

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: On the papers; 14 October 2020
DATE OF RULING: 20 October 2020
CASE MAY BE CITED AS: WOTCH Inc v VicForests (No 6)
MEDIUM NEUTRAL CITATION: [2020] VSC 674

PRACTICE AND PROCEDURE – Standing – Timber harvesting of State forests – Special interest in the subject matter of the proceeding – History, purposes and activities of plaintiff – *Associations Incorporation Reform Act 2012* (Vic) ss 30, 34, 35 – *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 – *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 – *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 – *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 – *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492 – *Maguire v Parks Victoria* [2020] VSCA 172.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	J Watson	Environmental Justice Australia
For the Defendant	J Pizer QC and F Hudgson	Russell Kennedy Lawyers



HIS HONOUR:

1 The plaintiff, WOTCH, is a community-based, not for profit, incorporated association with an interest in protecting the flora and fauna of Victoria's native forests. This ruling concerns WOTCH's standing in respect of part of the relief it seeks in the proceeding.

2 The defendant, VicForests, is a State body which undertakes timber harvesting in State forests in Victoria.

3 The proceeding concerns the legality of timber harvesting by VicForests in native forest coupes inhabited by species listed as threatened under the *Flora and Fauna Guarantee Act 1988* (Vic) which may affect those species.

4 The bushfires which occurred during the 2019/20 fire season ('the bushfires') caused significant population and habitat losses for some threatened species. WOTCH alleges that State and Commonwealth bushfire biodiversity responses that are currently underway 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 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 In this proceeding, WOTCH seeks relief in respect of forest coupes located in different regions in Victoria, both within the Central Highlands and outside that region. VicForests accepts that WOTCH has standing to seek relief in relation to coupes within, but not beyond the Central Highlands.

6 To establish standing, WOTCH must demonstrate a special interest in the subject matter of the litigation.

7 The issues raised for consideration in this ruling are:

(a) Is WOTCH prevented from relying on activities outside the Central Highlands



to support its claim for standing, because those activities are outside its purposes and are therefore unlawful?

- (b) Has WOTCH demonstrated that it has a special interest in the subject matter of the proceeding in respect of forest coupes outside the Central Highlands?

WOTCH

8 WOTCH's history, purposes and activities are relevant to whether it has standing in respect of the coupes outside the Central Highlands region.

9 WOTCH has been active since 2014, and was incorporated in 2015.

10 Until very recently the purposes of WOTCH, recorded in its rules of association adopted in 2015, were:

1. To historically record flora and fauna found within the Central Highlands of Victoria; and
2. To promote and educate the public about the importance of biodiversity in this area.

11 On 24 August 2020, WOTCH held a special general meeting at which a special resolution was unanimously passed amending its purposes to:

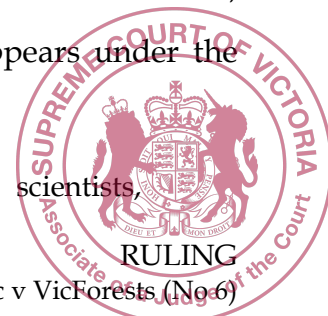
[T]o protect Victoria's native forests through the use of citizen science, community engagement and advocacy.

That amendment brought the purposes of WOTCH in line with its mission statement, developed in September 2017:

WOTCH is a volunteer-run grassroots organisation dedicated to protecting Victoria's native forests through the use of citizen science, community engagement and advocacy.

12 On the home page of its website WOTCH gives a description of what it stands for, which is consistent with its mission statement. The following appears under the heading 'About':

WOTCH is a community of passionate volunteers and citizen scientists,



dedicated to protecting the wildlife of the Central Highlands of Victoria.

13 The 'About' section of WOTCH's Facebook page includes the following:

Wildlife of the Central Highlands is a grassroots organisation working towards the protection of Victoria's native forests and their flora, fauna and ecological values by means of citizen science, collaboration and community engagement. ...

This page is a collection of images, videos and accounts of the wildlife sighted within logging coupes of the Central Highlands. With each tree that falls, with each hectare of habitat lost, we come closer to losing these species forever.

14 The bio on WOTCH's Instagram account reads:

A dedicated citizen science group in the Central Highlands, Victoria: protecting our endangered flora & fauna from logging.

15 In the statement of claim filed in this proceeding, WOTCH sets out its claim for standing as follows:

3. The Plaintiff:

- (a) is an incorporated association engaged primarily in recording flora and fauna, and promoting and educating the public about the importance of biodiversity.

Particulars

The Plaintiff refers to its Rules of Association, a copy of which is in the possession of the Plaintiff's solicitors and may be inspected upon request.

- (b) conducts field surveys for threatened fauna, flora and ecological communities that attract protection under legislative instruments in Victorian State forests;

Particulars

Since 2015 the Plaintiff has conducted approximately 250 surveys in the field in Victoria to document and report on the presence of biodiversity values.

- (c) has submitted at least 130 reports to the Victorian government in support of requests for protection of species or habitat in the Central Highlands;
- (d) sits on the stakeholder reference group for the Office of Conservation Regulator at the Victorian Department of Environment, Land, Water and Planning (DELWP);
- (e) receives specialised survey equipment such as infrared cameras from DELWP on loan for the purposes of the group's survey activities.



16 In her second affidavit filed in the proceeding Ms Forster, who is the president of WOTCH, states that the association's primary activities are:

- (a) conducting surveys for threatened species in forests earmarked for logging;
- (b) training others in survey methods;
- (c) conducting public education; and
- (d) advocating to government for forest protection.

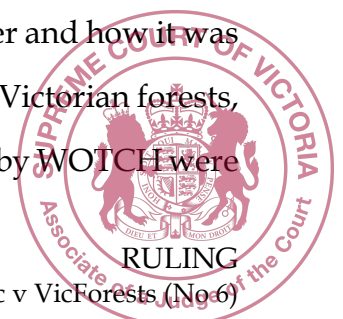
Ms Forster states that while each of these activities are principally undertaken by WOTCH in the Central Highlands, they also occur outside that region.

17 Ms Forster sets out what she says are examples of WOTCH's activities outside the Central Highlands on which it relies to establish standing. Whilst I accept Ms Forster may not have listed all of WOTCH's activities outside the region, I infer that those that have been listed are considered to be the most material to the standing issue.

Training

18 Ms Forster cites seven examples of training delivered by WOTCH members between October 2014 and June 2020 to different groups based outside the Central Highlands and university students, the purpose of which was to teach survey techniques to attendees.

19 One example is that in each year between 2014 and 2018 a WOTCH member took between 25 and 50 Deakin University students on forest tours to demonstrate the use of thermal imaging techniques and explain the use of citizen science to protect forests. While Ms Forster said the purpose of this training was to encourage the students to become involved in citizen science and forest protection in Victoria, I note the activity was conducted in the Central Highlands. Further, to the extent the training had relevance beyond that region, the evidence does not establish whether and how it was particularly aimed at protection of threatened species and habitat in Victorian forests, rather than more generally. A further two training sessions relied on by WOTCH were



delivered in the Central Highlands.

- 20 A further training session involved surveying for a threatened species of grevillea at Mount Cole in Western Victoria, and another resulted in identification of a koala and brushtail and ringtail possums at Seymour, both outside the Central Highlands.

Public education

- 21 Ms Forster gave eight examples of public education provided by WOTCH members which she said was directed to citizen science, forests and forest-dwelling species. The following are two examples. A WOTCH member appeared on a panel at the 2019 Environmental Film Festival Australia to discuss the importance of native forests for biodiversity and the impacts of logging on wildlife and forests Australia-wide, with specific examples of logging effects on owls and Greater Gliders in East Gippsland. This followed the screening of a documentary film *'The Time of Forests'*, which concerned forestry practices in Europe. A second example is that in 2018 Ms Forster attended a workshop at the Melbourne Polytechnic, Fairfield campus, which was co-delivered by another member of WOTCH and a representative from a second environmental organisation. The workshop related to Victorian forest protection issues across the Central Highlands, Gippsland, East Gippsland and North East Victoria, including the role of citizen science in advocating for the conservation of threatened species. It is not clear what role the WOTCH members played in these presentations, and whether their involvement extended beyond speaking to their experience of issues in the Central Highlands.

- 22 One presentation took place in New South Wales.

- 23 Three of the presentations involved a WOTCH member delivering the same talk about surveys of threatened arboreal species, and where those species were in decline throughout their range, not only in the Central Highlands.

Advocacy

- 24 WOTCH has conducted campaigns enlisting community support to lobby the



Victorian government to protect the Greater Glider. In 2018 WOTCH produced and distributed a postcard addressed to the Victorian Minister for Energy, Environment and Climate ('the Minister') which read:

I respectfully request that you do everything within your power to cease clearfell logging operations in areas where Greater Gliders (*Petauroides volans*) are found, to protect these marvellous creatures. Anything short of this will condemn the [Greater] Glider to extinction and is truly unacceptable.

WOTCH collected over 1,000 of the postcards signed by members of the public which it delivered to the Minister.

25 In June 2019, WOTCH produced a template email for members of the public to send to the Minister concerning the decline of Greater Glider population caused by logging practices, and the urgent need for an Action Statement following listing of the species as threatened under the *Fauna and Flora Guarantee Act 1988* (Vic). WOTCH published the template on its website, emailed it to its supporters and posted it on social media to encourage members of the public to send the template email to the Minister.

26 In January 2020, jointly with another environmental organisation, WOTCH published a template email for members of the public to send to the Minister calling for protection of all remaining Greater Glider habitat from timber harvesting given the damage to the species caused by the bushfires. On 30 January 2020, WOTCH jointly wrote to the Minister's office seeking to meet the Minister to discuss the plight of the Greater Glider in the light of the bushfires and continued logging of habitat.

27 These campaigns were complemented by social media posts by WOTCH dating from mid-2017 directed to the importance of protecting habitat for the threatened Greater Glider, risks to the species including from logging, both within and beyond the Central Highlands, and the need for an Action Statement. In 2019, Ms Forster made a video entitled '*Greater Glider: Still Threatened, Still No Protection*' which WOTCH published on Facebook. In the video, reference is made to loss of Greater Glider habitat in the Central Highlands and East Gippsland.

28 In May 2018, three members of WOTCH conducted an advocacy spotlight tour in the



Central Highlands for a Federal Member of Parliament and the then Victorian Shadow Minister for Environment. The tour involved spotlighting Greater Gliders, and contained information on the impact of logging State-wide.

29 WOTCH was invited to, and attended, two consultations in October 2018 on the proposed renewal of all Victorian Regional Forest Agreements, and since 2019, has been a member of the Office of the Conservation Regulator Stakeholder Reference Group, at which its representatives have spoken about protection for threatened species such as the Greater Glider and Sooty Owl. The Reference Group discussed, among other things, implementation of the Greater Glider Action Statement to maximise protection of the species, and how timber harvesting activities should be managed to meet the requirements of the Action Statement. In 2017, WOTCH was invited to, and attended, the 'Greater Glider Knowledge Gaps Workshop' held by DELWP. The invitation from DELWP acknowledged the expertise of WOTCH in relation to the Greater Glider.

30 In June 2019 WOTCH published, together with two other environmental organisations, a report on an investigation into Greater Glider habitat logged since the species was listed as threatened, which is called '*Gliding Towards Extinction*'. In the report, WOTCH is described as a volunteer citizen science organisation that monitors logging operations and conducts surveys for protected flora and fauna within the proposed Great Forest National Park in Victoria's Central Highlands. The report was not limited to the Central Highlands, and considered the impacts of logging on Greater Glider habitat across Victoria.

31 In August 2019, WOTCH made a joint statement, together with seven other environmental groups, in relation to Australia's faunal extinction crisis and risks, including from timber harvesting. WOTCH also made an individual submission to the Senate Inquiry on Australia's faunal extinction crisis in which it described having an intimate and extensive knowledge of the forests of the Central Highlands, emphasised the importance of its survey activities in identifying threatened species such as the Leadbeater's Possum, Greater Glider and Spotted-tail Quoll, and



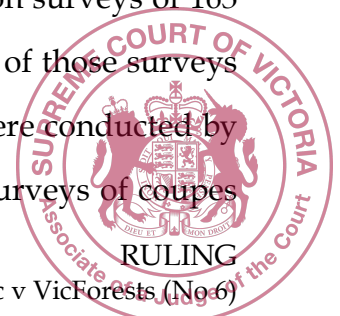
commented on the inadequacy of current protection of those species from timber harvesting in that region. In the submission, WOTCH supported the proposed Great Forest National Park, which it argued would positively impact threatened species in the Central Highlands.

32 In May this year, WOTCH made a submission directed to threats to Australia's biodiversity and to fauna species to an independent panel reviewing the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'). Two examples discussed in the submission were the Leadbeater's Possum and the Greater Glider. Submissions were made in relation to the threats caused by logging in Victorian forests, the inadequacy of the Greater Glider Action Statement citing East Gippsland as a specific example, the need for expansion of the national reserve system with particular reference to the Central Highlands, and the effect on that system of the bushfires and the need for stronger regulation and protection for threatened flora and fauna. In the submission, WOTCH refers to its history of having conducted hundreds of flora and fauna surveys in the Central Highlands.

Surveys

33 WOTCH members have conducted a small number of surveys outside the Central Highlands, at least some of which had only a very limited relationship to the subject matter of this proceeding. Examples given included a survey in a state forest near Ararat in January this year directed to identification of species endemic to that area, a survey in the Otways in 2014 which identified a koala, a number of wombats and a wallaby, and a survey in the Ku-ring-gai Chase National Park in New South Wales.

34 WOTCH has conducted over 300 surveys of forest coupes in the Central Highlands to detect threatened species. This survey activity is a foundation for WOTCH's reports to government, and much of the advocacy and educational activity in which it engages. For example, the *Gliding Towards Extinction* report relied on surveys of 163 forest coupes in which 726 Greater Gliders were detected. Over 90 of those surveys were of coupes in the Central Highlands, of which more than 60 were conducted by WOTCH. WOTCH did not conduct any of the approximately 70 surveys of coupes



outside the Central Highlands.

The relationship between species and habitat inside and outside the Central Highlands

35 Professor Driscoll is the Director of the Centre for Integrative Ecology at Deakin University, which focuses on understanding how individual plants or animals, species and ecosystems respond to environmental change, such as changing climates, fire regimes and land clearing.

36 In a report prepared at the request of WOTCH, Professor Driscoll said there were two clear ways in which the health, status, outlook or security of a species outside the Central Highlands could impinge in a substantive way on the same species within the Central Highlands. First, a change in the distribution or abundance of a species outside the Central Highlands could alter the conservation status and ecological importance of the species as it exists inside the Central Highlands. He said:

Increasing the degree of threat to a species through action outside of a region could have a real effect on what managers must do inside that region for that species. More resources need to be directed towards a species if that species moves closer towards extinction.

37 Second, species such as the Powerful Owl are very likely to have a widespread gene flow, resulting in genetic mixing which is important in preventing inbreeding depression, which is a risk if populations are small, and may help populations adapt to climate change.

38 Professor Driscoll said that events or activities such as fire and logging that cause populations to be lost or reduced will contribute to worsening the conservation status of a species. He said that large areas of unburnt forest are particularly important after extensive fires elsewhere, and that logging unburnt habitat will have a larger detrimental impact on forest-dependent species than before the bushfires because unburnt areas are likely important ecological refuges.

Can WOTCH rely on activities outside the Central Highlands to establish standing?

Submissions

Defendant

39 WOTCH is an incorporated association with limited purposes. Critically, those purposes were, until very recently, confined to surveying activities conducted in the Central Highlands, and to promoting and educating the public about the importance of biodiversity in that region.

40 Pursuant to s 34(c) of the *Associations Incorporation Reform Act 2012* (Vic) (*Associations Act*), WOTCH must not do anything outside the scope of its purposes.

41 The acts that WOTCH relies on to establish standing were outside the scope of its purposes, and were therefore prohibited by s 34(c) of the *Associations Act*. While those acts are not invalid,¹ they are unlawful in the sense of being prohibited by statute.

42 The Court should not permit WOTCH to benefit from its own unlawful conduct by allowing it to rely on unlawful activities to establish or support its claim that it has standing. Since WOTCH cannot rely on its activities beyond the Central Highlands to support its claim for standing in relation to coupes outside that area, that claim must fail.

43 The recent amendment by WOTCH of its purposes can only have prospective effect. The Court should not place any weight on self-serving or opportunistic steps taken after the proceeding was commenced, and in direct response to submissions made by VicForests in respect of the issue of standing.

Plaintiff

44 WOTCH submitted, first, that the special interest test is not a rigid, inflexible rule, but involves a curial assessment of the importance of a plaintiff's concern with the subject matter of the litigation, in the light of the plaintiff's purposes, history and activities.² VicForests' submission, which would have the effect of replacing the well-established

¹ *Associations Incorporation Reform Act 2012* (Vic) s 35(1).

² *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36 (Gibbs CJ), 42 (Stephen J) (*'Onus'*).



standing test with a rigid and inflexible rule based on the words of WOTCH's rules of association, is contrary to principle, devoid of authority and should be rejected.

45 Second, VicForests' submission is not supported by a proper interpretation of the *Associations Act*. The significance of the restriction imposed by s 34(c) must be determined by reference to the balance of that Act. Sections 35(1) and (2) provide that no act of an incorporated association, nor any act of its members, is invalid by reason of the fact that the Act was prohibited by s 34, and s 35(3) provides that any lack of capacity or power or any prohibition may only be asserted or relied upon in certain proceedings. On a proper interpretation, there is no basis for VicForests' allegation that the relevant conduct of WOTCH was unlawful, or that the *Associations Act* provides any basis to challenge WOTCH's standing.

46 Third, activities of WOTCH outside the Central Highlands, directed as they were to the preservation of species found within the Central Highlands, may properly be understood as ancillary or incidental to what were, until recently, its stated purposes.

47 Fourth, it is evident from WOTCH's mission statement, the breadth of its activities, and the acknowledgement of various bodies as to its standing in relation to matters concerning threatened species and logging generally, that WOTCH has evolved over time. The recent amendment of its purposes does no more than reflect what had already occurred in practice: in the work WOTCH has done, how it saw its purposes by way of its mission statement developed in 2017, and how it was perceived in the community.

Analysis

48 The general powers of an incorporated association are governed by s 30 of the *Associations Act*, which relevantly provides:

Subject to its rules, an incorporated association may –

...

- (d) do anything that is incidental or conducive to the attainment of the purposes and the exercise of the powers of the association.



49 VicForests relies on ss 34 and 35 of the *Associations Act*, which relevantly provide:

34 Restriction of exercise of powers

An incorporated association must not, otherwise than as provided by this Act—

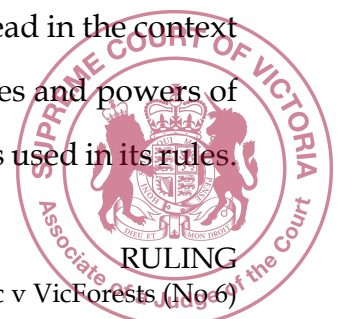
...

- (c) do any act that is outside the scope of the purposes of the association.

35 Prohibited transactions

- (1) No act of an incorporated association (including the entering into of an agreement by the association) and no conveyance or transfer of property to or by an incorporated association is invalid by reason only of the fact that—
 - (a) the association was without the capacity or power to do the act or execute or take the conveyance or transfer; or
 - (b) doing the act, or executing or taking the conveyance or transfer, was prohibited under section 34.
- (2) No act performed by a person for or on behalf of an incorporated association (including the entering into of an agreement on behalf of the association) is invalid by reason only of the fact that the act was prohibited under section 34.
- (3) Any lack of capacity or power or any prohibition referred to in subsection (1) or (2) may be asserted or relied on only in—
 - (a) proceedings against an incorporated association by a member of the association or the Registrar to restrain the association from doing any act or executing or taking a conveyance or transfer of property; or
 - (b) proceedings by an incorporated association or by a member of the association against the present or former secretary or former public officer of the association; or
 - (c) an application by a member of an incorporated association or the Registrar to wind up the association; or
 - (d) an application by the Registrar to appoint a person as the statutory manager of an incorporated association.

50 The restriction in the exercise of powers imposed by s 34(c) is to be read in the context of s 30(d), the text of which makes clear that the scope of the purposes and powers of an association are not to be narrowly or strictly confined by the words used in its rules.



Acts which are related to, connected with, helpful, beneficial or advantageous to the stated purposes may fall within the scope of an association's purposes recorded in the rules of association. Professor Driscoll's evidence supports the connection or relationship between the protection of biodiversity in forests within the Central Highlands and forests outside that region. Training, educational, advocacy and survey activity within Victoria but outside the Central Highlands could easily be seen to be helpful, beneficial or advantageous to the promotion of the need to protect the same biodiversity values within the Central Highlands. The nature of activities in which WOTCH engaged outside the Central Highlands are incidental or conducive to the attainment of its purposes within the Central Highlands. Even accepting VicForests' submission as to the application of the *Associations Act* to the question of standing the acts upon which WOTCH relies, fall within what was, until recently, the scope of its purposes, and are not prohibited or unlawful acts by reason of s 34(c) of the *Associations Act*.

51 Further, to the extent the acts relied on were outside the scope of the purposes of WOTCH, they were not invalid. VicForests cites no authority in support of the assertion that assessment of the concern of WOTCH with the subject matter of the proceeding cannot include consideration of acts by it which are not invalid. I agree with the plaintiff's submission that the approach for which VicForests contends would have the effect of replacing the well-established flexible standing test with a rigid and inflexible rule based on a strict interpretation of words in an incorporated association's rules which set out its purposes.

52 The acts upon which WOTCH relies were within its Mission Statement, which was developed and adopted by it three years ago. There is no suggestion of any difference of view within the WOTCH membership as to the propriety of the Mission Statement or the lawfulness of acts by WOTCH outside the Central Highlands.

53 I reject VicForests' submission that WOTCH is prevented from relying on activities outside the Central Highlands to establish standing.

Has WOTCH demonstrated a special interest?

Submissions

Plaintiff

54 WOTCH submits that while a large part of its activities are directed to forests, flora and fauna within the Central Highlands, it has established a special interest in the subject matter of the litigation beyond those geographical bounds for two reasons. First, it undertakes activities for the protection of forests and species beyond the Central Highlands. Second, it is focused on the protection of threatened species which live in, but are not confined to, the Central Highlands. To narrow its interest in the protection of relevant species to the bounds of the Central Highlands would be superficial and contrary to the ecological reality.

55 WOTCH's training and public education activities have been conducted in, or concerned, diverse areas across the State. The plaintiff's involvement with organisations like the Victorian National Parks Association, La Trobe University, Deakin University and the Indigenous Flora and Fauna Association demonstrate the standing it holds among the broader conservationist and intellectual community, which is a further indication of its special interest in the protection of threatened species and Victorian forests outside the Central Highlands. Such training and education has related to a number of species with which the litigation is concerned which occur in and beyond the Central Highlands. The plaintiff's educational activities demonstrate a deep interest in the protection of forests and threatened species generally, and the dissemination of learnings and techniques used to pursue those objectives.

56 WOTCH's advocacy activities focus on making submissions, and facilitating community members to make submissions, to government on the protection of threatened species, particularly those that are forest-dependent. A critical part of that advocacy relates to the Greater Glider, reflecting WOTCH's special interest in the welfare of that species generally.

57 Invitations extended to it by the Victorian and Commonwealth governments to sit on



consultative bodies for forest-related matters, and recognition by Environment Victoria for 'its tireless campaigning to protect Victoria's magnificent native forests', demonstrate that WOTCH is not perceived as having a role limited to the Central Highlands. WOTCH's activities on social media have extended to forests and biodiversity beyond the Central Highlands, such as its ongoing, extensive advocacy for the protection of the Greater Glider throughout Victoria.

58 WOTCH has conducted eight surveys of threatened species outside the Central Highlands.

59 Turning to the second matter, even if it were to be assumed that WOTCH's special interest is particular to the forests of the Central Highlands and the species therein, those forests and members of those species are interconnected with those elsewhere in Victoria. WOTCH relies on the evidence of Professor Driscoll as to the following matters. First, a change in the distribution or abundance of a species outside the Central Highlands could alter the conservation status, and hence ecological importance, of that species in the Central Highlands. Second, changes that impact a species outside the Central Highlands may have genetic effects on populations of that species inside the region. Events such as fire and logging, both of which can eliminate and fragment populations, may contribute to the worsening conservation status of species, and interrupt gene flow. Third, large areas of unburnt forests are particularly important to a range of mammals and birds after extensive fires elsewhere, such as the bushfires. It is apparent, in the light of the evidence of Professor Driscoll, that the plaintiff's special interest in forests and species in the Central Highlands cannot be separated from interrelated populations of those species outside the region.

60 Viewed as a whole, the evidence demonstrates WOTCH undertakes activities involving significant and repeated expenditure of time, effort and resources directed to the protection of forests and species beyond the Central Highlands.

61 WOTCH submitted that, if it is not accepted it has standing in respect of the whole subject matter of the proceeding beyond the Central Highlands, its activities clearly

establish a sufficient interest in the Greater Glider to establish standing in respect of that species outside the region.

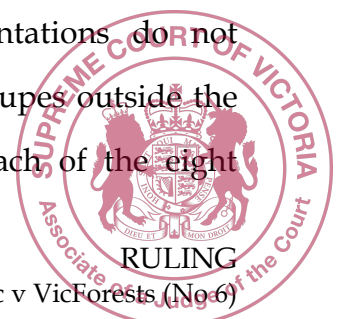
Defendant

62 What distinguishes WOTCH from an ordinary member of the public, in terms of its interest in the subject matter of the proceeding, is the extensive survey work that it performs in forests. A party's standing turns on the closeness of its relationship with the subject matter of the dispute. In this case, the serious effort required to perform the survey work on the ground reflects WOTCH's closeness to the subject matter of the proceeding in the Central Highlands, but not elsewhere.

63 WOTCH conducted only five surveys outside the Central Highlands before the proceeding commenced, one of which was in New South Wales, and another in response to a training request where neither the location nor subject matter of the survey was determined by WOTCH. No detail has been provided of the three surveys undertaken after commencement of this proceeding. This limited number of surveys should be viewed in the context of the WOTCH's approximately 250-300 surveys conducted since 2015. The handful of surveys conducted outside the Central Highlands are best described as marginal or peripheral to WOTCH's principal activities and are insufficient to demonstrate a special interest in the fate of wildlife outside the Central Highlands.

64 Of the seven training sessions to groups based outside the Central Highlands, two were conducted within the Central Highlands (Toolangi State Forest and Flowerdale). Further, the training sessions merely show an interest in encouraging training participants to advocate for the protection of forests and to become involved in citizen science and forest protection in Victoria, and it does not follow that WOTCH holds a special interest in those areas rising higher than a broad environmental concern.

65 Taken alone, or in combination, WOTCH's educational presentations do not demonstrate that it has standing to seek relief in relation to the coupes outside the Central Highlands. An examination of the subject matter of each of the eight



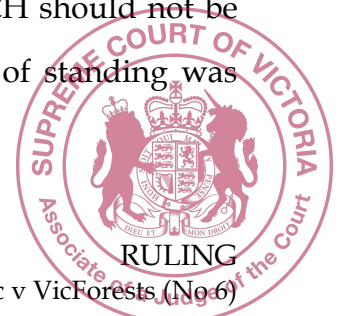
educational activities may reveal an intellectual or emotional concern with the subject matter of the presentation, but are not sufficient to demonstrate a special interest in the subject matter of this litigation.

66 The few examples of WOTCH's advocacy in respect of species or habitat outside the Central Highlands are isolated examples at the periphery of its advocacy activities when viewed in the context of at least 130 reports to the Victorian government in support of requests for protection of species in the Central Highlands. Any advocacy for threatened species whose presence and habitat extends beyond the Central Highlands, such as the Greater Glider, is no more than a manifestation of its purpose of promoting the importance of biodiversity in the Central Highlands and simply reveals that WOTCH has an intellectual or emotional concern with those habitats beyond the Central Highlands.

67 WOTCH's evidence of generic submissions about the importance of forest conservation and the benefits of citizen science both in Victoria and beyond is sufficient to reveal an intellectual or emotional concern in the broad subject matter but is insufficient to amount to a special interest.

68 Where WOTCH has prepared a submission or report jointly with other environmental organisations, it should be inferred its role in preparation of the document was largely confined to its knowledge of and expertise in the subject matter as it relates to the Central Highlands.

69 WOTCH cannot rely on activity after commencement of the proceeding, such as preparation of the *Gliding Towards Extinction* report for two reasons. First, as a matter of logic, the question being considered by the court is whether WOTCH had standing when it commenced the proceeding. Events after the proceeding commenced are irrelevant to that question. Second, the report was prepared after VicForests filed its defence in the proceeding raising the question of standing. WOTCH should not be entitled to place opportunistic reliance on activity after the issue of standing was raised.



70 Social media campaigns conducted by WOTCH may reveal a concern with species such as the Greater Glider, but do not require the sort of time or effort that would reveal a sufficient closeness with the subject matter of the proceeding.

71 Any acknowledgment by outside bodies cannot assist WOTCH's case as the capacity in which WOTCH has been acknowledged is not apparent. Any invitations to sit on consultative bodies does not assist as it is not clear why WOTCH was invited to participate and it can be safely inferred that WOTCH was invited to participate because of its activities in the Central Highlands.

72 WOTCH's reliance on the report of Professor Driscoll is misplaced. In cases involving groups established to protect forests, the Court looks at matters such as the purposes for which the group was formed,³ the connection with and use made by the group of the particular forest area in dispute,⁴ the advocacy by the group in relation to its area of concern,⁵ and recognition by external bodies for such endeavours.⁶ The focus is entirely upon what the interest group is concerned about and the activities it engages in as a manifestation of those concerns.

73 There is no additional requirement for, or benefit to, a plaintiff seeking to establish standing to show that its concerns have a logical scientific or ecological underpinning. That is because the Court is concerned solely with the identification of the plaintiff's purposes and, more importantly, what it has actually done to achieve those purposes. Accordingly, showing that there is good reason why WOTCH may be concerned for the fate of particular species outside the Central Highlands does nothing except demonstrate that intellectual concern has a scientific or ecological basis.

74 It is relevant to consider what the material does not show in relation to WOTCH's general interest in the threatened species, including the Greater Glider, beyond the Central Highlands. The evidence does not show that WOTCH is the peak

³ *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1, 27 [82] ('*Brown Mountain*'); *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102, 114 ('*Bridgetown/Greenbushes*').

⁴ *Brown Mountain* (n 3) 26-7 [80(b)], [83]-[84]; *Bridgetown/Greenbushes* (n 3) 114-5.

⁵ *Brown Mountain* (n 3) 26-7 [80(c)], [85]; *Bridgetown/Greenbushes* (n 3) 114.

⁶ *Brown Mountain* (n 3) 26-7 [80(d)], [86]; *Bridgetown/Greenbushes* (n 3) 114-5.



environmental body for the Greater Glider in Victoria; that WOTCH has been recognised by any government body as the responsible environmental organisation to make submissions about the Greater Glider in Victoria; that WOTCH has received any government funding in relation to the Greater Glider in Victoria; that WOTCH has received any government awards or recognition specifically in respect of the Greater Glider; or that any of WOTCH's objects are specifically and expressly directed to the Greater Glider beyond the Central Highlands.

Standing principles

75 WOTCH has standing in the proceeding to the extent it has a special interest in the subject matter of the litigation.⁷

76 *Onus v Alcoa of Australia Ltd* ('*Onus*') concerned an application by the appellants to prevent the respondent from carrying out works which would interfere with Aboriginal relics located on its land.⁸ Discussing the application of a special interest rule, Stephen J said:

Thirdly, the distinction between this case and the *A.C.F. Case* [*Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493] 'is not to be found in any ready rule of thumb, capable of mechanical application; the criterion of "special interest" supplies no such rule. As the law now stands it seems rather to involve in each case a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter.'⁹

The features in *Onus* which the Court concluded were sufficient to establish standing included that the appellants were part of a small community of Aboriginal people living in the area which they had traditionally occupied, who had an interest in cultural relics found in that area which were of spiritual significance to them, of which they were custodians and which they used to teach their children the culture of their people.

⁷ *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 530; *Onus* (n 2) 36; *Brown Mountain* (n 3) 24 [72].

⁸ *Onus* (n 2).

⁹ *Ibid* 42.

77 In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*,¹⁰ Gaudron, Gummow and Kirby JJ stated:

The first question is why equity, even at the instance of the Attorney-General, would intervene. The answer given for a long period has been the public interest in the observance by such statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed. Where there is a need for urgent interlocutory relief, or where the fiat has been refused, as in this litigation, or its grant is an unlikely prospect, the question then is whether the opportunity for vindication of the public interest in equity is to be denied for want of a competent plaintiff. The answer, required by the persistence in modified form of the *Boyce* principle, is that the public interest may be vindicated at the suit of a party with a sufficient material interest in the subject matter. Reasons of history and the exigencies of present times indicate that this criterion is to be construed as an enabling, not a restrictive, procedural stipulation.¹¹

78 In *Environment East Gippsland Inc v VicForests ('Brown Mountain')*,¹² Osborn J referred with approval to the following principles identified by Sackville J in *North Coast Environment Council Inc v Minister for Resources ('North Coast')*:¹³

- A plaintiff must demonstrate a "special interest" in the subject matter of the action. A "mere intellectual or emotional concern" for the preservation of the environment is not enough to constitute such an interest. The asserted interest "must go beyond that of members of the public in upholding the law ... and must involve more than genuinely held convictions".
- A plaintiff may be able to demonstrate a special interest in the preservation of a particular environment. If it does so an intellectual or emotional concern is no disqualification from standing to sue.
- An allegation of non-compliance with a statutory requirement or an administrative procedure is not enough of itself to confer standing.
- The fact that a person may have commented on environmental aspects of a proposal as part of an environmental assessment process does not of itself confer standing to complain of a decision based on that process.
- An organisation does not demonstrate a special interest simply by formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment.¹⁴

79 The plaintiff in *Brown Mountain* sought to restrain logging of four coupes containing

¹⁰ (1998) 194 CLR 247

¹¹ *Ibid* 267 [50].

¹² *Brown Mountain* (n 3).

¹³ (1994) 55 FCR 492 ('*North Coast*').

¹⁴ *Brown Mountain* (n 3) 25-6 [78] (citations omitted).



old growth forest located in the valley of Brown Mountain Creek because, it alleged, logging would breach VicForests' obligations relating to the protection of endangered species. Two of the four factors identified by Osborn J as being sufficient in combination to establish standing provided a very direct link between the activities of the plaintiff and the subject matter of the proceeding. The first was that the plaintiff ran annual or biennial ecology camps in the critical habitat areas which were the subject of the proceeding, which included leading participants on a forest walk it had developed which traversed two of the coupes in question. Further, the plaintiff had carried out surveys in the area for over a decade and had submitted the results to government agencies. Second, the plaintiff made submissions to a government department which had resulted in a logging moratorium in the area.

80 *North Coast* concerned an application for declaratory and other relief by the plaintiff in respect of a decision by the defendant to grant a licence to export woodchips.¹⁵ Sackville J held that the plaintiff had standing to challenge the decision on the basis that the plaintiff:

- was the peak environmental organisation in the north coast region of NSW, having 44 environmental groups as its members and its activities related to the areas affected by the wood-chipping;
- was recognised by the Commonwealth for a number of years as a significant and responsible environmental organisation and had received regular financial grants;
- was recognised by the government of NSW as a body that should represent environmental concerns on advisory committees;
- conducted or co-ordinated projects and conferences on matters of environmental concern for which it had received significant Commonwealth funding;
- had made submissions on forestry management issues to the Resource Assessment Committee and funded a study on old growth forests.¹⁶

¹⁵ *North Coast* (n 15).

¹⁶ *Brown Mountain* (n 3) 25 [77], where Osborn J summarises Sackville J's conclusions in *North Coast* (n 15) 512-3.

81 In *Maguire v Parks Victoria*,¹⁷ the Court of Appeal observed:

The fact that a plaintiff has engaged in activities relating to the subject matter in the past and taken up the opportunities for engagement or consultation that exist may be relevant to whether it has standing to challenge an exercise of power. A recognised history of being consulted and speaking for a matter may support a special interest. However, this is by no means determinative. The fact that the Australian Conservation Foundation had earlier commented on a draft environmental impact statement produced pursuant to administrative procedures did not of itself confer standing on it to challenge or complain of a decision resulting from the environmental assessment process.¹⁸

Analysis

82 Consideration of the plaintiff's standing must begin with identification of the subject matter of the proceeding.

83 The proceeding concerns threatened species which inhabit native forests in Victoria; damage to biodiversity values caused by the bushfires, in particular to populations and habitat of those threatened species; State and Commonwealth bushfire responses which the plaintiff alleges are expected to provide information and advice in relation to the risk to those species; and the legality of timber harvesting by VicForests of coupes known to contain or be likely to contain the species or habitat of the species before that advice is received.

84 WOTCH frequently undertakes activities within the Central Highlands region directed to protection of threatened species and the forest habitat of those species. It has conducted over 300 surveys to identify the presence of threatened species and habitat, and made over 130 reports to the Victorian government in support of requests for protection of those species and that habitat. The survey and report activity in the Central Highlands is consistent with what were until recently WOTCH's purposes, and with the way WOTCH has often described itself on its website and in other material. The survey results underpin and inform WOTCH's advocacy activity. These activities demonstrate the direct and immediate concern WOTCH has with the protection of forest-dwelling threatened species and the habitat of those species in the

¹⁷ [2020] VSCA 172.

¹⁸ Ibid [102] (citations omitted).

Central Highlands, and establish WOTCH's standing in that region in respect of the subject matter of the proceeding.

85 In contrast, the activities on which WOTCH relies to establish a special interest outside the Central Highlands are fewer in number and less directly and immediately concerned with the protection of threatened species and habitat. The survey activity which is the foundation of WOTCH establishing a special interest in the subject matter of the proceeding in the Central Highlands is almost absent outside that region. Further, with the exception of a report to DELWP of detection of two flora species at Mount Cole in Western Victoria, there is no evidence the results of surveys outside the Central Highlands were used by WOTCH to report the presence of threatened species, or to advocate for protection of species or habitat at the location surveyed.

86 The training and educational activities by WOTCH outside the Central Highlands demonstrate a general interest in promotion of citizen science and preservation of forest environments. However, there is little if any evidence about how those activities might influence the protection of species and habitat with which this proceeding is concerned. For example, there is no evidence of WOTCH training or educating a particular group to survey coupes and report the presence of threatened species in another region of Victoria as it has done in the Central Highlands. There is no evidence of feedback from the training and education sessions which have been conducted to show what they are achieving, or whether and how participants are using the information and skills gained from the sessions to help protect threatened species or habitat in other regions of Victoria.

87 There is a material difference, in terms of weight and proximity, between activities within the Central Highlands which are directed to and concentrated on the protection of species and habitat, and the more diffuse survey, training and education activities conducted by WOTCH outside the region.

88 WOTCH has been involved in education, advocacy and consultation outside the Central Highlands which is concerned with protection of threatened species and forest

habitat across Victoria. However, it is often unclear whether WOTCH's involvement relates to its acknowledged special interest and knowledge of that subject matter in the Central Highlands, or extends beyond that region. For example, the joint statement with seven other environmental groups in relation to Australia's faunal extinction crisis related to native forests across Victoria, but the individual submission made by WOTCH was based on its survey activities and knowledge in relation to threatened species and habitat in the Central Highlands, and advocated for steps necessary to protect species in that region. When it extends beyond the Central Highlands, WOTCH's advocacy appears to remain based in part on its knowledge and expertise gained from activity in that region, and is often a joint effort which likely reflects the more significant input of collaborating organisations in relation to matters outside the Central Highlands.

89 Advocacy and consulting activities by WOTCH directed to the protection of threatened species across Victoria must be considered in the context of its acknowledged special interest in that subject matter in the Central Highlands. A particular issue with which WOTCH is concerned is the threat of species' extinction. That threat is not confined to the Central Highlands. There is a relationship between the future of threatened forest-dwelling species in the Central Highlands and beyond that region. I accept that considered in this way, survey activity by WOTCH in forest coupes in the Central Highlands is related to advocacy by it directed to protection of threatened species generally. However, that relationship is less proximate outside the Central Highlands.

90 The evidence of Professor Driscoll does not greatly assist. As VicForests submitted, standing will be determined by what the evidence establishes WOTCH is concerned about and the activities in which it engages as a manifestation of those concerns. WOTCH's activities do not evidence a level of concern, whether directly in relation to forests or threatened species outside the Central Highlands, or indirectly via the relationship between populations of species which occur inside the Central Highlands with those outside the region, which is sufficient to establish a special interest.



91 The particular threat which underpinned the first point made by Professor Driscoll arose from the widespread loss of habitat and populations of threatened species caused by the bushfires. It might be that the bushfires alter the conservation status and ecological importance of a species as it exists inside the Central Highlands. However, that is not to the point. This proceeding is essentially concerned, in the context of the bushfires, with the risk to the threatened species caused by logging non-fire-affected forest. Professor Driscoll's report does not establish that logging activity by VicForests in non-fire-affected forest outside the Central Highlands may result in a sufficiently significant risk to threatened species as to alter the conservation status and ecological importance of those species as they exist inside the Central Highlands.

92 While the geographic boundary of the Central Highlands may be arbitrary and contrary to ecological reality in respect of some of the threatened species with which the proceeding is concerned, that is the boundary which WOTCH has, by and large, adopted in terms of its activities and, until recently, its stated purposes.

93 The strongest evidence in support of WOTCH having standing beyond the Central Highlands is its advocacy relating to the fate of the Greater Glider generally. The subject matter of campaigns to protect the Greater Glider includes the impact on the species of timber harvesting, the need for an Action Statement following listing of the species under the *Flora and Fauna Guarantee Act 1988* (Vic), and for protection following the bushfires. In conjunction with the campaigns, WOTCH corresponded with the Minister seeking to reinforce the above concerns. Threats to the Greater Glider from logging Victorian native forests was a particular focus of the submission by WOTCH concerning review of the *EPBC Act* and the subject of the joint report '*Gliding Towards Extinction*'. Unlike other activities in which WOTCH is engaged outside the Central Highlands region, this advocacy is particularly directed to the protection of the Greater Glider generally against threats from timber harvesting and bushfire.

94 To a degree, advocacy activity directed to protection of the Greater Glider is emblematic of a broader concern by WOTCH with threatened species and forest

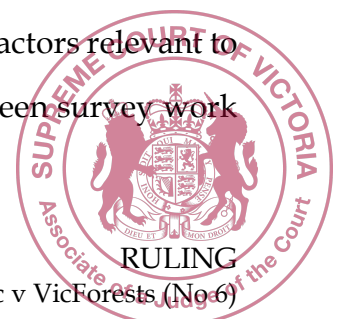
habitat outside the Central Highlands. However, the pattern of activity in relation to the Greater Glider raises for consideration whether WOTCH has a special interest in that species generally, even if it has failed to establish standing in relation to the broader subject matter of the proceeding outside the Central Highlands.

95 I do not accept VicForests' submission that WOTCH cannot rely on acts done after commencement of the proceeding to support standing. Whether a plaintiff has established that it has a special interest in the subject matter of a proceeding is to be assessed on all the evidence, which includes past actions and, at least in some cases, a serious intention to take steps in future.¹⁹ Advocacy by WOTCH in support of the Greater Glider since commencing the proceeding is entirely consistent with the course of conduct in which it has been engaged for a number of years, and was not an opportunistic attempt by it to establish standing after the issue was raised by VicForests. Although it has not explicitly stated that it will do so, I infer it is likely WOTCH will continue to advocate for the Greater Glider in future.

96 Some of the features which led to standing being established by the plaintiffs in *Onus*, *Brown Mountain* and *North Coast* are absent in this case. Outside the Central Highlands, WOTCH has not engaged in the sort of activities on the ground which were central to the plaintiffs establishing standing in *Onus* and *Brown Mountain*. WOTCH is not the peak environmental organisation in relation to the subject matter of the proceeding, as was the case in *North Coast*. However, each case in which the standing of the plaintiff is in issue must be decided on its own facts. It is therefore important to consider what the evidence does establish in relation to WOTCH's interest in relation to the subject matter of the proceeding.

97 WOTCH has used the knowledge and expertise gained from numerous surveys conducted in the Central Highlands to promote protection of the Greater Glider and its habitat across Victoria. There is no distinction drawn in the evidence between the Central Highlands and other forest regions in Victoria in relation to factors relevant to protection of the Greater Glider. There is a direct relationship between survey work

¹⁹ *Australian Conservation Foundation Inc v South Australia* (1990) 53 SASR 349, 354-5.



in the Central Highlands and advocacy for the Greater Glider by WOTCH.

98 Since 2017 WOTCH has consistently advocated for the Greater Glider by running campaigns and using social media to enlist public support to pressure the Victorian Government to protect the species, engaging directly with members of Parliament, and writing submissions and reports. While some efforts were collaborative, and a foundation of the advocacy activity was knowledge and expertise gained in the Central Highlands, the advocacy is clearly directed to WOTCH's concern with and interest in the species as it exists in Victoria.

99 WOTCH has taken up each opportunity for engagement and consultation in relation to the Greater Glider. It has a history of being consulted and speaking for the species.

100 Leaving the Greater Glider to one side, taken collectively, the matters on which WOTCH relies do not establish that it has a special interest in the subject matter of the proceeding outside the Central Highlands.

101 However, I have come to a different conclusion in relation to the Greater Glider. In my view, since 2017 WOTCH has demonstrated a particular concern for and interest in the species and its habitat which extends beyond the Central Highlands.

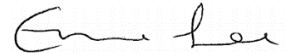
Conclusion

102 I conclude that WOTCH has established a special interest in the subject matter of the proceeding beyond the Central Highlands region to the extent it concerns the Greater Glider, and therefore has standing in the proceeding to the extent it relates to that species. I conclude that WOTCH has otherwise failed to establish standing in relation to the subject matter of the proceeding outside the Central Highlands.

CERTIFICATE

I certify that this and the 27 preceding pages are a true copy of the reasons for ruling of Justice Keogh of the Supreme Court of Victoria delivered on 20 October 2020.

DATED this twentieth day of October 2020.



Associate

