take into account any relevant findings in planning and conducting its timber harvesting operations in these coupes.

4. In a nutshell, the Plaintiff contends it is unlawful for VicForests to harvest timber in these coupes until the impact of the Bushfires on threatened species is fully understood. Interlocutory injunctive relief is necessary because VicForests is currently harvesting timber (or proposing to imminently commence harvesting timber) in 10 coupes where the Plaintiff contends it is unlawful to do so.
5. At the same time, the Plaintiff filed an interlocutory application seeking injunctive relief, together with the supporting Affidavit of Danya Jacobs (**Jacobs Affidavit**).
6. VicForests was notified of the Plaintiff's concern about the legality of VicForests' continued timber harvesting in coupes containing threatened species or habitat of threatened species impacted by the Bushfires, and was asked to notify the Plaintiff's solicitors by 9am today whether it would agree to cease timber harvesting in these coupes, at least until the conclusion of State and Commonwealth governmental biodiversity response to the Bushfires.¹ No response has been received.²

The Parties

7. The Plaintiff is an association incorporated under the *Associations Incorporation Reform Act 2012* (Vic). It conducts citizen science 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.³ As deposed by Ms Jacobs, it 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.⁴
8. VicForests is established as a State body under s 14 of the *State Owned Enterprises Act 1992* (Vic). It conducts timber harvesting operations in the State. Relevantly, 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.

¹ Jacobs Affidavit at [142].

² Jacobs Affidavit at [143].

³ Jacobs Affidavit at [4].

⁴ Jacobs Affidavit at [4] The Plaintiff is able to satisfy the "special interest" test required in such a case in order to establish standing: see *Environment East Gippsland Inc v VicForests* [2009] VSC 386 at [64]-[71].

Relevant legal principles

9. In determining whether an interlocutory injunction should be granted, the Court must consider:⁵ *first*, whether the Applicant has demonstrated the existence of a serious question to be tried; and *secondly*, whether the balance of convenience favours the grant of the injunction. It is well recognised that the two questions are not independent.⁶ The requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought.⁷
10. The analysis is not different when an interim injunction is sought, although the assessment of the balance of convenience might be different in that context.⁸

There is a serious question to be tried

11. VicForests is obliged, 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. It is this obligation that founds the Plaintiff's claim against VicForests. The Plaintiff contends that VicForests is in breach of such a Code, and therefore in contravention of s 46(a) of the SFT Act, in its timber harvesting operations in the coupes the subject of this application where timber harvesting has commenced. In relation to those coupes where timber harvesting is imminent, the Plaintiff seeks a *quia timet* injunction, on the basis this imminent action is unlawful.
12. The relevant Code is the "Code of Practice for Timber Production 2014" (the **Code**), published in 2014 by the Department of Environment and Primary Industries under Part 5 of the *Conservation, Forest and Lands Act 1987* (Vic) (the **CFL Act**).
13. **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.
14. 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;

⁵ See, e.g., *Beecham Group Ltd v Bristol Laboratories* (1968) 118 CLR 618 at 622-623; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [19] (Gleeson CJ and Crennan J); [65] (Gummow and Hayne JJ).

⁶ As noted by Bromberg J in *BAF18 as litigation representative for BAG18 v Minister for Home Affairs* [2018] FCA 1060 (**BAF18**) at [8].

⁷ See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [71] (Gummow and Hayne JJ).

⁸ See *De Lage Landen Pty Limited v Riry Pty Limited* [2018] VSC 319 at [22]-[25].

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”.

15. **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.
16. It is established that the precautionary principle imposes enforceable obligations on VicForests.⁹ VicForests’ exercise of power in conducting timber harvesting operations is conditioned on the obligation to adopt a precautionary approach – all matters capable of supervision by the Courts.¹⁰ The obligation in s 2.2.2.3 of the Code is to be treated in the same way.
17. The Greater Glider, the Powerful Owl, the Sooty Owl and the Smoky Mouse are all species that have been listed as threatened under the *FFG Act*.¹¹ A species is only 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”.¹² These species are present in the coupes in issue in this injunction in which VicForests is presently conducting or imminently proposing to conduct timber harvesting.¹³ Timber harvesting will result in the destruction of the habitat of those species in those coupes.¹⁴
18. In the aftermath of the Bushfires, the Commonwealth and Victorian State governments have announced biodiversity responses to address, inter alia, the loss of flora and fauna arising from the Bushfires. The Victorian government has published *Victoria’s bushfire emergency: Biodiversity response and recovery, Preliminary report – Version 1 (Preliminary State bushfire biodiversity response)*.¹⁵ That report is preliminary and work is ongoing. However of particular relevance, the Preliminary State bushfire biodiversity response:
 - 18.1 identifies species of immediate concern, relevantly including the Greater Glider, the Powerful Owl, the Sooty Owl and the Smoky Mouse.¹⁶

⁹ *Environment East Gippsland Inc v VicForests* [2010] VSC 335 [15]-[16], and [582]-[605] (esp [601]); *MyEnvironment Inc v VicForests* [2012] VSC 91 at [263].

¹⁰ *MyEnvironment Inc v VicForests* [2012] VSC 91 at [263]-[265].

¹¹ Affidavit of Danya Jacobs affirmed on 28 January 2020 (**Jacobs Affidavit**), [43], [54], [65], [72].

¹² *Flora and Fauna Guarantee Act 1988* (Vic), s 11(1).

¹³ Jacobs Affidavit [79]-[127].

¹⁴ Jacobs affidavit [42], [58], [66], [74].

¹⁵ Jacobs Affidavit, [22] Exhibit DJ-15.

¹⁶ Preliminary State bushfire biodiversity response, Exhibit DJ-15 pp 13, 15.

- 18.2 states that experts have identified that the key actions necessary for immediate and short term implementation include protection and management of key unburnt areas and populations;¹⁷
- 18.3 states that the mitigation will increasingly include options beyond the fire areas.¹⁸
19. The Commonwealth government has also commenced a bushfire recovery process, including convening an expert panel (the **Commonwealth bushfire biodiversity response**).¹⁹ These responses are addressing, inter alia, impacts on threatened species and appropriate emergency actions and responses.²⁰
20. Neither the State nor the Commonwealth bushfire biodiversity response is complete.
21. In addition to the State and Commonwealth response to the bushfires, it is also relevant to have regard to the Greater Glider Action Statement that was published by the State Government in November 2019.²¹ The Action Statement identified:
- 21.1 the distribution of the Greater Glider in Victoria as in the Gippsland, East Gippsland and Central Highlands area;²²
- 21.2 the threatened status of the Greater Glider;²³
- 21.3 the threats to the Greater Glider which are bushfire, planned burning, drought, timber harvesting and hyper-predation;²⁴
- 21.4 additional conservation measures including the immediate protection of key areas of habitat across eastern Victoria.²⁵ An indicative map of these immediate protection areas (IPAs) is at Attachment 1 to the Action Statement.
22. The areas that were set aside in East Gippsland for IPAs are in the same area that has been extensively affected by the Bushfires. A real question therefore arises as to whether the IPAs in the Action Statement have any remaining conservation value.
23. The Plaintiff contends that at least until:
- 23.1 the governmental responses to the bushfires are finalised; and

¹⁷ Preliminary State bushfire biodiversity response pp 28, 45.

¹⁸ Preliminary State bushfire biodiversity response p 2.

¹⁹ Jacobs Affidavit [28]

²⁰ Jacobs Affidavit [22]-[29].

²¹ Jacobs Affidavit [47], Exhibit DJ-25 (**Action Statement**).

²² Action Statement p 3.

²³ Action Statement p 5.

²⁴ Action Statement p 5.

²⁵ Action Statement p 9.

23.2 VicForests has developed and implemented timber harvesting prescriptions to protect fire-affected threatened species in light of the governmental responses,

it is a breach of ss 2.2.2.2 and 2.2.2.3 of the Code for VicForests to continue to harvest timber in coupes known to VicForests or DELWP to contain or be likely to contain a species identified as threatened pursuant to the FFG Act and affected by the Bushfires, or habitat of such species.

24. In advancing this contention, the Plaintiff makes the following points:

24.1 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.

24.2 There is no doubt that the 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.²⁶

24.3 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”.²⁷

24.4 Given the devastating impact of the Bushfires on fauna, including threatened species, and in light of the fact there are ongoing (but not yet complete) State and Commonwealth biodiversity responses in train, “careful evaluation” of management options by VicForests when contemplating harvesting timber in a coupe that is known to contain or known to be likely to contain threatened species (or habitat of the same) requires a “wait and see” approach. In light of these events and the uncertainty of the impact, it is simply not presently possible for VicForests to say there will be no serious or irreversible damage caused by the timber harvesting.

24.5 To do otherwise – 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.

24.6 So, too, 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 requires a “wait and see” response from VicForests, so it can

²⁶ Jacobs Affidavit [23], [25]-[29].

²⁷ Jacobs Affidavit [24], [141(a)(i)].

properly consider the relevant advice and research in final form before taking any further steps.

25. The point can be shortly put this way: the State and Commonwealth bushfire biodiversity responses, when finalised, will be directly relevant to VicForests' continued timber harvesting in coupes where there is a risk to threatened species, or habitat of threatened species, affected by the Bushfires. Given the magnitude of the Bushfires and the impact on flora and fauna, and the risks of continued timber harvesting for threatened species, ss 2.2.2.2 and/or 2.2.2.3 of the Code require VicForests to await the final reports and then undertake a full analysis of the findings and recommendations, before taking any further steps.
26. The Plaintiff anticipates two arguments that will be put against but which should be rejected by the Court for a number of reasons.
27. First, one of the various arguments raised in the case of *MyEnvironment Inc v VicForests*²⁸ (***MyEnvironment***) was that timber harvesting should be restrained pending a review of the adequacy of the existing reserve system as a result of the 2009 bushfires. The argument was rejected. However, the factual foundation for the argument was quite different. It relied on research being planned within a government department more than 2 and a half years after the relevant fires, not immediate, well-resourced and large-scale governmental responses of the kind in issue here, which describe the fires as "an ecological disaster", "extensive and severe", "exceptional in size and impact", requiring "emergency", "immediate" and "urgent" response²⁹.
28. Moreover, *MyEnvironment* involved only one species, which had not been detected in that coupe.³⁰ Here, multiple threatened species in issue have been recorded in the relevant coupes.
29. Further, the court considered there to be inadequate evidence of any connection between the research and the coupe in issue. Here the government response is being conducted at a broader level and looking at key populations outside the East Gippsland area, which will include populations in the Central Highlands.
30. Further, there was no claim/argument in that case of non-compliance with obligations to consider certain research and plan consistently with it, being the crux of argument here.³¹

²⁸ [2012] VSC 91 (***MyEnvironment***).

²⁹ Jacobs Affidavit at [29] and [23].

³⁰ *MyEnvironment* at [288]

³¹ *MyEnvironment* at [288], [325]-[328].

31. Second, *MyEnvironment* also involved an argument that timber harvesting should be suspended until a review of the Action Statement for the species in issue, the Leadbeaters' Possum, was finalised. That argument was rejected. However in that case there was no suggestion that the protections in the Action Statement would be relevantly altered.³² Here by contrast, the area that was set aside as necessary for immediate protection in East Gippsland has been largely consumed by the Bushfires. The Action Statement expressly stated that the Immediate Protection Areas were "indicative", with boundaries not yet finalised, and a finalised map foreshadowed³³. This has not yet occurred³⁴. It will now require the Government to consider whether additional areas where the Greater Glider is found should be set aside for immediate protection. Areas in the Central Highlands that contain records of the species, where the coupes in issue in this case are found, are an obvious candidate for immediate protection, given that it has not been affected by the Bushfires.

The balance of convenience favours the grant of the injunction

32. The balance of convenience clearly favours the grant of the injunction.

33. It is useful to refer to *Environment East Gippsland v VicForests*,³⁵ where Forrest J granted an injunction against timber harvesting in similar circumstances. The circumstances that are similarly relevant here are that:

33.1 Although some financial loss will be caused, the asset will be retained and can be harvested at a later date;

33.2 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 10 of which are subject to this application;³⁶

33.3 Preservation of threatened fauna is a paramount consideration in the regulatory regime, and accordingly the limited assets of WOTCH is not a reason not to grant the injunction.

33.4 Timber harvesting causes irreparable damage to the habitat of fire affected threatened species.³⁷

³² *MyEnvironment* at [324].

³³ Jacobs Affidavit at [48]

³⁴ Jacobs Affidavit at [49]

³⁵ [2009] VSC 386 at [98]-[106].

³⁶ Jacobs Affidavit [19], DJ-13.

³⁷ Jacobs affidavit [42], [58], [66], [74]. See also [17] of the submissions above.

34. By contrast, as set out above, 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 federal government as being on a path to extinction. An award of damages plainly cannot compensate for such damage.

Conclusion

35. For the reasons given, an interim injunction should be granted in this case in the terms sought in the Interlocutory Application.

Date: 28 January 2020

KATHLEEN FOLEY

JULIA WATSON