



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

Case: S ECI 2020 00373

Filed on: 20/04/2020 03:24 PM

S CI 2020 00373

BETWEEN

WOTCH INC

Plaintiff

VICFORESTS

Defendant

REPLY

Date of document: 20 April 2020

Filed on behalf of: Plaintiff

Environmental Justice Australia

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In Reply to the Defence filed on 3 April 2020, the Plaintiff says (adopting the definitions used in its Statement of Claim):

1. Save for the admissions therein and save for those paragraphs specifically pleaded to in this Reply, the Plaintiff denies each and every allegation in the Defence, and joins issue with it in respect of the matters raised in its Defence.
2. As to paragraph 4, it denies the allegations therein and says further that:
 - (a) Species of flora and fauna for which the Plaintiff surveys within the Central Highlands, including fire-affected threatened species, also occur in other parts of Victoria;
 - (b) The importance of biodiversity in the Central Highlands (about which the Plaintiff was established to promote and educate the public) is informed by and affected by the status of the constituent species of such biodiversity in other parts of Victoria;

- (c) The importance of biodiversity, including fire-affected threatened species, within the Central Highlands is greater by reason of the impacts of the 2020 bushfires on fire-affected threatened species located in other parts of Victoria;
- (d) The Plaintiff has undertaken activities concerned with the protection of forests and threatened species beyond the Central Highlands

Particulars to subparagraph (d)

- (a) The Plaintiff visited and educated the public about the importance of forests and biodiversity in Mirboo North and was awarded a certificate of appreciation by Preserving Our Forests (Mirboo North & District) in 2019.
 - (b) The Plaintiff co-published a report concerning the Greater Glider in Victoria entitled “Gliding Towards Extinction” in 2019.
 - (c) The Plaintiff makes representations to government, including to the Office of the Conservation Regulator as a member of its stakeholder reference group, concerning the regulation of timber harvesting and protection of threatened species in Victoria.
3. It admits sub-paragraphs 8(a) and (b).
4. It admits sub-paragraphs 15(a) and (b) and says further that:
- (a) the express provisions of the Management Standards and Planning Standards pleaded therein are limited to those relating to detection-based rules only for the Powerful Owl, Smoky Mouse and Sooty Owl and do not include all express provisions for the conservation of such species contained in the Planning Standards;
 - (b) the Planning Standards establish express provisions for the conservation of the Powerful Owl and Sooty Owl in the form of both detection-based rules and fixed Forest Management Zone (**FMZ**) rules;
 - (c) the further express provisions in the Planning Standards for the conservation of fauna by fixed FMZ rules provide as follows:

- i. “In establishing and maintaining a FMZ scheme, the planning standards in this document that apply to SPZ and SMZ establishment and amendment should be adhered to”: Cl 2.1.1.
 - ii. “Plan management actions for rare and endangered fauna in accordance with Table 3 (Fixed FMZ rules for fauna)”: Cl 4.2.1.1.
 - iii. “Maintain FMZ schemes for rare and endangered fauna in accordance with Table 3 (Fixed FMZ rules for fauna)”: Cl 4.2.1.2;
- (d) the Fixed FMZ Rules in Table 3 for the Powerful Owl and Sooty Owl are as follows:
- i. In respect of the Powerful Owl in the North East FMAs:
 - A. A zoning management action which states:

‘Identify and maintain a target of 125 Powerful Owl Management Areas (POMA) of at least 500 ha of suitable habitat across public land in the Benalla-Mansfield and Benalla-Mansfield, North East FMA area. Allocate POMAs across State forest and conservation reserves, with preference to protect suitable habitat within conservation reserves, especially in large reserves where the home range can be protected within the reserve. Where possible, locate POMAs in the best habitat (subject to other management objectives) over nest sites or probable breeding areas based on the occurrence of owlets or adult roosting pairs. Select Powerful Owl sites to meet the POMA target in the following order of priority:

 - 1. confirmed nest trees utilised during the past 5 years*
 - 2. confirmed roost trees utilised during the past 5 years*
 - 3. repeated sighting or vocalisation during the past 5 years*
 - 4. incidental sighting or vocalisation during the past 5 years*
 - 5. historic record not reconfirmed in the past 5 years*
 - 6. potential habitat area (preferably based on formal analysis and modelling).*

Locate the POMA within a 3.5 km radius of the Powerful Owl site. Suitable habitat areas are areas of greater than 100 ha (contiguous if possible) dominated by old trees and areas likely to support high densities of prey species. Include State forest areas of the POMA in SPZ.’
 - B. A review requirement which states:

'Review POMA allocation when records of higher priority are discovered subject to other management objectives.'

ii. In respect of the Sooty Owl in the North East FMAs:

A. A zoning management action which states:

'Identify and maintain a target of 100 Sooty Owl Management Areas (SOMA) across public land in the Benalla-Mansfield and Benalla-Mansfield, North East FMA area. Locate SOMAs based on probable breeding areas based on the occurrence of owlets or adult roosting pairs and on habitat identified by habitat modelling. SOMAs may overlap with management areas established for other species.

Allocate SOMAs across State forest, conservation reserves and other suitable public land areas with preference to protect suitable habitat within conservation reserves, especially in large reserves where the home range can be protected within the reserve.

Where clearfell or seed tree harvesting systems are used, select a 500 ha area within a 3.5 km radius of the record (approximate area of 3800ha) for each SOMA. Align SOMA boundaries with recognisable features, preferably natural, such as ridgelines or sub-catchments. Where possible SOMAs should comprise of patches greater than 100 ha in area and contiguous with other forest. Maximise the inclusion of habitats known to be used by the Sooty Owl, such as forest in headwaters, old-growth forest in gullies, forest with a diversity of preferred EVCs, forest of preferred growth stages such as mixed - senescent - mature, otherwise mature or mixed senescent - mature - regrowth, forest with large and / or dead hollow-bearing trees, forest with abundant Silver Wattle, Tree-ferns and Blanket-leaf, and forest in deep gullies. Avoid locating SOMAs in extensive areas of forest known to be less suitable, forest less than 28 m tall, treeless areas, regrowth forest or any of the dry EVCs. Include State forest areas of the SOMA in SPZ.'

iii. For each other FMA (i.e. other than the North East FMAs), similarly worded Fixed FMZ rules apply for the Powerful Owl and the Sooty Owl as those set out above;

Particulars

Planning Standards Table 3 Fixed FMZ Rules for Fauna pp 20-35.

(e) s 16 of the SFT Act requires the Defendant to carry out its functions in accordance with an allocation order, once made, in so far as those functions relate to timber resources or the area to which the order applies;

- (f) an allocation order was made in 2013 (and amended in 2014 and 2019), which applies to the timber resources and the area the subject of the TRP (the **Allocation Order**);
- (g) the Allocation Order contains a condition that the Defendant must comply with the forest management zoning scheme (**FMZ scheme**) established pursuant to any applicable forest management plan which is a working plan made under s 22 of the *Forests Act 1958* (Vic);

Particulars

Victorian Government Gazette No. S 153 24 April 2019

- (h) the spatial dataset constituting the FMZ scheme does not comply with the fixed FMZ rules for the Sooty and/or Powerful Owls;

Particulars

It refers to and repeats the particulars to paragraphs 25 and 26 of the Statement of Claim.

The FMZ scheme does not include in SPZ or conservation reserves at least 500 POMAs and 500 SOMAs of suitable Powerful Owl and Sooty Owl habitat.

Further particulars may be provided.

- (i) the Defendant's planning in each of the coupes on the TRP is required by cl 2.1 of the Management Standards to be based upon the spatial dataset constituting the FMZ scheme (subject to cl 2.1.1.2 and 2.1.1.3);
 - (j) by reason of the fact the FMZ scheme does not comply with the fixed zone rules for the Sooty Owl and/or the Powerful Owl, the Defendant's planning is not authorised by law.
5. As to paragraph 16, it says further that severe bushfires also occurred in Gippsland.
 6. As to paragraph 17, it says further that the bushfires also caused loss of flora and fauna, including the loss of members of species listed as threatened in Part 3 of the FFG Act and the loss of habitat of such species, in Gippsland.

7. As to sub-paragraph 21(b), it admits that the Defendant published a statement on its website on 7 February 2020 that included the words quoted therein and otherwise denies the allegations in that sub-paragraph.
8. As to sub-paragraphs 22(a)-(b), it says that the cessation of timber harvesting in relation to the coupes identified in sub-paragraph 22(a) and the non-commencement of timber harvesting in the coupes identified in sub-paragraph 22(b) occurred by reason of the interlocutory injunction granted in this proceeding and/or undertakings given by the Defendant in this proceeding.
9. As to sub-paragraphs 23(d) and 27(d), it admits that on 30 March 2020 the Victorian and Commonwealth governments renewed the Central Highlands Regional Forest Agreement and otherwise denies the allegations in that sub-paragraph.

DATED 20 April 2020

KATHLEEN FOLEY

JULIA WATSON

COLETTE MINTZ

Counsel for the Plaintiff

Environmental Justice Australia

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Solicitors for the Plaintiff