

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

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JUDGE: Keogh J  
WHERE HELD: Melbourne  
DATE OF HEARING: 7 August 2020 and 11 August 2020  
DATE OF RULING: 21 August 2020  
CASE MAY BE CITED AS: WOTCH Inc v VicForests (No 5)  
MEDIUM NEUTRAL CITATION: [2020] VSC 528

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PRACTICE AND PROCEDURE – Interlocutory 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) – Code of Practice for Timber Production 2014.

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



HIS HONOUR:

- 1 The subject matter of this proceeding is timber harvesting by VicForests in native forest coupes inhabited by species listed as threatened under the *Flora and Fauna Guarantee Act 1988* (Vic) ('the *FFG Act*'). The bushfires which occurred during the 2019/20 fire season ('the bushfires') caused significant population and habitat losses for some of those species.
- 2 The plaintiff alleges State and Commonwealth bushfire biodiversity responses which 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.
- 3 This ruling deals with the plaintiff's application for an interlocutory injunction to restrain VicForests from harvesting certain forest coupes in the Central Highlands forest region pending trial, which is fixed for October this year. It follows, and should be read with, an interim ruling by me on the same application on 16 July 2020,<sup>1</sup> and three earlier rulings in this proceeding by McMillan J granting interim and interlocutory relief in relation to other forest coupes.<sup>2</sup> The plaintiff alleges each coupe the subject of this application contains relevant threatened species.
- 4 I will adopt without restatement the relevant background set out in the previous rulings to which I have referred.
- 5 The following further evidence has been filed since the hearing of the interim application:

(a) plaintiff-

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<sup>1</sup> [2020] VSC 433.

<sup>2</sup> *Wildlife of the Central Highlands Inc v VicForests* [2020] VSC 10; *WOTCH v VicForests* (No 2) [2020] VSC 99; and *WOTCH v VicForests* (No 3) [2020] VSC 220.

- (i) expert report of Dr Andrew Smith dated 30 July 2020 and letter of instruction dated 22 July 2020;
  - (ii) second expert report of Dr Andrew Smith dated 2 August 2020 and letter of instruction dated 2 August 2020;
  - (iii) tenth affidavit of Danya Jacobs affirmed 4 August 2020;
  - (iv) seventh affidavit of Hayley Forster affirmed 6 August 2020.
- (b) defendant – affidavits of:
- (i) Ishara Kotiah affirmed 4 August 2020;
  - (ii) Anne Mary Geary affirmed 4 August 2020;
  - (iii) Dion Kriek (second) affirmed 4 August 2020;
  - (iv) Maria Cardoso affirmed 4 August 2020;
  - (v) Greg McNulty affirmed 4 August 2020;
  - (vi) Bruce McTavish affirmed 4 August 2020;
  - (vii) William Edward Paul (fourth) affirmed 4 August 2020;
  - (viii) William Edward Paul (fifth) affirmed 6 August 2020;
  - (ix) James Murdoch Gunn (third) affirmed 5 August 2020;
  - (x) James Murdoch Gunn (fourth) affirmed 6 August 2020;
  - (xi) James Murdoch Gunn (fifth) affirmed 11 August 2020;
  - (xii) Jack Darcy Trainor affirmed 6 August 2020;
  - (xiii) Jack Darcy Trainor (second) affirmed 7 August 2020.

6 The new evidence goes principally to the following matters:

- (a) VicForests' response to DELWP analysis and the Office of the Conservation Regulator (OCR) position statement ('the position statement') relating to the impact of the bushfires on threatened species, which includes a precautionary principle analysis by VicForests in response to the bushfires ('the PPA');
- (b) adaptive management measures which VicForests says it applies when planning for and harvesting coupes in the Central Highlands;
- (c) expert evidence of Professor Smith including as to risks to the Greater Glider, the impact of the 2019/20 bushfires ('the bushfires'), and the efficacy of adaptive management measures implemented by VicForests directed to the risk to threatened species associated with timber harvesting; and
- (d) the balance of convenience.

7 These reasons will focus on one of the three species on which the application is based, namely the Greater Glider, because it is that species to which much of the material, and submissions by the parties, were directed.

### The coupes

8 There are 24 forest coupes which are now the subject of this application. The plaintiff has tendered evidence of detections of threatened species in each of the coupes. The following are examples:

*Myrrh* 3 Greater Gliders in March 2020, and 15 Greater Gliders detected and recorded in April 2020 by the Forest Protection Survey Program conducted by DELWP ('FPSP').

*Frankincense* 3 Greater Gliders and 1 Sooty Owl in June 2020 by FPSP.

*Chamander* 5 Greater Gliders and 1 Sooty Owl in April 2020 by FPSP.

*Thinker* 12 Greater Gliders in September 2019 by FPSP.

*DonToo PCL* 10 Greater Gliders in June 2020.



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

- 9 The plaintiff added coupe 297-504-0002 (Funny) to its application after the interim ruling. This ruling includes my reasons for making an interim order on 12 August restraining VicForests from further timber harvesting in Funny.

### **Position before the bushfires**

- 10 In 2017 the Greater Glider was listed as threatened under the *FFG Act*. The Scientific Advisory Committee ('the committee') recommendation which led to that listing described timber harvesting among threats likely to result in the extinction of the Greater Glider:

Timber harvesting in greater glider habitat has been proven to cause declines and/or local extinctions of greater glider populations (Lindenmayer et al. 2011, Kavanagh and Webb 1998, Lunney 1987, Dunning and Smith 1986, Tyndale-Biscoe and Smith 1969). Timber harvesting practices reduces the number of hollow bearing trees available for denning by tree removal or as a result of regeneration burns after the logging (Lindenmayer et al. 2011, 2002; Lunney 1987). In addition, the species does not cope well with habitat change {Kavanagh and Wheeler 2004, Tyndale-Biscoe and Smith 1969). Although all animals may not die from the initial impact they will die shortly afterwards. This is due to life history traits: affinity with home range, small home ranges, attachment to hollow bearing trees they use for denning and their specialist diet (Tyndale-Biscoe 2005).

In Victoria timber harvesting is widespread in the eastern and central parts of state. This is also the main distribution and habitat of the greater glider. Considering the known impacts of timber harvesting on gliders (Kavanagh and Webb 1998, Lunney 1987, Tyndale-Biscoe and Smith 1969, Dunning and Smith 1986), it is likely that other local extinctions of this species have already occurred and will continue to occur in the future.

The committee cited studies of the decline in the Greater Glider in the Central Highlands and East Gippsland, with one study showing annual decline of sites occupied by the Greater Glider in the Central Highlands averaging 8.8% per year in the period 1987 to 2010, and a more recent study showing Greater Glider occupation in only 16% of the Central Highlands sites where they had previously been recorded.

The committee made the following findings:



- The Greater Glider is in a demonstrable state of decline likely to lead to extinction;
- The Greater Glider is significantly prone to future threats that are likely to lead to extinction; and
- The threats are operating and are expected to continue to operate in the future at a level likely to lead to extinction.

11 In November 2019 a Greater Glider action statement was prepared by DELWP under s 19 of the *FFG Act* ('the action statement'), which stated the Victorian government had committed to the following measures and actions to benefit the Greater Glider:

- Immediate protection of more than 96,000 hectares of State forest in the Strathbogie Ranges, in the Central Highlands, in East Gippsland and near Mirboo North.
- The end of timber harvesting in old growth forest immediately.
- Phase out of native forest timber harvesting by 2030.
- A state-wide prescription to provide additional protection in timber harvesting coupes where five or more Greater Gliders per spotlight kilometre are observed.
- Further research to improve understanding of biology, habitat and threats.
- Enhanced protection from the impacts of bushfires and planned burning.

The action statement listed 'fast facts' in relation to Greater Gliders, which included:

They need large tree hollows for shelter (each animal uses multiple hollows).

Under 'life history and ecology' the action statement records:

There is only limited information on current densities.

While evidence is lacking for Victoria, it appears that the Greater Glider has a low capacity for dispersal. Coupled with low reproductive output, this makes the Greater Glider more sensitive to elevated mortality and breeding failure and suggests it has a limited ability to recovery from disturbance.

12 The action statement records the following in relation to threats:

The key threats to the Greater Glider can be summarised in terms of elevated mortality, habitat degradation and the risks associated with small, fragmented populations, including genetic decline. Factors contributing to elevated mortality and the loss of hollow-bearing trees include bushfire, planned burning, drought, timber harvesting and hyperpredation.



And in relation to timber supply:

Native forest timber harvesting in the eastern and central parts of Victoria overlaps with the main distribution and habitat of the Greater Glider. Timber harvesting has the potential to affect Greater Glider populations through localised habitat modification, however, timber harvesting only occurs in a relatively small proportion of the total area of habitat occupied by Greater Gliders.

13 Long-term objectives in the action statement include:

To address specific knowledge gaps in the biology and ecology of the Greater Glider to support ecologically sustainable management regimes.

To secure populations or habitat from potentially incompatible land use or catastrophic loss.

Intended management actions included research to assess the survival and persistence of Greater Gliders under various timber harvesting scenarios, and to quantify the specific benefits of different timber harvesting strategies. One step directed to securing populations from potentially incompatible land use was retention of at least 40% of the basal area of eucalypts across each timber harvesting coupe prioritising live, hollow-bearing trees wherever the density of Greater Gliders is equal to or greater than five individuals per spotlight kilometre.

14 From about July 2019, VicForests developed a suite of adaptive management measures intended to apply to its timber harvesting operations. These measures, which exceed regulatory prescriptions governing VicForests' operations, are particularly directed to species dependent on hollow bearing trees for habitat, which includes the Greater Glider. The adaptive management measures are:

- (a) A pre-harvest survey program for hollow bearing trees in all coupes.
- (b) A pre-harvest survey program for flora and fauna, 80% of which are undertaken by DELWP, 20% of which are undertaken by VicForests.
- (c) Use of silvicultural methods which emphasise the retention of hollow bearing trees and provide recruitment trees and connectivity, including:



- (i) Variable Retention 1 silvicultural system which requires a minimum of 10 trees per hectare to be retained in the harvest area;
  - (ii) Variable Retention Silvicultural System 2 requires a retention of 20 trees per hectare;
  - (iii) Single tree selection generally requires the retention of around 50% of the trees in a forest stand;
  - (iv) Identification and protection of all hollow bearing trees across a coupe where reasonably practicable.
- (d) The maintenance and injection of uneven aged stand characteristics into gross coupe area.
- (e) The application of the VicForests Greater Glider Conservation Strategy. This strategy involves retention of 40% of the basal area of eucalypts across each timber harvesting coupe, prioritising live hollow bearing trees, wherever a density of Greater Gliders equal to or greater than five individuals per spotlight kilometre (or equivalent measure) is identified.
- (f) A post-harvest retention survey program to assess whether areas planned to be retained following harvesting were actually retained.
- (g) A post-harvest flora/fauna survey program to show whether animals remain in coupes after harvesting or recolonise the coupes over time once harvesting is complete.

15 Shortly prior to the interlocutory hearing VicForests decided to make the following amendments in respect of coupes to be harvested in the Central Highlands by November 2020:

- (a) reduce the density requirement in 14(e) to three Greater Gliders per spotlight kilometre; and





(b) survey coupes for the Smoky Mouse in certain areas.

16 Greater Gliders are distributed throughout forested parts of Eastern Victoria, including the Central Highlands and East Gippsland regions.

### Timber harvesting

17 VicForests is a State body which conducts timber harvesting in State forests in Victoria.

18 Timber harvesting in native forests is heavily regulated with prescriptions directed to protection of native flora and fauna and biodiversity values.

19 VicForests is obliged to comply with the Code of Practice for Timber Production 2014 ('the Code'), which imposes the following mandatory actions:

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 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.

20 The Code contains the following definitions:

'**biodiversity**' means the natural diversity of all life: the sum of all our native species of flora and fauna, the genetic variation within them, their habitats and the ecosystems of which they are an integral part.

'**precautionary principle**' means 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.

### The bushfires

21 The bushfires burnt large areas of Victorian native forest in a number of regions, including East Gippsland, causing significant loss of flora and fauna. There was little direct impact on forests in the Central Highlands by the bushfires.



22 There is evidence that up to half of the indicative 96,000 hectare immediate protection area set aside in the action statement for protection of the Greater Glider is within the bushfire area in East Gippsland, and has been fire affected.

**The bushfire response**

23 The preliminary State Bushfire Biodiversity Response identified the Greater Glider as being amongst the fauna species of immediate concern on the basis of having more than 40% of its State-wide habitat within the projected impact area of the fire and on predicted percent decline in species abundance of over 25%. The preliminary Commonwealth Biodiversity Response identified the Greater Glider as one of 20 mammal species most affected by the bushfires, including on the basis of post-fire mortality.

24 In the 16 July 2020 interim ruling I set out details of a position statement produced by the OCR on 11 May 2020 to provide practical guidance to VicForests on interpretation of the precautionary principle and its application to conservation of biodiversity values following the bushfires. The position statement was based on analysis by DELWP of the impact of the bushfires on populations and habitat of threatened species, and the future risks to those species, including from timber harvesting in the Central Highlands.

25 A response by the Chief Executive Officer of VicForests to the Chief Conservation Regulator by letter of 5 June 2020 includes:

VicForests does not agree that the precautionary principle has been triggered, and further, does not agree that it is capable of being triggered across the same broad landscape basis that you found. As per the state of the law ... the relevant considerations are firstly whether there is a threat of serious or irreversible environmental damage through timber harvesting activity, and then whether there is scientific uncertainty as to the impact of the harvesting activity.

...

VicForests accepts that the 2019/20 fires have likely had a significant impact on the biodiversity values in a proportion of fire affected areas of the forest estate. Depending on the location of the affected areas, there may also have been a significant impact on a particular threatened species. Clearly this will depend on the values that existed in an area before the fires and the impact of

the fires on those values.

At a landscape level, it is clearly relevant to consider the scale of activity proposed by VicForests. Over the next year VicForests plans to harvest no more than 3000 hectares of forest across all forest management areas. To meet the quality and species requirements of our customers, we anticipate that approximately half of the areas to be harvested may fall within the highest value (top 20%) areas as modelled through the IBVM. This is equivalent to approximately 0.1% of the total IBVM top 20% area.

The maximum area proposed to be harvested by VicForests is insignificant as a proportion of the overall highest value areas identified through the model. The level of harvesting proposed does not create a risk of serious or irreversible damage at a landscape level.

I would also note that the IBVM has not taken into account disturbance history and, for example, includes areas that have been recently harvested. The model provides theoretical guidance as to the likely areas of highest biodiversity value. These values will ultimately need to be determined through field verification.

#### **VicForests' position on risks through timber harvesting operations at a coupe level**

While it may take some time to understand the total impact of the fires on threatened species at a landscape level this does not mean that there are any limitations on the ability to fully understand the impacts in a specific area of the forest following values assessment.

...

The DELWP Advice does not therefore consider the impact of the current VicForests timber harvesting practices, the very practices which VicForests intends to use in timber harvesting of non-fire affected areas.

Accordingly, VicForests does not accept that it is necessary to postpone harvesting in areas of highest value habitat for the 'basket' of 34 identified priority species. The VicForests modified harvesting approach developed following the fires will protect the habitat attributes for any priority species identified in the specific harvest areas. The preliminary results from post-harvest surveys conducted by VicForests following the use of its modified harvesting approach suggests that it will be effective to protect biodiversity values in the highest value habitat areas.

It appears from this response that there may be fundamental differences between the OCR and VicForests as to the application of the precautionary principle following the bushfires, including whether:

- (a) the precautionary principle can be triggered in a non-fire impacted region such as the Central Highlands by damage to species and habitat caused by the



bushfires in East Gippsland;

- (b) the precautionary principle requires consideration of all risk of serious or irreversible harm to species, or is limited to risk through timber harvesting activity;
- (c) the scale of proposed harvesting activity is insignificant and does not pose a risk of serious or irreversible damage to species at a landscape level.

There might also be differences of approach as to the reliability of models, including the integrated biodiversity values model ('IBVM') and habitat distribution model ('HDM') as opposed to field verification, and different views on the efficacy of VicForests' adaptive management measures.

26 Between March and June 2020 VicForests undertook its precautionary principle analysis of the consequences of the impact of the bushfires on threatened species for:

- (a) timber harvesting in parts of the Central Highlands region where threatened species or their habitat was likely to be present; and
- (b) timber harvesting in fire-affected forest regions where threatened species or their habitat was likely to be present.

VicForests has also responded to the DELWP analysis.

27 The position statement and the PPA are both underpinned by an evaluation of risk to threatened species in the light of the bushfires. DELWP has assessed the species which are the subject of this proceeding as of concern on the basis of the degree to which they have been affected by the bushfires, and as priority species on the basis that they are now at increased risk from timber harvesting. VicForests has reached a different conclusion in relation to both matters. The volume and complexity of evidence on which the DELWP and VicForests' evaluations are based is substantial.

28 Mr Gunn reviewed the DELWP analysis which led to the conclusion that the Greater Glider was a priority species on the basis that future timber harvesting would occur

in 1% or greater of State-wide top 20% of the State-wide high quality habitat for that species. He concluded the DELWP analysis contained factual inaccuracies caused by flawed assumptions and data limitations, and that when corrected for accurate projected future timber harvesting, the Greater Glider was not a priority species. Mr Gunn identified one significant difference related to the treatment of projected timber harvesting. DELWP appears to have used all areas available for timber harvesting as a relevant parameter. Mr Gunn used modelled harvesting projected to be undertaken by VicForests by 2030, which is a much smaller area. Whether there is a rational basis for the DELWP approach is unclear.

29 The evaluation of risk to species by DELWP and VicForests was based on data modelling. Witnesses gave the following evidence in relation to the IBVM and HDM models:

(a) Ms Kotiah, who undertook relevant data analysis for VicForests:

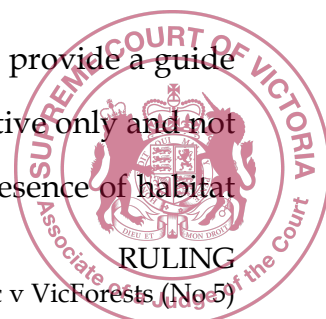
13 The IBVM (Integrated Biodiversity Values Model) is an output layer from the Zonation modelling package (an international habitat modelling software package used by DELWP) which integrates information on the ranking of habitat for multiple species combined. It is derived from individual HDMs and other information. Other layers from DELWP Analysis include the combined HDMs top 10% (best habitat from 91-100%) and combined HDMs top 20% (which is in fact the habitat from 81-90%).

14 The IBVM Top 20% data uses a pixel which represents 225 metres x 225 metres of land i.e. around 5 hectares.

(b) Mr Paul:

The IBVM Top 20% is produced by a model which amalgamates information from a range of sources to produce combined habitat rankings for the 34 species of concern as identified by DELWP in its Biodiversity report following the 2019/20 bushfires. The inputs into that model include habitat distribution models (**HDMs**) for the individual species of concern. While these are based in part on the history of sightings of a species, they are also based on factors which are considered to be predictive of habitat for a particular species eg climate, terrain, vegetation structure.

(c) Mr Paul said that whilst IBVM and HDM data can be used to provide a guide for the kind of habitat which exists in an area, they are indicative only and not as effective or reliable as an 'on the ground' survey of the presence of habitat



or fauna species. He described instances of HDMs showing high value habitat for a particular coupe where none is found on a coupe habitat survey, and HDMs showing low value or no habitat where high value habitat is found on a coupe survey.

(d) Mr McTavish:

48 Across all the FMAs [forest management areas], 40% of the forest harvested came from IBVM top 20%. Much of the timber had been harvested by clear-felling over that period. Despite a large percentage of forest harvested in the previous five supply years coming from IBVM top 20% habitat, the areas where the was harvested remained in the IBVM top 20% habitat and were not classified as lower quality habitat following harvesting. This shows that timber harvesting does not necessarily result in serious or irreversible damage of the quality of the habitat.

49 ... This area had been intensively logged before the Black Saturday bushfire. It was burnt with high intensity, killing the ash species trees, in the Black Saturday bushfire. After the bushfire, salvage logging was undertaken in stands that had not yet been harvested. Despite this history of harvesting activity and bushfire the area was still identified as within the IBVM top 20%. This indicated that neither harvesting nor recent fire events caused severe or irreversible damage to the environment. ...

(e) Mr McTavish:

- (i) there is a total of almost 1.2 million hectares of IBVM top 20%;
- (ii) only around 37% of the IBVM top 20% is available for timber harvesting;
- (iii) in the last five years the percentage of IBVM top 20% which has been harvested in the Central Highlands forest management areas ('FMAs') is Central Gippsland: 1.52%, Central: 3.36% and Dandenong: 0.74%;

(f) Mr Gunn: the HDMs do not predict whether or not a species is currently present in the habitat at a particular location.

### **Response to risk**

30 Ms Cardoso, VicForests' Acting Manager, Biodiversity Conservation and Research, gave the following evidence in relation to VicForests' precautionary principle risk

assessment:

10. The risk assessment took into account the habitat available to the different species both in reserves and under general management and addressed the actual rather than perceived impact of the fire. I contributed to the analysis of the risk assessment to the threat of the species from timber harvesting, in particular the classifications of the risk as either low, medium or high and I helped to develop the thresholds for each of these classifications and each species. This analysis considered the risks of impact on species HDMs. For example, if >70% of the HDM was impacted, then risk = high. If <20% of the HDM was impacted than risk = low. Not many species were rated as high risk. Only those endemic to East Gippsland where virtually all of their habitat was impacted by fire.
11. The risk assessment was then used to develop appropriate additional measures to enable harvesting of timber in some parts of fire-affected areas (where different prescriptions from those normally implemented by VicForests were required). The risk assessment also supported the conclusion we reached that, in non-fire-affected areas, the measures VicForests was implementing (which were beyond those required by regulation) were sufficient and that we did not need to do more.

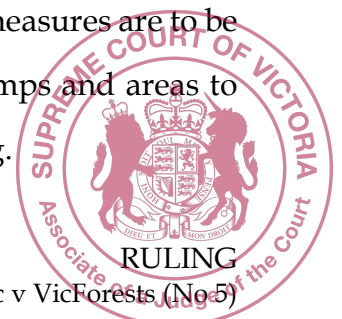
### **Application of the adaptive management measures by VicForests**

- 31 Ms Cardoso gave the following evidence in relation to the post-harvest retention survey program:

The post-harvest retention surveys assess whether the areas which were planned to be retained following harvesting were actually retained (this is done using aerial photography from drones). The preliminary results from these surveys show that generally the areas of landscape which are meant to be retained are being retained and generally a larger proportion of area is retained compared to what was planned. There is insufficient data as yet for the results to be statistically significant.

No survey data has been tendered.

- 32 The plaintiff relies on evidence of observations by witnesses and photographs which it submitted shows harvesting in coupes which is not in accordance with the adaptive management measures, and which effectively amounts to clear felling/intensive logging inconsistent with the protection of local threatened species' populations and habitat. In response, VicForests submits the adaptive management measures are to be applied across entire coupes, with trees often being retained in clumps and areas to promote connectivity, which may result in areas of intensive logging.



### Are the adaptive management measures effective?

33 Ms Cardoso said in relation to the post-harvest flora/fauna surveys:

VicForests undertakes some of the fauna survey work in house and is also developing tenders and programs to contract out some of the fauna surveys. Melbourne University is also undertaking the program for post-harvest surveys of specific coupes as part of research into flora regeneration under retention harvesting systems. The preliminary results from these surveys show that animals are remaining in or re-colonising coupes which have been harvested but, at this point there is insufficient data as yet for the results to make inferences about correlation between fauna presence and retention.

There does not appear to be any evidence of a scientific evaluation of the survey program, or of survey data.

### Evidence of Dr Smith

34 Dr Smith is an environmental scientist and consultant who appears to have considerable experience qualifying him to give opinions in relation to the Greater Glider. In a report dated 30 July 2020 commissioned by the plaintiff, Dr Smith expresses opinions including:

- (a) Greater Glider populations are reduced by severe wildfire, and typically take 10–20 years to recover to normal densities by expansion and dispersal.
- (b) High intensity logging of native forests, which includes clear felling and current variable retention systems, results in the loss of local Greater Glider populations.
- (c) In recent years, the effects of intensive logging on Greater Glider populations have been compounded and exacerbated by the effects of unusually severe and extensive wildfires, including those in 2009 in the Central Highlands and 2019/2020 in north-east and East Gippsland.
- (d) This greatly increases the importance of remaining Greater Glider populations in State forests, especially the above-average density populations commonly found in the mixed species forests of the Central Highlands.





- (e) Forty per cent basal area retention will only have a beneficial effect if it is applied to the logged and loggable portion of a coupe with priority going to the retention of the largest trees. Even then, Dr Smith expects it would result in a decline in Greater Glider numbers on the coupe of between 100% and 60%, depending on the pattern of tree retention and the size and distribution of trees retained. This level of harvesting intensity (60% basal area removal) is close to the limit below which Greater Gliders are not expected to survive.
- (f) A precautionary approach to protection of Greater Gliders in all Victorian forests in the light of the 2009 and 2019/2020 wildfires would require:
  - (i) pre-logging surveys of all coupes;
  - (ii) application of low intensity (at least 60% basal area retention in the loggable area) single tree selection harvesting with priority protection of the largest trees including those with hollows in all coupes with Greater Gliders;
  - (iii) scientifically designed monitoring to provide proof of effectiveness of mitigation measures and data for genuine adaptive management
- (g) Greater Glider habitat trees following variable retention can only be reliably retained and protected with low intensity (greater than 60% basal area retention) selection harvesting.
- (h) The adverse effects of logging on Greater Gliders may not become apparent for many years after logging.

Dr Smith reviewed photographs and videos of coupes harvested by VicForests purportedly in accordance with the adaptive management measures, which he said showed high intensity clear felling which would eliminate all Greater Gliders present within the logged area, and cause a reduction in the size and extent of the regional Greater Glider population which could lead to the species' regional extinction.



**Serious question to be tried**

35 Questions which arise for consideration at trial may include:

- (a) Is the precautionary principle triggered in respect of the subject species in relation to timber harvesting in the Central Highlands in the light of the bushfires?
- (b) Is there a relevant risk of serious or irreversible harm to the species?
- (c) Does the PPA represent a conscientious and careful engagement by VicForests in a process designed to be attentive to the protection and conservation of the subject species in the light of relevant risks?
- (d) Are the adaptive management measures an effective and proportionate response to the risk to the subject species?

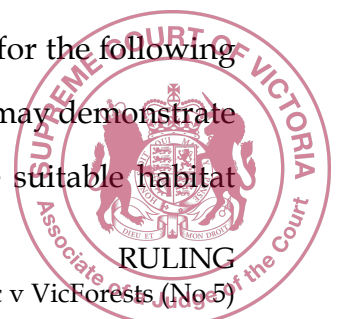
36 Resolution of matters likely to be in issue at trial will depend to a significant degree on the current state of the species population.

37 In relation to the Greater Glider there is evidence of:

- (a) a rapid decline in the Greater Glider population leading to its listing as a threatened species under the *FFG Act*; and
- (b) further significant loss of population and habitat caused by the bushfires.

Assessment of population viability may extend beyond gross numbers and require consideration of losses of local populations, connectivity between population groups, genetic diversity, and the sustainability of isolated populations and capacity to repopulate areas adversely affected by wildfire, logging, climate change and other impacts.

38 Reliance in the DELWP and VicForests risk analyses on the IBVM and HDM models as a proxy for Greater Glider populations may not be well founded for the following reasons. First, the studies cited by the scientific advisory committee may demonstrate a significant and continuing loss of populations from areas where suitable habitat



exists. Second, there is evidence the bushfires caused loss of high quality habitat in East Gippsland, increasing the value of habitat in the Central Highlands. A consequence may be that the overall value of the top 20% of Greater Glider habitat has been reduced. Third, a more likely explanation for the observation of Mr McTavish set out at paragraph 29(d) may be that the habitat models do not take sufficient account of disturbances such as logging and wildfire which have a detrimental effect on habitat value which may be long-term. In other words the models may overstate the quality of habitat which remains.

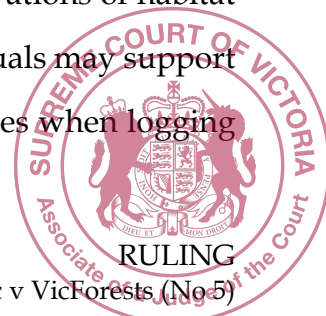
39 The OCR and VicForests have reached very different conclusions as to the threat to species such as the Greater Glider associated with planned or proposed timber harvesting activities in the Central Highlands region in the light of the bushfires. Evidence in relation to these matters is complex. It is neither possible nor appropriate to attempt to resolve differences at this interlocutory stage. These are matters for trial.

40 I note that DELWP conducts 80% of the pre-harvest fauna surveys of coupes; there is continuing engagement between VicForests and the OCR/DELWP in relation to the bushfire response and planned harvesting; and the OCR has an enforcement role which is described as follows:

Where a duty holder is found not to be meeting its obligations to comply with the precautionary principle under clause 2.2.2.2 of the Code, the Conservation Regulator will consider enforcement action including mandatory directions powers, injunctions and prosecution.

VicForests argues I should proceed on the basis that a regulator with proper expertise and authority is reviewing its actions to ensure it complies with the precautionary principle.

41 VicForests submitted that detections of Greater Gliders in a coupe some months ago was not evidence that Greater Gliders would be present when timber harvesting operations commence. I disagree. The number of detections, observations of habitat trees, and scientific evidence as to the limited home range of individuals may support an inference that Greater Gliders will be present in the subject coupes when logging is scheduled to commence.



42 The scientific advisory committee stated that intensive timber harvesting practices cause loss of local Greater Glider populations. Dr Smith gives the same opinion, in greater detail, and expressed more strongly.

43 The adaptive management measures implemented by VicForests do appear to accord with the action statement, and to that extent have a basis in scientific recommendation. However, there is only limited evidence that timber harvesting is being done in accordance with the adaptive management measures, and evidence from the plaintiff's witnesses that it is not. Further, there is evidence that it is not yet possible to determine the efficacy of the measures (Ms Cardoso), and that the measures will be totally ineffective in protecting the Greater Glider at a local level (Dr Smith). Finally, the action statement recommendations predate, and do not take into account, the bushfires.

44 The adaptive management measures are central to VicForests' response to its assessment of risk to the subject species associated with timber harvesting. It is not possible at this stage to reach any conclusion as to whether the measures are being conscientiously applied and are effective. The plaintiff argues that the lack of any change to VicForests' timber harvesting practices in the Central Highlands in response to the bushfires, and the lack of any real engagement by VicForests with the OCR position statement and recommendations, is evidence that the PPA is not a conscientious and careful engagement in a process in compliance with clause 2.2.2.2 of the Code. Further, the plaintiff argues that VicForests is failing to comply with the precautionary principle because the outcome of its activities does not effectively address the threat to relevant species. Consideration of whether VicForests' response in the Central Highlands to the bushfires complies in process and outcome with the precautionary principle is a complex question to be resolved at trial.

45 VicForests relies heavily on evidence which it submits establishes that the scale of timber harvesting activity in high value habitat of threatened species will be so limited that no question of serious or irreversible harm will arise. The scale of VicForests' operations will be relevant to the potential impact of timber harvesting activities on

threatened species, and the proportionality of its response.

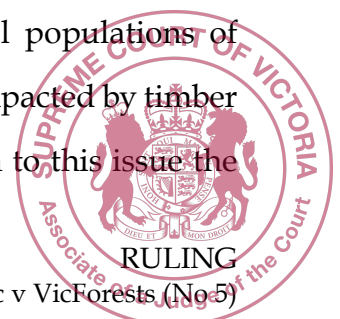
46 The following matters may also need to be taken into account. First, for reasons stated above, the habitat models may be an unreliable proxy for the presence of threatened species in forest coupes, and for the state of threatened species populations across forest regions. Second, there is evidence of populations of threatened species in the subject coupes. Third, there is evidence those populations will be detrimentally affected and possibly lost if logging occurs. Fourth, those losses may be long term or permanent. Fifth, depending on the actual state of populations of the subject threatened species, those losses may cause serious or irreversible damage to the environment.

47 I am satisfied for the above reasons that the plaintiff has demonstrated a prima facie case in relation to the subject coupes. However, I also accept that VicForests' position has been strengthened by the very detailed evidence it has tendered setting out its response to the OCR position statement and DELWP analysis, development of the PPA, and as to the likely future scale of timber harvesting.

#### **Balance of convenience**

48 VicForests submits that application of adaptive management measures to timber harvesting in the subject coupes will result in sufficient protection of any threatened species present in the coupe, and the habitat of that species, and on that basis there is no evidence of a threat of harm to the species which would be caused by timber harvesting. I reject this submission. While the action statement does provide some scientific support for the adaptive management measures in relation to the Greater Glider, for reasons already stated there is no data establishing the efficacy of the adaptive management measures, and there is strong evidence from Dr Smith that the adaptive management measures will not be effective.

49 I accept that the plaintiff has established the likelihood that local populations of threatened species, including the Greater Glider, will be adversely impacted by timber harvesting in the subject coupes. However, I also weigh in relation to this issue the



detailed evidence of Mr Gunn setting out the planning for harvesting in the subject coupes including application of relevant prescriptions and the adaptive management measures which appear to show planned retention of vegetation in at least some of the coupes at a level which Dr Smith would say may offer some level of protection to Greater Gliders, and is significantly beyond the action statement recommendation.

50 The limited scale of timber harvesting activity represented by the coupes which are the subject of this application is a relevant consideration.

51 Mr Kriek, VicForests' General Manager, Operations, states:

- (a) VicForests supplies on average 70% of its total annual supply volume pursuant to the Central Highlands regional forest agreement;
- (b) the volume of timber that is harvested from the Central Highlands cannot be harvested from elsewhere in Victoria. The reason is that the Victorian forestry plan is based on available forest and uses strategic modelling to spread harvesting activity across the different forest management areas;
- (c) fifteen of the coupes which are the subject of this application are scheduled for harvest in the period to June 2021, 11 in the spring period, and 4 in the summer period;
- (d) the 11 spring coupes are expected to yield a total volume of 65,870 m<sup>3</sup>. It is not anticipated this volume would be able to be replaced because:
  - (i) of the lack of replaceable seasonal volume contingency coupes;
  - (ii) there is insufficient time to undertake a pre-harvest survey and road forwarding aspect.
- (e) around 12,000 m<sup>3</sup> of the expected yield of the summer coupes will not be able to be replaced;



- (f) the harvesting shortfall will result in an estimated revenue loss to VicForests of \$7.3 million and income loss to contractors of \$4.8 million;
- (g) currently 32 coupes in the Central Highlands are enjoined in this proceeding, which has resulted in a 7.6% reduction in the volume of timber harvest in the Central Highlands because there are insufficient contingency coupes available. The estimated revenue loss from this reduction in harvest volume is \$6 million.

52 The plaintiff submitted:

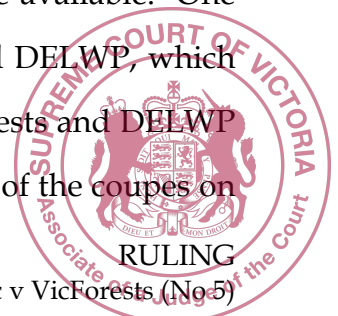
- (a) Mr Kriek's evidence should carry little weight because no material was produced to support opinions he expressed;
- (b) harvest volumes are often variable, and Mr Kriek's evidence takes no account of other factors which may be contributing;
- (c) Ms Forster analysed the Timber Release Plan ('TRP') and identified 36 available replacement contingency coupes.

53 Mr Gunn reviewed Ms Forster's analysis and excluded seven coupes on the basis they are outside the Central Highlands region, four coupes for TRP reasons, 20 coupes because of constraints which apply, one coupe which has a small net area and the high likelihood of Leadbeater's Possum detections and another because of access difficulties. On Mr Gunn's analysis this left three coupes available as contingencies.

54 Mr Kriek states:

'Contingency coupes' for a specific financial year are those which are TRP approved, unharvested and unscheduled at specific point in time (ie, this would exclude any coupes that appear on an 18-month Rolling Operations Plan).

Mr Kriek then analyses what I understand to be the current TRP to identify unconstrained coupes beyond the rolling operations plan which are available. One class of coupes considered not available is described as constrained DELWP, which Mr Kriek says are coupes that require further work between VicForests and DELWP to address road access through special protection zones. A number of the coupes on



Ms Forster's contingency coupe analysis were rejected as being available by Mr Gunn for this reason. It is not clear to me whether further work with DELWP will allow those coupes to become available, and over what timeframe this might occur.

55 The capacity of VicForests to bring forward contingency coupes to replace the timber volume which would have been harvested from injuncted coupes remains in issue. It is not entirely clear that timber harvested from contingency coupes in another forest region cannot be used to replace timber that would have been harvested from injuncted coupes in the Central Highlands, or that constrained coupes are necessarily unavailable. Further, Mr Kriek appears to assume permanent injunctions, or at least injunctions lasting beyond the date of trial. At this stage it is only the cost of an interlocutory injunction which is relevant. There is no evidence that interlocutory injunctions to November this year will cause revenue and income losses of the magnitude stated by Mr Kriek.

56 However, I am satisfied of the following matters. First, the interlocutory orders already in force in this proceeding restrain VicForests from harvesting a volume of timber which is significant in terms of its operations. Second, it appears from Mr Kriek's evidence that only 11 of the 24 coupes which are the subject of this application are scheduled to be harvested before trial. I proceed on the basis that timber harvesting will not commence in the remaining 13 coupes prior to trial. Third, the volume of timber expected to be harvested from the 11 spring coupes is very considerable in terms of VicForests' operations. Fourth, operationally it is not straightforward to identify and bring forward contingency coupes to replace timber supply. Fifth, it is unlikely VicForests will be able to maintain timber supply if it is restrained from harvesting the spring coupes. This is particularly so given the impact of current interlocutory orders which restrain VicForests from harvesting 26 coupes until trial.

57 Sixth, I accept that there is a basis to challenge the asserted losses set out in the evidence of Mr Kriek and others upon which VicForests relies. However, I also accept that restraining timber harvesting in the spring coupes pending trial would cause



significant disruption to the businesses of VicForests and its contractors. While the economic cost of the injunctions may be overstated in VicForests' material, it is likely to be considerable. This is particularly so given the interlocutory injunctions which are already in force in this proceeding.

58 There is a relationship between the strength of the plaintiff's prima facie case and consideration of the balance of convenience. I accept that the strength of the prima facie case advanced by the plaintiff has been weakened by evidence of steps which have now been taken by VicForests and which may represent a conscientious and careful engagement in a process required by the precautionary principle. This is particularly so given evidence as to the scale of projected timber harvesting activity. These matters do affect the plaintiff's prospects of success at trial.

59 In relation to the coupes which are the subject of this application, the balance of convenience does not clearly favour the plaintiff. I rely on the following factors in coming to this conclusion:

- (a) the relatively limited area of habitat which will be impacted by harvesting in the spring coupes;
- (b) the evidence of Mr Gunn setting out in detail application of the adaptive management measures to harvesting in the coupes. I take into account that questions remain as to the efficacy of the measures.
- (c) the cost to VicForests and its contractors of interlocutory injunctions granted in this proceeding restraining harvesting in other coupes until trial;
- (d) the significant economic costs to VicForests and its contractors if the application were granted.

60 I reached this conclusion as to the balance of convenience with hesitation, given evidence as to the long-term or possibly permanent impact on local populations of threatened species caused by timber harvesting operations. I have done so on the basis of an understanding that it is only the 11 spring coupes which will be harvested prior to trial.

**Coupe 297-504-0002 (Funny)**

61 In April 2020 Mr Nesbitt and Ms Forster carried out a spotlight survey of Funny and detected 11 Greater Gliders, nine of which were within the coupe, and two adjacent to the coupe. Evidence of the detections was emailed to DELWP.

62 Pursuant to orders made on 13 May, the Plaintiff gave notice to VicForests of coupes in which there had been detections, which included Funny ('the detection coupes').

63 On 16 and 23 June VicForests responded, pursuant to the 13 May orders, by providing to the plaintiff a list identifying which of the detection coupes were scheduled for harvesting in the period to trial ('the scheduled list'). The scheduled list did not include Funny.

64 On 7 July the Plaintiff issued a summons seeking interim and interlocutory injunctions restraining VicForests from harvesting those coupes on the scheduled list.

65 On 16 July I delivered the interim ruling on the plaintiff's application, the effect of which was to restrain VicForests from commencing harvesting in coupes on the scheduled list until the interlocutory hearing of the summons. Coupes in which harvesting was already underway were not restrained. Orders were made in accordance with the ruling on 18 July.

66 On about 18 July VicForests brought forward Funny as a contingency coupe. Final planning was undertaken and a contractor entered the coupe on 23 July to commence timber harvesting. No notice was given to the Plaintiff.

67 On 1 August Mr Nesbitt conducted a spotlight survey in Funny coupe and detected six Greater Gliders.

68 The Plaintiff then added Funny to the coupes which are the subject of this application. On 11 August I heard submissions from the parties as to whether an interim injunction should be granted restraining continuation of timber harvesting in Funny. On 12 August I made an interim order restraining further timber harvesting operations in Funny coupe, and indicated my reasons for doing so would be included as part of this interlocutory ruling.

69 My reasons for making this order are briefly summarised as follows. First, to do so is consistent with the reasons set out in the 16 July ruling. Had it been made known that harvesting was scheduled to commence in Funny on 23 July, orders would have been made preventing this occurring.

70 Second, whether and if so when a particular coupe is to be harvested is within the exclusive knowledge of VicForests. It was within the spirit, if not the text, of the order of 13 May that VicForests would give notice to the Plaintiff of its intention to commence harvesting Funny. This was particularly so in the context of the ruling published on 16 July resulting in orders made on 18 July.

71 Third, for reasons already stated there is a serious question to be tried in relation to Funny coupe.

72 Fourth, whilst I accept there is cost and inconvenience to VicForests associated with granting an interim order resulting in at least postponement of timber harvesting in Funny coupe, contract of payments, and some delay associated with transfer of operations to an alternative coupe, I also accept that by bringing forward timber harvesting in Funny coupe without notice to the plaintiff, VicForests was to a degree the author of its own misfortune.

### **Conclusion**


73 The plaintiff's application for interlocutory injunctions in relation to the subject coupes is dismissed.

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CERTIFICATE

I certify that this and the 26 preceding pages are a true copy of the reasons for judgment of Justice Keogh of the Supreme Court of Victoria delivered on 21 August 2020.

DATED this twenty-first day of August 2020.



Associate

