

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: 30 November 2020
DATE OF RULING: 4 December 2020
CASE MAY BE CITED AS: WOTCH Inc v VicForests (No 7)
MEDIUM NEUTRAL CITATION: [2020] VSC 817

PRACTICE AND PROCEDURE – Whether relief sought in amended statement of claim is impermissible because it would amount to a declaration that VicForests has committed a crime – Case management – *Sustainable (Forests) Timber Act 2004 (Vic) ss 45, 46* – *Warburton Environment Inc v VicForests (No 2)* [2020] VSC 738 – *Kinglake Friends of the Forest Inc v VicForests (No 3)* [2020] VSC 777 – *Pharmacy Guild of Australia v Ramsay Health Care Limited* [2019] NSWSC 1045.

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



HIS HONOUR:

- 1 This 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.
- 2 The trial of the proceeding, originally listed for October of this year, was adjourned when it became apparent the parties would be unable to complete necessary preparation for trial. The proceeding has not yet been refixed.
- 3 On 20 October 2020 I delivered a ruling dealing with the plaintiff's standing in respect of part of the relief sought in the statement of claim. VicForests conceded that the plaintiff had standing in respect of the subject matter of the proceeding within the Central Highlands forest region. I determined that the plaintiff also had standing in respect of the subject matter of the proceeding outside the Central Highlands to the extent it concerned the Greater Glider, which is one of the threatened species.
- 4 The plaintiff has applied to file an amended statement of claim ('ASOC'), in part to respond to the standing ruling, and seeks timetabling orders to a trial date in mid-2021.
- 5 This ruling deals with the following issues:
 - (a) Whether part of the relief sought in the proposed ASOC:
 - (i) is impermissible because it would amount to a declaration that VicForests has committed a crime; and
 - (ii) would unworkably expand the issues for determination at trial such that, from a case management perspective, it is not appropriate for the plaintiff to be permitted to seek relief in that form.
 - (b) Particularisation of coupes which are the subject of the proceeding including:
 - (i) Compliance by the parties with Orders 3 and 4 made 13 May 2020 directed to the identification and particularisation of forest coupes



which are the subject of the proceeding;

- (ii) Whether, in the light of a number of coupes which the plaintiff will particularise, the trial should proceed by reference to representative samples for identified categories of coupes; and
 - (iii) Whether the plaintiff should be required to particularise each coupe in respect of which it will seek to obtain relief if successful in the proceeding.
- (c) The data/criteria to be used to identify coupes which are unburnt, and may on that basis be the subject of the proceeding.
 - (d) Whether matters pleaded in reply by the plaintiff should more properly be pleaded in the ASOC.
 - (e) Discovery, timetabling orders and a trial date.

Proposed ASOC – prayer for relief

6 Paragraph A of the prayer for relief in the proposed ASOC reads:

A declaration that any past and ongoing timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* (Vic) in the coupes particularised in paragraph 22 above were and/or are unlawful.

7 In the proposed ASOC the plaintiff pleads:

- (a) VicForests is required by s 46(a) of the *Sustainable (Forests) Timber Act 2004* (Vic) ('*SFT Act*') to comply with any relevant Code of Practice relating to timber harvesting, including the *Code of Practice for Timber Production 2014* ('the Code');
- (b) The Code requires as mandatory actions application of the precautionary principle to the conservation of biodiversity values, and consideration of advice of relevant experts and relevant research in conservation biology and flora and fauna management when planning and conducting timber harvesting ('the mandatory actions');



- (c) Bushfires which occurred in the 2019/20 fire season have caused significant losses of flora and fauna throughout Victoria, including losses to species listed as threatened under Part 3 of the *Flora and Fauna Guarantee Act 1988* (Vic);
- (d) State and Commonwealth bushfire biodiversity responses have commenced but are not complete;
- (e) Since the commencement of the proceeding in January 2020 VicForests has undertaken, and is continuing to undertake, timber harvesting operations in coupes known by it or the Department of Land, Environment, Water and Planning ('DELWP') to contain or be likely to contain fire-affected threatened species; and
- (f) The timber harvesting operations do not comply with the mandatory actions in the Code and s 46 of the *SFT Act*.

8 VicForests submitted:

- (a) It may only harvest timber in accordance with an allocation order published by the Minister under s 13 of the *SFT Act*.¹ The current allocation order requires VicForests to comply with the Code. Therefore timber harvesting operations that do not comply with the Code are not undertaken in accordance with the allocation order.
- (b) Under s 45(1) it is an offence to undertake timber harvesting operations in any part of a State forest unless those operations are authorised operations. A harvesting operation is not an authorised operation unless it is undertaken by or on behalf of VicForests in accordance with an allocation order.
- (c) A person commits an offence if they undertake timber harvesting operations that are not authorised in that sense. The proposed amendment to paragraph A of the prayer for relief would therefore amount to a declaration that VicForests had engaged in criminal conduct. The general rule is that such a declaration

¹ See also *SFT Act*, s 14.



will not be made because a criminal court is the proper forum for the question.²

9 VicForests submitted, in the alternative, that a declaration to the effect that past timber harvesting operations by it were unlawful would not resolve any relevant controversy in the case, and accordingly a prayer for relief in those terms should not be permitted.

10 Finally VicForests submitted that from a case management perspective it was not desirable to allow the amendment to the prayer for relief because VicForests' analysis and application of the precautionary principle had evolved over time since the bushfires. Allowing the amendment would result in the need for evidence as to the various approaches taken by VicForests to application of the Code to timber harvesting operations at different times since the bushfires, imposing a significant burden on it, and likely expanding the scope of lay and expert evidence required to address the issues to be determined, which would result in delay. The lack of utility in making the declaration as to past conduct serves to underscore the conclusion that the proposed amendment should not be allowed.

Analysis

11 An offence is created by s 45, which is in Part 5 of the *SFT Act* which concerns the management of timber resources by VicForests. Section 45 relevantly reads:

- (1) A person must not undertake timber harvesting operations in any part of a State forest unless those operations are authorised operations.

Penalty: 60 penalty units, in the case of a natural person;

240 penalty units, in the case of a body corporate.

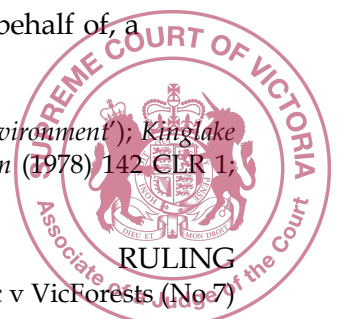
- (2) For the purposes of this section, *authorised operations* means –

- (a) in the case of vested timber resources –

- (i) timber harvesting operations undertaken by, or on behalf of, VicForests in accordance with an allocation order and a timber release plan that relates to that allocation order; or

- (ii) timber harvesting operations undertaken by, or on behalf of, a

² *Warburton Environment Inc v VicForests (No 2)* [2020] VSC 738, [59] (*Warburton Environment*); *Kinglake Friends of the Forest Inc v VicForests (No 3)* [2020] VSC 777, [31]; *Sankey v Whitlam* (1978) 142 CLR 1; *Pharmacy Guild of Australia v Ramsay Health Care Limited* [2019] NSWSC 1045, [167].



person who has entered into an agreement with VicForests for the harvesting and sale of timber resources, or the harvesting or sale of timber resources; ...

Timber harvesting operations is defined in s 3 of the *SFT Act*.

- 12 Part 6 of the *SFT Act* concerns management of timber harvesting, and includes s 46 of the Act which requires compliance with the Code:

The following persons must comply with any relevant Code of Practice relating to timber harvesting –

- (a) VicForests;
- (b) a person who has entered into an agreement with VicForests for the harvesting and sale of timber resources or the harvesting or sale of timber resources;
- ...
- (d) any other person undertaking timber harvesting operations in a State forest.

- 13 For the following reasons I do not accept VicForests’ submissions. First, there is a general approach that a civil court will not make a declaration that a defendant has committed a crime. In *Warburton Environment Inc v VicForests (No 2)* (*‘Warburton Environment’*),³ Garde J said:

The general rule is well established in relation to applications for declaration of criminal conduct in civil proceedings. While there is jurisdiction in a proper case to make a declaration that a defendant has committed a crime, such a declaration will not ordinarily be made because a criminal court is the proper forum for the question. It is necessary to demonstrate exceptional circumstances before a civil court will grant declaratory relief in relation to allegations that may be the subject of criminal proceedings.⁴

Second, a more flexible or nuanced approach may be required when considering a prayer for declaratory relief which may raise issues of criminal conduct but is not in the form of a declaration that the defendant has committed a crime. Third, in contrast to many of the cases in which a prayer for declaratory relief has been struck out or the relief has been refused, the plaintiff in this proceeding does not allege in the pleadings or seek a declaration that VicForests has committed an offence under the *SFT Act*. The

³ [2020] VSC 738.

⁴ Ibid [59] (citations omitted).

plaintiffs in *Pharmacy Guild of Australia v Ramsay Health Care Limited*⁵ pleaded and sought declaratory relief on the basis of an alleged contravention by the defendants of a statutory provision which created an offence. Similarly, in *Warburton Environment* the plaintiff sought declarations that VicForests had contravened s 45(1) of the *SFT Act*, and in *Kinglake Friends of the Forest Inc v VicForests (No 3)*,⁶ the plaintiffs pleaded that VicForests had committed offences under s 45(1), and sought declaratory relief to that effect. I note that the plaintiff does not allege VicForests has breached any provision in Part 5 of the *SFT Act*. Fourth, I do not accept the assertion by VicForests that any non-compliance with the Code would have the necessary consequence, subject to any available defence, that VicForests was guilty of an offence under s 45(1) of the *SFT Act*. Whether acts or omissions which constitute a failure to comply with a provision of the Code would necessarily expose VicForests to successful prosecution under s 45(1) would require consideration and interpretation of the Code, the allocation order and the *SFT Act*. I note the scheme of the *SFT Act* is to place s 45 in Part 5, and to provide an audit process in Part 6 which is directed to VicForests' compliance with the Code. Fifth, VicForests is not being prosecuted for any alleged breaches of s 45(1) relevant to the facts and circumstances of this proceeding, and there is no suggestion this will occur in future. Sixth, whether, and if so in what way, VicForests has breached the Code, and what if any relief should be granted, are questions for trial.

14 Seventh, a declaration to the effect that in the period since January 2020 VicForests has failed to comply with the Code in the manner alleged when undertaking timber harvesting activity in coupes which it or DELWP knew to contain threatened species or the habitat of those species would determine a real controversy between the parties. The plaintiff's case is that timber harvesting should not have occurred in those coupes until the Commonwealth and State bushfire biodiversity responses are complete and have been taken into account by VicForests in planning for and undertaking those activities. The premise underlying this case is that in the context of harm to threatened

⁵ [2019] NSWSC 1045.

⁶ [2020] VSC 777.



species caused by the bushfires the risk to those species from timber harvesting activities must be assessed and responded to, before timber harvesting is planned and undertaken in coupes known to contain threatened species or the habitat of those species. In response VicForests alleges that application by it of a suite of adaptive management measures, which it largely developed and implemented in July 2019, meant that timber harvesting was undertaken by it in accordance with the Code. In part the question of whether VicForests' timber harvesting activities complied with the Code will depend on the measured outcomes for threatened species in coupes harvested since January 2020. While there has been some evolution or development of VicForests' response to mandatory actions required by the Code, the degree to which those changes have significantly altered VicForests' activities within coupes may be in issue.

- 15 Eighth, I do not agree that the amendment proposed to paragraph A of the prayer for relief would unworkably expand the issues for determination. As stated, VicForests' evidence suggests that relevant timber harvesting since January 2020, at least in the Central Highlands region has been undertaken in accordance with its suite of adaptive management measures developed in July 2019. There has been discovery in relation to the harvested coupes in the Central Highlands, much of the evidence in relation to those coupes is contained in affidavits which have already been filed, and that evidence has already been considered at the interim and interlocutory injunction hearings which have occurred. Even if the prayer for relief is not amended it will be necessary to consider the outcome in coupes harvested since January 2020 to assess the efficacy of the adaptive management measures on which VicForests relies.

Particularisation of coupes which are the subject of the proceeding

- 16 Paragraph 22 of the proposed ASOC reads:

Of the coupes scheduled for harvesting in the TRP, VicForests has commenced timber harvesting (or is proposing to imminently commence timber harvesting) in coupes:

- (a) in the Central Highlands, that contain or are likely to contain fire-affected threatened species, or habitat of fire-affected threatened species; and



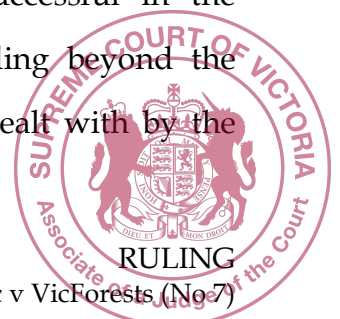
- (b) outside the Central Highlands, that contain or are likely to contain Greater Glider, or its habitat.

Particulars

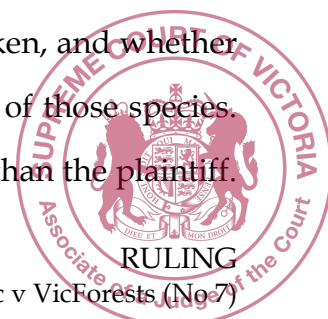
Particulars now appear in Schedule A to the pleading.

There are 26 coupes currently listed in Schedule A.

- 17 Two issues arise. First, Orders 3 and 4 made by McMillan J on 13 May 2020 established a procedure to identify further coupes scheduled to be harvested before trial, and for the plaintiff to provide further particulars under paragraph 22 of the statement of claim. The plaintiff has given notification to VicForests in respect of over 300 coupes with lists provided on 28 May and 23 November 2020. The parties were in dispute as to the certainty of the notification lists and the time by which VicForests was to respond. I resolved that dispute by an order that VicForests respond to the 28 May and 23 November notification lists in accordance with Order 3 made 13 May 2020 by Friday 4 December 2020.
- 18 The second dispute relates to the manner in which the proceeding is to be conducted and the relief which may be available to the plaintiff if it succeeds.
- 19 The plaintiff indicated on 30 November that it anticipates particularising approximately 50 further coupes once VicForests has responded to the notification lists, with a result that a total of approximately 80 coupes would be particularised at trial.
- 20 The proceeding raises issues in relation to a number of different threatened species within the Central Highlands region and the Greater Glider outside the Central Highlands. There are different prescriptions which apply to timber harvesting depending on which threatened species is being considered. The plaintiff says the coupes it intends to particularise will cover the threatened species and the range of circumstances with which the proceeding is concerned. If successful in the proceeding, the plaintiff intends to seek injunctive relief extending beyond the particularised coupes to coupes falling within particular classes dealt with by the evidence and findings at trial.



- 21 VicForests submitted that the plaintiff must particularise every coupe which will be the subject of trial and in respect of which it will seek injunctive relief if successful. VicForests argues that because the orders sought would have such a substantial impact on its operations, it is entitled to have certainty in relation to the case brought against it, and to the relief which the plaintiff will seek if successful, which requires that the plaintiff identify and particularise every coupe in respect of which it will seek relief.
- 22 VicForests argues, from a case management perspective, that once coupes have been particularised by the plaintiff, a process should be developed and implemented to identify classes of coupes which will allow for a proper examination of the issues in the proceeding, and a selection of a limited number of coupes in each class which will be the subject of discovery and lay and expert evidence. VicForests argues that selecting representative samples for identified categories of coupes would likely result in the identification of around 20 to 30 coupes, reducing the time and cost associated with the proceeding and resulting in significant efficiency for the parties and the Court.
- 23 In response the plaintiff argues that the 80 coupes it will particularise will cover the representative categories; significant work has already been undertaken by both parties in relation to the 26 coupes already particularised, and by it in relation to other coupes it will particularise, and it is too late to introduce the representative category process at this stage; developing and implementing the representative category process is likely to prove contentious, complex and time consuming, which will itself lead to delay and inefficiency; and it is entitled to choose the coupes it will particularise and to run its case in respect of those coupes.
- 24 I do not accept VicForests' submissions. The plaintiff's pleading puts VicForests on notice of the case it must meet. VicForests is aware of when it intends to harvest particular coupes, the method by which harvesting will be undertaken, and whether a coupe is known by it to contain threatened species or the habitat of those species. VicForests is in a better position to know these operational matters than the plaintiff.



In respect of coupes planned for harvest before trial, there may be little uncertainty as to the case VicForests must meet.

25 A difficulty with the approach proposed by VicForests is that the list of coupes for harvest, coupe planning and scheduling are flexible and change frequently. This is not information within the knowledge of the plaintiff. If the plaintiff is unable to particularise every coupe in respect of which it seeks relief the full breadth of the case it brings may not be addressed at trial.

26 Further, the provision of notification lists, as was done by the plaintiff on 28 May and 23 November 2020, gives VicForests notice of coupes of which the plaintiff is aware and may seek relief if successful. It is appropriate to require the plaintiff to provide one further comprehensive notification list prior to trial. Finally, as already stated, the question of the extent and form of relief will be determined if the plaintiff is successful at trial. VicForests will be entitled to argue at that stage that certain relief should not be granted, or that the form of relief should be limited.

27 I accept the plaintiff's submissions in relation to the representative category proposal. The parties to this proceeding have shown very limited capacity to agree any matter of substance or process. It is almost certain that an attempt to introduce and implement a representative coupe process at this stage of the proceeding will result in further disputes, delay and inefficiency. It may be possible closer to trial to adopt a process which focuses attention on a more restricted number of coupes than those particularised by the plaintiff. Whether or not that can and should be done remains to be seen. However, I am not satisfied that attempting to introduce a representative coupes process at this stage of the proceeding will result in any saving of costs and time for the parties or the Court.

Claims concerning unburnt areas outside the Central Highlands

28 The 23 November 2020 notification list provided by the plaintiff included coupes in forest regions affected by the bushfires, which on a DELWP spatial dataset are within the fire footprint mapped as fire severity 'class 2 unburnt'.



29 VicForests submitted:

- (a) It is legally obliged to undertake its assessment and analysis of fire-affected forest by reference to Table 22 of the Management Standards;
- (b) It undertook its precautionary principle analyses by reference to Table 22 of the Management Standards; and
- (c) It has not used, and is not required to use, the category of fire severity 'class 2 unburnt' in its assessments and analyses.

VicForests submitted that categories 4 and 5 in Table 22, which are described as 'light crown scorch' and 'no crown scorch' would, taken together, be equivalent to class 2 unburnt, and that a practical effect of the approach taken by the plaintiff would be to require it to do additional work in a way that would not be consistent with the *Civil Procedure Act 2010* (Vic), as it would be much simpler to identify coupes falling within category 4 or 5 of Table 22.

30 The plaintiff submitted it is entitled to identify coupes according to the class 2 unburnt category because it is a matter for the plaintiff to make an assessment of what is burnt or unburnt according to a classification it thinks is sound. Further, at trial the plaintiff will rely on the department's data that it has used in its bushfire response, which will of course take into account what the department considers to be fire-affected and non-fire-affected. After the further coupes are particularised by the plaintiff VicForests will know which coupes will be dealt with by the evidence, and will not be disadvantaged because of the coupe category adopted by the plaintiff.

31 It is difficult to assess practical implications of this issue at this stage. I doubt the burden on VicForests of identifying coupes according to the category adopted by the plaintiff is unreasonable. I will hear further argument on the issue if it becomes apparent it will have significant implications for preparation of the evidence and at trial.

Status of matters pleaded in plaintiff's reply

32 In paragraph 15 of the statement of claim the plaintiff pleads:

Two documents that are incorporated into the Code under s 31(2) of the CFL Act are: (a) the Management Standards and Procedures for timber harvesting operations in Victoria's State forests 2014; and (b) Appendix 5 to the Management Standards and Procedures for timber harvesting operations in Victoria's State forests 2014: the Planning Standards for Timber harvesting operations in Victoria's State Forests 2014 (the **Planning Standards**).

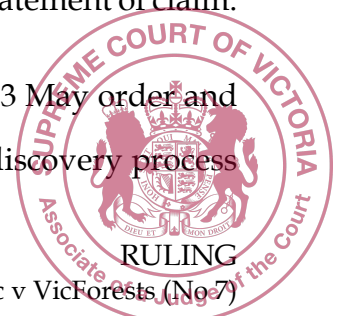
33 In its defence VicForests admitted paragraph 15 of the statement of claim, and pleaded prescriptions set out in the Planning Standards and Management Standards in relation to the Powerful Owl, Smoky Mouse and Sooty Owl. In paragraph 4 of its reply the plaintiff admitted the allegations pleaded by VicForests in paragraph 15 of its defence, pleaded further express provisions of the Planning Standards for the conservation of the Powerful Owl and Sooty Owl, and alleged that VicForests' planning for timber harvesting operations does not comply with Forest Management Zone Rules as required by the Planning Standards and is not authorised by law. It is unclear what flows from this pleading in relation to the case the plaintiff seeks to make in this proceeding, or what relief the plaintiff may be entitled to if it establishes the matters pleaded. What is clear is that the allegation of non-compliance with the Planning Standards rendering VicForests' actions unlawful is first made in the reply.

34 If the plaintiff seeks to maintain reliance on alleged non-compliance by VicForests with the Planning Standards it should plead the material facts in its ASOC so that VicForests can be clear about the case it has to meet, and can plead its defence to that case.

Future conduct of the proceeding

35 I will order that the plaintiff has leave to file and serve an amended statement of claim in the form that has been provided, subject to inclusion of matters pleaded in paragraph 4 of its reply on which it seeks to rely, by 4 December 2020. VicForests will have until 18 December to file and serve its defence to the amended statement of claim.

36 Discovery has been provided by VicForests in accordance with the 13 May order and the categories of discovery set out in Schedule 2 to that order. The discovery process



was completed in July. To date, discovery has been largely limited to documents relevant to the Central Highlands region, in part because of the interpretation by VicForests of the phrase 'for areas not affected by the [2019/20] Bushfires' found in a number of the discovery categories as not including regions such as East Gippsland or the North East, which were substantially affected by the bushfires. The plaintiff's interpretation of the limitation is that discovery was required of documents relevant to unburnt areas of forest regions substantially affected by the bushfires. Whichever interpretation is correct, the fact remains that discovery has not been made of documents which, particularly in the light of the standing ruling, are relevant. Discovery should now be made by VicForests of relevant classes of documents for areas not affected by the bushfires, which includes unburnt areas within forest regions significantly impacted by the bushfires such as East Gippsland and the North East.

37 Categories of discovery for regions outside the Central Highlands may require further refinement to take account of the standing ruling. I will list the proceeding for further directions to settle the categories of discovery and the timetable to a trial date.

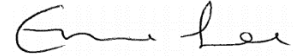
38 VicForests proposes two further limits on discovery to promote efficiency. First, that discovery should be limited to representative coupes. Given that I have rejected VicForests' representative coupe process proposal, it is inappropriate to limit discovery in this way. Second, VicForests proposes that because of difficulties associated with accessing hard copy coupe files from its regional offices discovery should be limited to electronic coupe files. VicForests acknowledges there are documents found on the hard copy files which are not part of the electronic files. I agree with the plaintiff's submission that in those circumstances discovery should not be limited to the electronic copy of each file. However, discovery can be made in tranches to allow a further reasonable period for VicForests to access hard copy coupe files.

39 I will now relist the matter to set a timetable for further steps and to fix a date for trial.

CERTIFICATE

I certify that this and the 12 preceding pages are a true copy of the reasons for ruling of Justice Keogh of the Supreme Court of Victoria delivered on 4 December 2020.

DATED this fourth day of December 2020.



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Associate

