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TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF VICTORIA

S ECI 2020 00373

COMMON LAW DIVISION

MELBOURNE

TUESDAY, 18 FEBRUARY 2020

BEFORE THE HONOURABLE JUSTICE McMILLAN

B E T W E E N:

WOTCH INC

Applicant

- and -

VICFORESTS

Respondent

MS K.E. FOLEY with MS C. MINTZ appeared on behalf of the  
Applicant.

MR I.G. WALLER QC with MR H. REDD and MS R.V. HOWE appeared on  
behalf of the Respondent.

1 MS FOLEY: If the court pleases, I appear with my learned  
2 friend, Ms Mintz.

3 HER HONOUR: Yes, Ms Foley.

4 MR WALLER: Your Honour, I appear with my learned friends  
5 Mr Redd and Ms Howe for the defendant.

6 HER HONOUR: Mr Waller. Ms Foley?

7 MS FOLEY: Thank you, your Honour. If I could just identify  
8 for the court the material that has been filed pursuant to  
9 the orders made by your Honour after the hearing of the  
10 interim injunction application.

11 HER HONOUR: Yes.

12 MS FOLEY: On 5 February the plaintiff filed its statement of  
13 claim, and on 7 February, consistent with your Honour's  
14 orders, the plaintiff filed two affidavits to put before  
15 the court direct evidence as to the matters that had been  
16 included in the affidavit of Danya Jacobs on information  
17 and belief. They are the affidavit of Jake McKenzie and  
18 the affidavit of Hayley Forster.

19 The defendant has filed six affidavits: the  
20 affidavit of Dion Creek, affirmed on 11 February; the  
21 affidavit of Monique Dawson, affirmed on 12 February; the  
22 affidavit of William Paul, affirmed on 11 February; and  
23 the affidavit of Ruizhu Jiang, affirmed on 14 February.  
24 There were two further affidavits filed by the defendant  
25 yesterday, your Honour: the affidavit of Andrew Prowse and  
26 a second affidavit of Ms Jiang.

27 Your Honour, the plaintiff also filed two further  
28 affidavits partly in reply to the defendant's material and  
29 partly to ensure that the court had relevant material  
30 before it that was not available when the application was  
31 first filed. We seek the court's leave in relation to

1 those parts, given that the orders contemplated reply  
2 evidence only. Those affidavits are the second affidavit  
3 of Jake McKenzie, affirmed on 14 February, and the third  
4 affidavit of Danya Jacobs, affirmed on 14 February.

5 HER HONOUR: Have you spoken to Mr Waller about that?

6 MS FOLEY: I haven't spoken to him, but I do understand from  
7 the submissions that there are objections in relation to  
8 that material. The objection, as I understand it, in  
9 relation to the second affidavit of Mr McKenzie concerns  
10 that part of the affidavit material which is not reply  
11 evidence.

12 MR WALLER: It relates to coupes not the subject of the  
13 proceedings, in particular paragraph 16 to 25,  
14 your Honour.

15 HER HONOUR: Why is that relevant, Ms Foley?

16 MS FOLEY: We had been in correspondence with VicForests,  
17 your Honour, in relation to the status of those coupes and  
18 we haven't to date received a response to the information  
19 that we have sought. Given where we are at with the  
20 correspondence I can't advance that matter any further.  
21 So we don't press those paragraphs.

22 Your Honour, there is, as I understand it, also  
23 an objection to some parts of the third affidavit of  
24 Ms Jacobs, and I will again let my learned friend address  
25 your Honour on that if I may.

26 HER HONOUR: It's going to be simpler if you two talk rather  
27 than directing it through me. They are simply objections.  
28 So you can deal with that shortly. But continue on.

29 MS FOLEY: Thank you, your Honour. Your Honour, in addressing  
30 your Honour today I'm going to endeavour not to repeat the  
31 submissions that I made at the interim injunction

1 application. Instead I propose to focus on the issues by  
2 reference to where we are now given the material that has  
3 been filed since that time; admittedly a large volume of  
4 material.

5 HER HONOUR: Yes.

6 MS FOLEY: I want to be clear, though, for your Honour that I'm  
7 not departing from anything that I said last time. Rather  
8 I'm seeking to build upon those submissions by reference  
9 to the evidence that's been put before the court.

10 HER HONOUR: Yes.

11 MS FOLEY: The first matter that I wish to address is whether  
12 the plaintiff has established the existence of a serious  
13 question to be tried. The starting point is the statement  
14 of claim which has been filed since the interim injunction  
15 application was heard. Could I take your Honour to that,  
16 please?

17 HER HONOUR: Yes.

18 MS FOLEY: The statement of claim discloses the same cause of  
19 action that was the subject of argument before your Honour  
20 last time, but it has now been advanced in a more  
21 developed form. Looking at paragraph 3, these are factual  
22 matters going to the plaintiff's standing. I don't  
23 understand from the defendant's submissions that there is  
24 any challenge to standing. So I won't address your Honour  
25 further on those factual matters.

26 Paragraph 10, if I can skip through to that, as  
27 your Honour will recall is the statutory obligation  
28 underpinning the plaintiff's statement of claim which is  
29 section 46(a) of the Sustainable Forests (Timber) Act  
30 2004, that is the obligation could comply with codes of  
31 practice.

1           In paragraphs 11 to 14 we set out the relevant  
2 code relied upon, and within that code the two particular  
3 sections that we invoke in our claim: section 2.2.2.2, the  
4 precautionary principle, and section 2.2.2.3. Your Honour  
5 is familiar with both of those.

6           In paragraphs 16 to 20 we plead out material  
7 facts relevant to the bushfires, the impact of the  
8 bushfires, including significant losses of flora and  
9 fauna, including threatened species, and also that the  
10 State and Commonwealth bushfire biodiversity responses  
11 have been commenced but not yet complete.

12           Paragraph 21, we say that notwithstanding the  
13 bushfires and that the government responses are not yet  
14 complete, VicForests continues to plan and continues to  
15 conduct timber harvesting operations. That of course is  
16 not in dispute.

17           Paragraph 22 is a very important paragraph in  
18 this pleading. It alleges that timber harvesting has  
19 commenced or VicForests is proposing to imminently  
20 commence in coupes that contain or are likely to contain  
21 fire affected threatened species or habitat of such  
22 species. Your Honour will recall that threatened species  
23 have a particular status under the Flora and Fauna  
24 Guarantee Act, and I went to those provisions on the last  
25 occasion.

26           The particulars to paragraph 22 identified the  
27 coupes that are the subject of that allegation, including  
28 what the plaintiff understood at the time of filing the  
29 statement of claim as to the current status of timber  
30 harvesting in each coupe, the proposed plans for timber  
31 harvesting and also identifies the fire affected

1 threatened species in question.

2 So these are the coupes, your Honour, that are  
3 the subject of the injunction application and there are 15  
4 of them. They are coupes that we say, absent the interim  
5 injunction or undertakings given, would be active coupes  
6 or coupes where we believe timber harvesting is imminent.

7 I pause there, your Honour, to note one thing and  
8 that is your Honour will recall from last time that the  
9 threatened species in issue were the greater glider, the  
10 sooty owl, the powerful owl and the smoky mouse. We now  
11 have an additional species and that is the alpine tree  
12 frog.

13 At paragraph 23 the plaintiff alleges that  
14 following the bushfires it is a failure by VicForests to  
15 comply with 2.2.2.2 of the code to plan or conduct timber  
16 harvesting in coupes known to it or to the department to  
17 contain or be likely to contain fire affected threatened  
18 species or habitat of the same. The particulars then  
19 address several matters relevant to that allegation. They  
20 go to matters such as how the State and the Commonwealth  
21 responses will include information VicForests will need to  
22 take into account to apply the precautionary principle and  
23 that timber harvesting in these coupes carries with it a  
24 probability or serious possibility of serious or  
25 irreversible damage to the species and that there is  
26 scientific uncertainty as to the threat at the current  
27 time.

28 We say that the precautionary principle requires  
29 VicForests to wait until the governmental responses are  
30 concluded so that the research and information that will  
31 come out of these responses can be understood and

1 considered and taken into account in VicForests' planning  
2 and operations going forward.

3 Your Honour, the next paragraph is a development  
4 since we filed the generally endorsed writ, and I don't  
5 mean a development in terms of new facts but a development  
6 in the way that the case is being framed. This is an  
7 allegation of breach of section 2.2.2.2 with respect to  
8 the greater glider and it focuses on the fact that the  
9 immediate protection areas for the greater glider are not  
10 yet finalised. I will take your Honour to factual  
11 material relevant to that in the course of my submissions.

12 We then see in 25 a similar development in  
13 relation to the powerful owl focusing on the need for a  
14 review of the powerful owl management areas. We use the  
15 word POMA to describe those areas.

16 Similarly until paragraph 26 the same allegation  
17 but with respect to the sooty owl, and those areas, the  
18 sooty owl management area allocations we refer to as the  
19 SOMA. These are the precautionary principle breach  
20 allegations.

21 Then in paragraph 27 we have an allegation of  
22 failure to comply with section 2.2.2.3 of the code.

23 We say at 28 that these breaches of the code, any  
24 of them, amount to a breach of the obligation under  
25 section 46 of the SFT Act to comply with the relevant code  
26 of practice.

27 So that is the plaintiff's case. You would have  
28 understood from last time, your Honour, in a nutshell we  
29 say the 2019 to 2020 bushfires have fundamentally changed  
30 the landscape, the legal landscape, relevant to  
31 VicForests' operations and it must await the assessment of

1 the damage and the impact on the species as well as a  
2 review of areas reserved to meet particular prescriptions  
3 before it can conduct timber harvesting in coupes where  
4 fire affected threatened species or habitat is present.

5 So the case now, your Honour, developed in the  
6 statement of claim is put at two levels. The first, as it  
7 was when I was last before your Honour, you must await the  
8 assessment and the advice from the Commonwealth and the  
9 State governmental responses. The second level, which has  
10 been developed in the pleading, you must await the review  
11 and finalisation of the IPA, the immediate protection  
12 areas, for the greater glider and the POMAs and SOMAs. So  
13 they are the specific prescriptions relevant to those  
14 species.

15 Your Honour, having stepped through the  
16 plaintiff's case, I want to turn in more detail to the  
17 question, this first limb of the argument, whether there  
18 is a serious question to be tried. It might be helpful in  
19 the first instance if I identify for the court the parts  
20 of the plaintiff's case that we do not believe are  
21 controversial.

22 It's not controversial that VicForests has an  
23 obligation to comply with the code. It shouldn't be, and  
24 I don't understand it is, controversial that section  
25 2.2.2.2 of the code gives rise to an enforceable  
26 obligation. We don't believe it will be controversial  
27 that 2.2.2.3 gives rise to a similarly enforceable  
28 obligation given that it is also a mandatory action under  
29 the code. So those building blocks of the case, that  
30 VicForests must comply with the code and that these two  
31 sections of the code upon which we rely are enforceable in



1 this court, aren't in issue.

2 We also don't see it as being in issue at a high  
3 level that the bushfires have had a devastating effect on  
4 flora and fauna, including threatened species. I say at a  
5 high level because based on the material filed by the  
6 defendant I don't believe I can say that we have agreement  
7 about the precise impact on any particular threatened  
8 species involved in this case. There doesn't seem to be  
9 an issue about the impact of the fires in a broad sense.  
10 But looking at the species in this case there is an issue  
11 between the parties about that.

12 We don't see it as being in contention that there  
13 are at the moment in existence Commonwealth and State  
14 governmental biodiversity responses and that those  
15 responses aren't yet complete.

16 So against that background of uncontroversial  
17 matters we turn then to the matters of controversy for the  
18 purposes of the first limb. The defendant's material  
19 that's relevant to a serious question to be tried is  
20 principally found in the Paul affidavit, to a lesser  
21 extent in the Jiang affidavit material, and also in  
22 correspondence that was exhibited yesterday to the  
23 affidavit filed by Mr Prowse, and that is correspondence  
24 from the chief conservation regulator. I will go to that  
25 evidence, your Honour.

26 If I could start with the affidavit of Mr Paul.

27 HER HONOUR: Just a moment. I'm going to do this  
28 electronically. Filed on the 11th or the 12th, dated the  
29 11th?

30 MS FOLEY: Yes, it was filed on the 11th. 12th. Dated the  
31 11th, filed on the 12th.

1 HER HONOUR: Yes. Thank you. Yes, I've got that.

2 MS FOLEY: Thank you. If your Honour can see in paragraph 1

3 Mr Paul is the manager of environmental performance at

4 VicForests. Paragraph 4 we say is a little summary of

5 VicForests' case on serious question to be tried. There

6 are three elements to it. I want to address in the first

7 instance 4(a) and 4(c) and I will turn later to 4(b).

8 In 4(a) says he is satisfied on the evidence that

9 VicForests is applying or exceeding applicable

10 prescriptions for threatened species and their habitat,

11 and in (c) he deposes he is satisfied that in each coupe

12 VicForests has appropriately and cautiously responded to

13 detections of threatened species and habitat values within

14 the coupes.

15 Your Honour, we say that neither of these points

16 grapple with the plaintiff's case. Before I develop that

17 submission I thought I should explain for your Honour the

18 word 'prescription' that is found throughout the material.

19 Prescriptions, as your Honour may have seen, are specified

20 requirements for protection of threatened species and

21 other environmental values in logging coupes. They are

22 set out in the planning standards, which is part of the

23 material before your Honour, and also informed by the

24 action statements and the FMPs.

25 They are often in the form of specified size

26 buffers around the particular values in a forest. For

27 example, a 200-metre buffer around a Leadbeater possum

28 detection or a 50-metre buffer along a stream. That's one

29 example of a prescription. They might also be in the form

30 of a fixed zone rule which applies to protect specified

31 areas of habitat or certain forest types across the

1 landscape. The POMAs and the SOMAs are examples of these  
2 kinds of prescriptions where protection of specified areas  
3 of good quality habitat are specified for owls across the  
4 landscape. That's just some background as to the use of  
5 that word, your Honour.

6 So let me turn back to developing the submission  
7 that paragraph 4(a) and 4(c) fails to grapple with  
8 the plaintiff's case. In short the prescriptions were  
9 developed for threatened species before the 2019 and 2020  
10 bushfires. So of course we say that the foundations on  
11 which those prescriptions were made have now changed  
12 fundamentally.

13 Mr Paul's affidavit contains no evidence that  
14 VicForests has considered the impact of the 2019/2020  
15 bushfires on threatened species or factored that  
16 information into how to manage detections in coupes that  
17 are to be harvested. He gives no evidence about that.  
18 Nor does VicForests respond with evidence relevant to the  
19 plaintiff's contention that a precautionary approach  
20 requires it to wait until governmental responses are  
21 complete.

22 For example, one might have expected evidence  
23 that says, 'The reason we don't consider that we need to  
24 wait for those responses is as follows,' or, 'The reason  
25 that we don't need to consider any research coming out of  
26 those responses is as follows.' We don't see that.  
27 Instead what we see in the Paul affidavit is that  
28 VicForests has been proceeding as if the fires never  
29 happened at all.

30 I will take your Honour a little later to an  
31 affidavit that was filed yesterday which contains the

1 statement that VicForests will undertake a review of its  
2 assessed high conservation values following the fire and  
3 is seeking information from the department to assist in  
4 that review. But what is clear is that VicForests does  
5 not see fit in the meantime to pause its logging  
6 operations in coupes that contain or are likely to contain  
7 fire affected threatened species.

8 So we say that the evidence filed by VicForests,  
9 and I'm dealing at the moment with the Paul material,  
10 demonstrates in support of the plaintiff's case that  
11 VicForests has been proceeding as if these fires had not  
12 occurred and it has not to date taken into account the  
13 impact of the bushfires on the overall population of  
14 threatened species and how that impact on the overall  
15 population might translate into changes in its operations  
16 in coupes containing populations of those species.

17 I would like to develop that overall submission  
18 by reference to the evidence in some more detail.  
19 Firstly, the point that the prescriptions we are talking  
20 about are pre-fire prescriptions. As a matter of fact all  
21 of the prescriptions that have been formulated for these  
22 fire affected species were formulated prior to the  
23 bushfires. We don't understand there to be any dispute  
24 about that.

25 Further, while these prescriptions have taken  
26 into account previously known impact of fires, obviously  
27 they could not have taken into account the impact of the  
28 2019 to 2020 fires because that impact is known to have  
29 been unprecedented. I don't think I need to take  
30 your Honour to evidence of that, but I will give  
31 your Honour the reference. The preliminary Victorian

1 plan, which is exhibit DJ-15, at page 2 - this is to the  
2 first affidavit of Ms Jacobs - states that 'the current  
3 fires are exceptional in size and impact.'

4 We don't believe VicForests can reasonably  
5 dispute that the areas reserved to meet these  
6 prescriptions will need to be reviewed post the bushfires.  
7 But to make good that proposition I will take your Honour  
8 to a couple of examples of the specific prescriptions for  
9 the greater glider, the powerful owl and the sooty owl.

10 Can I start, your Honour, with the greater  
11 glider. I will take your Honour to the action statement  
12 which is exhibit DJ-25 to the first affidavit of  
13 Ms Jacobs. If your Honour is using the electronic court  
14 book numbering it is at page 1430.

15 HER HONOUR: Sorry, repeat the exhibit again?

16 MS FOLEY: DJ-25, your Honour. That is at page 1430 of  
17 the bundle.

18 HER HONOUR: Yes, I've got that.

19 MS FOLEY: So you will see there this is the action statement  
20 for the greater glider which is published by the  
21 department consistently with its obligations once the  
22 species has been identified as listed under the Flora and  
23 Fauna Guarantee Act. If I can take your Honour to page  
24 1434 in the first instance.

25 HER HONOUR: Yes, I've got that.

26 MS FOLEY: You will see there 'Conservation measures'. The  
27 first dot point under that heading, "Immediate protection  
28 of more than 96,000 hectares of State forest in the  
29 Strathbogrie Ranges, in the Central Highlands, in East  
30 Gippsland and in Mirboo North. An indicative map of those  
31 areas is included as attachment 1. When boundaries are

1 finalised an update to this action statement will be  
2 released.'

3 Importantly this document, your Honour, was  
4 published by the department at the end of last year,  
5 November 2019, just before the bushfires as it turns out.  
6 So they have assessed all of the information and this is a  
7 very important document for the species. Just before the  
8 bushfires they have announced 96,000 hectares of State  
9 forest. So that's the IPA that your Honour would have  
10 seen everyone talking about.

11 If I can go to page 1437, please. If your Honour  
12 can see under the heading, 'Victorian conservation  
13 status'.

14 HER HONOUR: Yes.

15 MS FOLEY: And this is just to highlight consistently with what  
16 I said last time the matters that lead to a species such  
17 as the greater glider being listed as threatened. You can  
18 see there in the bullet points that the Flora and Fauna  
19 Guarantee Scientific Advisory Committee found, 'The  
20 greater glider is in a demonstrable state of decline  
21 likely to lead to extinction. The greater glider is  
22 significantly prone to future threats that are likely to  
23 lead to extinction, and the threats are operating and are  
24 expected to continue to operate in the future at a level  
25 likely to lead to extinction.' This is what leads to the  
26 action statement and the 96,000 hectares.

27 If I can then take your Honour to page 1441.  
28 Near the bottom of the page if your Honour can see  
29 'objective 2'.

30 HER HONOUR: Yes.

31 MS FOLEY: And item 5, it refers to - and this is retaining at

1 least 40 per cent of the basal area of eucalypts across  
2 each timber harvesting coupe. This is what's referred to  
3 as a statewide prescription in coupes where timber  
4 harvesting is being conducted.

5 So the primary protection under the action  
6 statement is the IPA. That is what the government decided  
7 was the critical measure of protection, and it was the  
8 measure of protection that was viewed as necessary to  
9 conserve the species prior to the 2019 to 2020 bushfires.  
10 A little later in my submissions I will deal with  
11 the impact of the fires in this IPA area. But for now  
12 what I'm establishing is that the information and the  
13 knowledge that led to these prescriptions was all  
14 pre-bushfires.

15 If I can take your Honour then to the  
16 prescriptions for the sooty owl which are found in the  
17 sooty owl action statement. If I can take your Honour to  
18 the exhibit DJ-29, please.

19 HER HONOUR: Yes.

20 MS FOLEY: And this is at page 1479 it begins of the exhibits,  
21 and I will start at page 1482.

22 HER HONOUR: Yes.

23 MS FOLEY: At the bottom of that page on the left-hand column  
24 your Honour sees, 'Major conservation objective'.

25 HER HONOUR: Yes.

26 MS FOLEY: 'For an endangered species to retain its potential  
27 for evolutionary development in the wild an effective  
28 population size of 500 to 1,000 is considered appropriate  
29 at this time. ' You will see in the next part of that  
30 paragraph that is talking about maintaining the sooty owl  
31 at its current level, and this is a species listed as

1 threatened.

2 In the next paragraph it says, 'At this point the  
3 short-term conservation objective is to prevent further  
4 population decline by maintaining good quality habitat for  
5 a population target of at least 500 breeding pairs of  
6 sooty owl on public land in Victoria.' So there we have  
7 the short-term objective which then informs the action  
8 that is taken.

9 If I can take you to page 1483 you will see a  
10 table there, your Honour, at the bottom of the page.

11 HER HONOUR: Yes.

12 MS FOLEY: Table 1. You can see there it's listed different  
13 forest management areas, and I will refer your Honour to  
14 East Gippsland, where the fires of course have impacted.  
15 The number of SOMAs, sooty owl management areas, is 131,  
16 which is 26 per cent of the proportion of the State  
17 target.

18 HER HONOUR: Yes.

19 MS FOLEY: Then turning to the next page, 1483 - - -

20 HER HONOUR: I was on at 1483.

21 MS FOLEY: I'm sorry, 1484, my apologies.

22 HER HONOUR: Yes.

23 MS FOLEY: Under the heading, 'Protection in State forest,'  
24 this is just to show how it translates into the logging.  
25 In paragraph 3 it says, 'Where clear-fell or seed tree  
26 systems are used each SOMA will comprise 500 hectares of  
27 forest to be managed as a special protection zone.'  
28 That's how it translates in practice.

29 Then skipping down to paragraph 4, 'Where  
30 selective harvesting is used, managed areas of  
31 approximately 1,000 hectares to maintain habitat capable



1 of supporting adequate populations.' Your Honour can see  
2 that?

3 HER HONOUR: Yes.

4 MS FOLEY: Now, again, this is what was required for  
5 conservation of the species or considered to be required  
6 by the government before the 2019/2020 bushfires.

7 If I can take your Honour then just to complete  
8 this set to the powerful owl action statement, and that is  
9 DJ-30 at page 1488.

10 HER HONOUR: Yes.

11 MS FOLEY: Your Honour, if you could turn to page 1490, please,  
12 and we see in the right-hand column at the top the  
13 heading, 'Reasons for conservation status'. 'Since  
14 European settlement 65 per cent of Victoria's forest cover  
15 has been cleared. Only 5 per cent of freehold land  
16 remains forested. This past permanent loss of habitat has  
17 likely led to an overall reduction in owl numbers and  
18 fragmentation of the original continuous population into a  
19 series of small residual populations each of which is at  
20 risk of becoming locally extinct.'

21 In the next paragraph about halfway down the  
22 paragraph your Honour will see a sentence starting, 'The  
23 powerful owl is'.

24 HER HONOUR: Yes.

25 MS FOLEY: 'Therefore vulnerable to land management practices  
26 that reduce the availability of these tree hollows now or  
27 into the future.'

28 In the final part of that section you will see  
29 the two dot points where a determination was made that  
30 'the powerful owl is significantly prone to future threats  
31 which are likely to result in extinction and are very rare

1 in terms of abundance or distribution.' So that's the  
2 background to what is then determined to be appropriate in  
3 the action statement.

4 We see here staying on that page under 'The major  
5 conservation objective' another short-term objective,  
6 'Prevent further decline by ensuring that good quality  
7 habitat for at least a population target of 500 breeding  
8 pairs is maintained on public land in Victoria.'

9 If I can take your Honour to a table similar to  
10 the one we looked at for the sooty owl, and that's on page  
11 1494, if your Honour has that table.

12 HER HONOUR: Yes.

13 MS FOLEY: You can see at the bottom of the table the East  
14 Gippsland FMA, 'Proportion of State target 20 per cent.  
15 100 POMAs,' powerful owl management areas. Again this is  
16 a prescription in place prior to the bushfires and  
17 informed by knowledge developed prior to the bushfire  
18 impact.

19 Now, despite what everyone understands to be the  
20 devastating impact of the bushfires, VicForests says it's  
21 enough that it complies with these prescriptions. At  
22 paragraph 66 of the Paul affidavit Mr Paul deposes that  
23 the action statement prescriptions are suitable for  
24 populations in the Central Highlands because those  
25 populations aren't fire affected.

26 At paragraph 70 he refers to the fact that the  
27 POMAs have been established, and at 74 he says the SOMAs  
28 have been established. What he does not say is how  
29 VicForests has taken into account that the primary  
30 conservation measures, the IPA, the POMAs and the SOMAs,  
31 have been affected in an overall sense by the bushfires,

1 and your Honour has seen from the tables I have gone to  
2 the percentages for the POMAs and the SOMAs that were in  
3 East Gippsland, and that as a result looking at the  
4 species as a whole the prescriptions are not currently  
5 being met.

6 Further, the prescriptions expressly require that  
7 these minimum areas of good quality or suitable habitat be  
8 maintained; not just established, which is the word used  
9 by Mr Paul. I don't need to take your Honour to it, but  
10 I will give you a few references. The planning standards  
11 at page 469 of the exhibit numbering uses the words  
12 'maintain the FMZ scheme for rare and endangered fauna'.  
13 The language of 'maintain' is repeated in the POMA and the  
14 SOMA prescriptions, and I have already taken your Honour  
15 to some of that. The language is 'identify and maintain  
16 the target'.

17 So the prescription we say requires the protected  
18 areas for this species be current areas of good quality  
19 habitat. It is not a process where you set it and then  
20 forget about it. It is not just concerned with a  
21 historical meeting of a target, but imposes an ongoing  
22 obligation and requirement.

23 We say that each of the conservation measures  
24 that have been put in place for the species that have been  
25 affected have been affected or are likely to have been  
26 affected by the fires. Ms Jacobs in her first affidavit  
27 at paragraph 53(c) deposes to the fact that about half of  
28 the IPA for the greater glider was in the burnt area or  
29 the projected impact area of the fires. Although we do  
30 not yet know the precise numbers, we say that it's obvious  
31 from the tables and the percentages of the POMAs and the

1 SOMAs that were in East Gippsland that the POMAs and SOMAs  
2 in that region are highly likely to have been affected by  
3 the fires.

4 Critically, we say the IPA, the POMAs and the  
5 SOMAs are all premised on the protection of good quality  
6 or suitable habitat for the species, and the fires of  
7 course have directly affected habitat for those species in  
8 the reserved areas in those regions. The extent of the  
9 impact and the impact on the quality and suitability of  
10 habitat is not yet known and is the subject of State  
11 assessment, not yet complete.

12 So we say, given each of these conservation  
13 measures have been affected, the areas protected to meet  
14 these prescriptions will need to be reviewed. The logical  
15 and probable consequence of those reviews will be that the  
16 habitat set aside to meet those prescriptions in  
17 place - we say it's a logical and probable consequence of  
18 those reviews that habitat will need to be set aside,  
19 further habitat will need to be set aside in order to meet  
20 the prescriptions to make up for the fact that some of the  
21 POMAs and some of the SOMAs, for example, and a good  
22 proportion of the IPA is in fire affected areas, and the  
23 land that will be identified will be from non-fire  
24 affected areas in all likelihood. That's why we have  
25 said, and I said on the last time, that the Central  
26 Highlands in areas where these species are found will be  
27 an obvious candidate for such areas.

28 So we say that VicForests in complying with the  
29 precautionary principle must wait, pause timber harvesting  
30 in these areas until review of the conservation measures  
31 have been undertaken.

1                   If I can take you to Mr Paul's evidence in  
2                   relation to that, and that's paragraph 65 and paragraph 66  
3                   of his affidavit, your Honour.

4 HER HONOUR: Yes.

5 MS FOLEY: The argument here in these paragraphs appears to go  
6                   as follows. Fire has affected the East Gippsland area,  
7                   but not the Central Highlands populations. He says, and  
8                   this is in paragraph 66, 'The greater glider has a small  
9                   home range. Therefore, we can treat the populations as  
10                  distinct and separate. So the fire that's impacted the  
11                  East Gippsland population,' he says, 'therefore won't  
12                  impact the population in the Central Highlands.  
13                  Therefore,' he says, 'the prescription remains good for  
14                  the gliders in the Central Highlands.'

15                  We say it's an extraordinary piece of evidence  
16                  because it ignores two important things. Firstly, it's  
17                  not looking at the impact on the species overall. The  
18                  fact that fire impact in the East Gippsland population  
19                  exists means there will be an impact on the species as a  
20                  whole and one can't just ignore that and focus on the  
21                  separate population in the Central Highlands because  
22                  clearly the conservation measures are concerned with the  
23                  species as a whole.

24                  He also doesn't take into account the fact in  
25                  relation to the greater glider, for example, that the IPA  
26                  was based on pre-bushfire understanding and knowledge and  
27                  that finalisation of the IPA because, as I have said, it  
28                  wasn't even finalised in November, it was still to be put  
29                  into final form, finalisation of it post-bushfires may  
30                  well mean changes to the way the populations in the  
31                  Central Highlands are to be protected. It doesn't deal

1 with that at all.

2 To give your Honour an example, the greater  
3 glider action statement, as we have seen, provides for the  
4 additional measure of protecting 40 per cent of the basal  
5 area in harvested coupes. Mr Paul in his affidavit in a  
6 number of paragraphs relies on this, the 40 per cent, to  
7 say in relation to specific coupes at issue in this  
8 proceeding, 'Well, we are meeting the prescription.' This  
9 is paragraphs 152, 156 and 162.

10 We say, given the loss of half of the IPA, it's  
11 safe to say that the additional measure in the greater  
12 glider action statement of protecting 40 per cent of the  
13 basal area in harvested coupes is not going to be  
14 considered sufficient going forward to conserve the  
15 species. This does not seem to have been given any  
16 consideration. Mr Paul simply relies upon the  
17 pre-bushfire protection and doesn't seek to explain why  
18 that is considered adequate by VicForests in the  
19 post-bushfire world.

20 There is no attempt in relation to other  
21 threatened species in the case, no attempt at all in the  
22 Paul affidavit, to respond to the plaintiff's contention  
23 that the protections that were put in place prior to the  
24 bushfires will need to be reviewed to take into account  
25 the bushfire impact and that those reviews may well lead  
26 to different protections for these species in a way that  
27 will impact VicForests' operations and planning going  
28 forward.

29 One might have expected, your Honour, in all the  
30 affidavit material that's been filed by my learned friends  
31 in the last few days, one might have expected evidence

1 from Dr Elizabeth Pryde, who is the acting manager of  
2 biodiversity, conservation and research within VicForests.  
3 Mr Paul describes her work in his affidavit at 23 to 24.

4 VicForests has put on no evidence from Dr Pryde  
5 or anyone else at VicForests as to how VicForests has  
6 taken into account the new information, the new research  
7 that is coming to light post-bushfires about impact on the  
8 threatened species. There is one caveat to that and it's  
9 the letter which talks about a review that will be  
10 conducted and I will go to that in a little while,  
11 your Honour.

12 Mr Paul also deposes - and this is in paragraphs  
13 78 to 81, for example, he deposes that VicForests in his  
14 view is complying with habitat tree prescriptions. The  
15 same kind of evidence is seen at 125 to 127. Again we say  
16 these prescriptions were in place prior to the bushfires.  
17 So it's not grappling with the case that we are advancing.  
18 They were also put in place prior to the listing of the  
19 greater glider.

20 Mr Paul similarly deposes in paragraphs 91 to 99  
21 that VicForests has finalised its giant, tall and large  
22 tree protection instruction. But again we say this  
23 occurred prior to the fires. There's also been no  
24 evidence that any such trees have been identified or would  
25 be protected in any of the coupes in issue in the  
26 proceeding.

27 In the same way, in part E of this affidavit  
28 Mr Paul deposes to the identification and management by  
29 VicForests of what they call high conservation values.  
30 But that document, the HCV document, was prepared prior to  
31 the bushfires and cannot take into account the bushfire

1 impact on fire threatened species.

2 So, your Honour, we say that there is simply no  
3 evidence in Mr Paul's affidavit of any assessment that's  
4 been undertaken as a consequence of the 2019/2020  
5 bushfires or of the consideration of any advice in  
6 relation to the impact on threatened species and the  
7 measures that they might need to take. That includes,  
8 your Honour, for example, the evidence he gives about  
9 their electronic planning system called CENGEA, and I'm  
10 sure I'm not pronouncing that correctly. He talks about  
11 detections of threatened species that are entered into it.  
12 But again there's no evidence that it's taking into  
13 account the impact of the fires or how that's being done.

14 As will become clear from the correspondence  
15 I will take your Honour to, it seems that is because a  
16 review will be undertaken but there is no such work being  
17 done and taken into account in the operations that are  
18 ongoing, save for the injunctive relief that this court  
19 has granted to date.

20 There are some other matters that I must address  
21 your Honour in relation to this affidavit, and then I'm  
22 going to turn to the Jiang affidavit. Your Honour, in  
23 part F of this affidavit Mr Paul gives evidence about  
24 conducting post harvest surveys on four coupes for the  
25 persistence of threatened fauna, including species such as  
26 the greater glider, to assess the efficacy of habitat  
27 retention for those species. Mr Paul deposes that on a  
28 preliminary basis those results are showing that those  
29 species remain within and around the harvested area.

30 However, we point out that no evidence was  
31 provided to support that statement. The underlying



1 material that might found that assertion has not been  
2 provided so we cannot understand it or test it. If  
3 VicForests had evidence in relation to the success of its  
4 retention methods we would have expected that evidence to  
5 have been exhibited to this affidavit. So we say the  
6 court should not attribute any weight to that assertion,  
7 particularly so where the scientific literature is clear  
8 that the greater gliders die during or shortly after  
9 timber harvesting.

10 I want to take your Honour to some evidence in  
11 relation to that. There's a bit of evidence in relation  
12 to it, but I will take your Honour to one example. This  
13 is in the first Jacobs affidavit. It's exhibit DJ-21 at  
14 page 1288, your Honour.

15 HER HONOUR: Yes, I have that page.

16 MS FOLEY: Thank you. Your Honour, this is the Scientific  
17 Advisory Committee under the Flora and Fauna Guarantee Act  
18 final recommendation for its nomination for listing the  
19 greater glider. So this is what, your Honour would have  
20 seen, forms the basis for the action statement. It is a  
21 very important document given its connection to the  
22 legislative scheme for listing.

23 If I can take your Honour to page 1290, please.

24 HER HONOUR: Just a minute. I don't think I have got it. Am

25 I looking at page 188 or - - -

26 MS FOLEY: The reference started at 1288. I want to take  
27 your Honour to 1290.

28 HER HONOUR: Yes, I have that.

29 MS FOLEY: This is the section dealing with timber harvesting,  
30 your Honour.

31 HER HONOUR: Yes.

1 MS FOLEY: 'Timber harvesting in greater glider habitat has  
2 been proven to cause declines and/or local extinctions of  
3 greater glider populations.' There is a reference there to  
4 a number of scientific sources in the literature. It then  
5 says, 'Timber harvesting practices reduces the number of  
6 hollow bearing trees available for denning' - the denning  
7 trees of course are where the greater glider makes its  
8 home - 'and for the female of the species where it has its  
9 young, or as a result of regeneration burns after the  
10 logging. In addition,' it says, 'the species does not  
11 cope well with habitat change. Although all animals may  
12 not die from the initial impact, they will die shortly  
13 afterwards. This is due to life history traits, affinity  
14 with home range, small home ranges, attachment to hollow  
15 bearing trees they use for denning, and their specialist  
16 diet.'

17 HER HONOUR: Yes.

18 MS FOLEY: We also say, your Honour, that the HCV prescriptions  
19 that are deposed to by Mr Paul at part H cannot provide  
20 the court with any confidence that timber harvesting will  
21 be carried out in a way that will preserve habitat in the  
22 coupes. For example, the summary and retention plan for  
23 the Pony coupe - this is referred to at paragraph 149 of  
24 Paul - provides that the coupe will be subject to a post  
25 harvest burn, and the measures are deposed to at  
26 paragraphs 154, 159, 216, 225 and 239.

27 It's clear from that description they are  
28 discretionary insofar as they relate to the retention of  
29 habitat trees and younger trees. They do not state how  
30 they are related to the conservation of the greater  
31 glider. For example, the action statement executive

1 summary makes the point that a gap of 150 metres is too  
2 great for a greater glider to glide. They can glide a  
3 maximum distance of 100 metres.

4 It also provides for discretionary retention of  
5 habitat islands. We say that such islands are much  
6 smaller than the home range of a single glider. Mr Paul  
7 himself deposes to the small home range and it can't be  
8 disputed on the evidence most are less than half a  
9 hectare, your Honour, this is the habitat islands, and yet  
10 the greater glider home range is one to two hectares.

11 We also see in relation to the Dowse coupe, and  
12 this is at 192, that it will be burned after harvesting.  
13 It's a clear impact on the habitat there, your Honour.

14 In relation to road works at 185 Mr Paul deposes  
15 that no timber harvesting activities are planned for the  
16 La Trobe coupe, but says in the next line that a road will  
17 be built. We say that construction of a road is highly  
18 likely to result in destruction of habitat. It's  
19 inevitable that habitat will be destroyed. There is no  
20 assessment of how VicForests' conduct in this coupe will  
21 affect species at all, let alone in light of the impacts  
22 of the bushfires.

23 Your Honour, that deals from an evidentiary  
24 perspective with paragraph 4(a) and paragraph 4(c) of that  
25 summary at the beginning of the affidavit. But I want to  
26 now turn to 4(b), if I can, which is the other limb to  
27 what is advanced in this paragraph. Here Mr Paul deposes  
28 that VicForests, he says, is not harvesting - he says he  
29 is satisfied that VicForests is not harvesting or  
30 intending to harvest the habitat of fire affected  
31 threatened species in the coupes the subject of the

1 proceeding.

2 I must confess on the plaintiff's side we are a  
3 little confused by this and perhaps my learned friend will  
4 enlighten us at some point. We say that VicForests is  
5 harvesting in coupes that contain fire affected threatened  
6 species or are likely to contain such species as well as  
7 habitat. It's not just a habitat case. So it's  
8 interesting that Mr Paul here only refers to habitat.  
9 He's silent as to the species themselves.

10 But also to the extent that he's deposing that  
11 VicForests is not harvesting and does not intend to  
12 harvest the habitat of fire affected threatened species  
13 his evidence is contrary to evidence of the detections of  
14 those species in the coupes and within the harvest units  
15 which is evidenced, we say, by photos and video evidence  
16 that's been put on by the plaintiffs and also by in some  
17 cases VicForests' own maps.

18 Your Honour, at this point we thought it would be  
19 useful to show the video which is one of the videos in the  
20 affidavit of Mr McKenzie to give an example of the direct  
21 evidence of species detections that we are talking about.

22 HER HONOUR: Yes.

23 MS FOLEY: We can pause now so that we can get that video set  
24 up, your Honour.

25 (A video was played to the court.)

26 MS FOLEY: Thank you, your Honour. Your Honour, this video was  
27 taken by Mr McKenzie. It's exhibit JRM-14. It's an  
28 example of the kind of direct evidence that we have put  
29 before the court, people from the plaintiff's organisation  
30 as your Honour will have seen with experience in making  
31 these identifications with relevant qualifications who

1 regularly provide reports to government in relation to  
2 detections of the greater glider. That video was taken in  
3 the Upper Thomson coupe in the harvest unit, a coupe where  
4 logging has stopped due to the injunctive relief, interim  
5 relief, that has been given in this proceeding.

6 It is difficult to see how, given the evidence  
7 that has been put forward, direct evidence from  
8 Mr McKenzie and Ms Forster, how it is that Mr Paul can  
9 make the statement that he makes at paragraph 4(b). Not  
10 only that, your Honour. In the third affidavit of  
11 Ms Jacobs there is evidence of the number of threatened  
12 species detections within the specific areas of the  
13 subject coupes mapped by VicForests itself, that is the  
14 harvest units.

15 We see that some of the defendant's maps  
16 themselves record the fire affected threatened species in  
17 the harvest unit. I will give your Honour an example of  
18 that. It's exhibit WEP-18 to the Paul affidavit, and  
19 that's for the Casella East coupe which shows seven  
20 greater gliders in the harvest unit planned for logging by  
21 the most intensive of the methods deposed to by Mr Paul.

22 Mr Paul does not attempt to deal with this kind  
23 of evidence at all, your Honour. But it does seem at odds  
24 with much of the evidence for Mr Paul to say in 4(c) what  
25 he says while at the same time acknowledging that there  
26 are detections of species and habitat values in the coupes  
27 in VicForests' own material.

28 We have also put evidence before the court  
29 recording that the logging that's occurred to date in six  
30 of the subject coupes which are part logged show, firstly,  
31 that hollow bearing trees have been pushed over despite

1 the defendant's statements that such trees are to be  
2 retained. Exhibit JRM-37 at pages 35 to 36 to the second  
3 McKenzie affidavit depicts an example of a very large  
4 hollow bearing tree pushed over in the Cumba coupe.

5 In the second affidavit of Mr McKenzie at  
6 paragraphs 33 to 39 he deposes to his observations of  
7 hollow bearing trees pushed over in three additional  
8 part-logged coupes. We also say that evidence filed by  
9 the plaintiff discloses that coupes have been intensively  
10 logged with few or no retained trees recorded in large  
11 parts of the coupes, despite the defendant's statements  
12 that certain minimum numbers of trees are to be retained  
13 per hectare in excess of the five per hectare minimum  
14 required by the code.

15 In one instance we say that about five hectares  
16 has been cleared with just one retained tree. That's in  
17 the Rockarime coupe, and the photo is at JRM-39, page 46.  
18 In another coupe, the Timber Top Princess Di coupe, a very  
19 large cleared area is visible with few retained trees.  
20 That's JRM-40, page 49. There's further evidence in the  
21 second affidavit of Mr McKenzie at 43 to 57. In light of  
22 that evidence, your Honour, I'm not going to address 4(b)  
23 any further. But I will turn, if I can, to the Jiang  
24 affidavit.

25 HER HONOUR: Yes.

26 MS FOLEY: And that is directed to the serious question to be  
27 tried limb of the argument. Does your Honour have that  
28 affidavit? There were two affidavits of Ms Jiang and I'm  
29 going to start with the first one filed on 14 February  
30 2020.

31 HER HONOUR: Just a minute. Which one do you want first?

1 MS FOLEY: The 14 February affidavit, your Honour, the  
2 affidavit of Ruizhu Jiang.

3 HER HONOUR: Yes.

4 MS FOLEY: If you look at the first part of the affidavit,  
5 going down to paragraph 3, setting out education, training  
6 and experience.

7 HER HONOUR: Yes.

8 MS FOLEY: You'll see in paragraph 7 Ms Jiang only started work  
9 at VicForests quite recently, January 2020, according to  
10 the affidavit.

11 HER HONOUR: Yes.

12 MS FOLEY: Ms Jiang completed a masters and a PhD. It says  
13 completed in February 2020.

14 HER HONOUR: Yes.

15 MS FOLEY: Conferral date yet to be confirmed. Her affidavit  
16 says nothing about any other relevant employment. So it  
17 does appear that her very new role at VicForests is her  
18 first employment position in the field.

19 At paragraph 25 Ms Jiang deposes to having  
20 reviewed maps created by another VicForests employee,  
21 Ruhong Yan. We have no evidence from that person and  
22 VicForests has not put before the court the spatial data  
23 said to have been used in preparing those maps.

24 Ms Jiang then prepared a table of the proportion  
25 of the threatened species at issue in this proceeding that  
26 she says are present in fire affected areas. If I can  
27 take your Honour to paragraph 26 it appears - it's not  
28 expressly said, but it appears from this paragraph that  
29 this analysis was triggered by the proceeding. It doesn't  
30 appear that it was a pre-existing analysis being done by  
31 VicForests.

1           The table at 26 sets out the results of her work  
2           which records a small percentage of threatened species  
3           relevant to this proceeding in the fire affected areas.

4           We say it is difficult to reconcile that evidence  
5           with the evidence published by the State government in its  
6           draft report at DJ-14, pages 1179 to 1181 of the exhibits,  
7           that identify the alpine tree frog, the smoky mouse, the  
8           greater glider and the sooty owl as species of most  
9           immediate concern based on data including habitat  
10          distribution in currently burnt area and per cent decline  
11          in species abundance. I went to some of that material on  
12          the last occasion, your Honour.

13          Now, at 31 Ms Jiang sets out a similar analysis  
14          in relation to the proportion of predicted potential  
15          important habitat in fire affected areas. I will go to  
16          this. It's quite small and maybe difficult for  
17          your Honour to read, but I want to look at some of the  
18          information in this table. Has your Honour got the table  
19          there at paragraph 31?

20   HER HONOUR: Yes.

21   MS FOLEY: We can see that it's dealing with each of the  
22          species at issue in the proceeding. Can I start with the  
23          greater glider your Honour will see about three columns  
24          in.

25   HER HONOUR: Yes.

26   MS FOLEY: Under the section 'total important habitat in State  
27          forest', 'not affected' and then the third one is  
28          'affected by fire'.

29   HER HONOUR: Yes.

30   MS FOLEY: Ms Jiang says she found 18 per cent of the greater  
31          glider modelled habitat in State forest was affected by



1 fire and six per cent of that species is modelled habitat  
2 not in State forest affected by fire. We contrast that to  
3 the State preliminary report prepared by the department's  
4 biodiversity unit which found that 26 per cent of  
5 the greater glider modelled habitat was within the current  
6 fire extent - that was as at 23 January 2020 - and that  
7 47 per cent was within the projected fire impact. The  
8 reference for that, your Honour, is DJ-15, which is the  
9 preliminary Victorian plan, at page 1232.

10 Looking to the alpine tree frog, Ms Jiang found  
11 that one per cent of the alpine tree frog modelled habitat  
12 in State forest was affected by fire and six per cent of  
13 the species modelled habitat not in State forest affected  
14 by fire. Does your Honour see those figures?

15 HER HONOUR: Yes.

16 MS FOLEY: If we compare that to the State preliminary report,  
17 this is again at DJ-15, which found 23 per cent of  
18 the alpine tree frog modelled habitat was within the  
19 current fire extent as at 23 January 2020 and 98 per cent  
20 was within the projected fire impact. That's at page 1230  
21 of the bundle.

22 Looking to the powerful owl, Ms Jiang at 31 found  
23 that 14 per cent of the powerful owl modelled habitat in  
24 State forest was affected by fire and five per cent of the  
25 species modelled habitat not in State forest was affected  
26 by fire. Yet the State preliminary report at DJ-15 found  
27 23 per cent of the powerful owl modelled habitat was  
28 within the current fire extent as at 23 January and  
29 35 per cent was within the projected impact area. That's  
30 at page 1232 of the bundle.

31 For the sooty owl your Honour will see in the

1 table Ms Jiang found that 27 per cent of the sooty owl  
2 modelled habitat in State forest was affected by fire and  
3 eight per cent of the species modelled habitat not in  
4 State forest was affected by fire. We contrast that to  
5 the State preliminary report at DJ-15 which found that  
6 41 per cent of the sooty owl modelled habitat was within  
7 the current fire extent and 59 per cent was within the  
8 projected impact area.

9 Now, it is we say a curious result that the  
10 VicForests results are different to the department's  
11 results given that the VicForests analysis is said to be  
12 based on the department's data. One would have expected  
13 an explanation for the discrepancy in the evidence filed  
14 by Ms Jiang, and of course we say ultimately these are  
15 questions for trial.

16 But we do also note that the greater glider and  
17 the smoky mouse were found in the most recent Commonwealth  
18 analysis of species. Your Honour will have seen that in  
19 the recent affidavit we filed. Of the species of most  
20 concern, these two were identified as among the 19 mammals  
21 identified as being on the provisional list of animals  
22 requiring urgent management intervention. That is at  
23 DJ-110 at page 35 of that bundle. That is based on  
24 pre-fire imperilment, bio-overlap, fire mortality and  
25 post-fire mortality. That was conducted, your Honour,  
26 that research by an expert panel appointed by the  
27 Commonwealth government comprising senior academics and  
28 scientists using a framework developed and documented to  
29 conduct the assessment. That's at DJ-110, figure 2, page  
30 28.

31 Critically, it's evident from page 22 of that

1 bundle that it was conducted having regard to the biology  
2 of the species and their vulnerability to fire and their  
3 ability to recover from it. It's a much more nuanced  
4 analysis than simply identifying percentages of modelled  
5 habitat, which is what we see here.

6 Your Honour will see in DJ-110 when the  
7 methodology is described it's talking about the physical,  
8 behavioural, ecological and life history traits that  
9 influence a species' response to fire and the capacity of  
10 populations to recover and so on.

11 Importantly, your Honour, we say none of the  
12 underlying material that was relied upon by Ms Jiang has  
13 been provided to the court. There's not a single exhibit  
14 to this affidavit. It's extraordinary. Even if we do  
15 accept her figures at face value, what we see in the table  
16 at 31 is still very concerning. It shows 14 per cent of  
17 predicted potential important habitat of the powerful owl,  
18 for example, affected by the fire, 14 per cent;  
19 27 per cent for the sooty owl; and 18 per cent for the  
20 glider.

21 But of course we say without knowing the inputs,  
22 without knowing the underlying material the court can't  
23 afford it much weight. But in an overall sense and  
24 looking at it from a serious question to be tried  
25 perspective these kinds of factual disputes will be  
26 matters for the trial. It is clear that there is a real  
27 question to be answered about the precise impact of the  
28 fires on particular threatened species at issue in these  
29 proceedings and on their habitat. We rely on the already  
30 published information from the State and Commonwealth  
31 governmental responses in support of that proposition.

1                   It's also, we say, the kind of information that  
2                   the governmental responses are likely to be building upon  
3                   and finessing over time as their work continues. The  
4                   governmental responses will be building upon multiple  
5                   sources of knowledge in contrast to what we see in this  
6                   affidavit. We know at the Federal level, for example,  
7                   expert panels are being convened. That will provide, we  
8                   hope, the very best information available to understand  
9                   the impacts and be able to make the most informed  
10                  decisions going forward. That is a process that will take  
11                  time.

12                  It is unreasonable to have expected Ms Jiang of  
13                  course to have that kind of data available to her. It  
14                  doesn't exist. So no-one can say, Ms Jiang can't say,  
15                  what the impacts are. It is not yet known. I will make  
16                  that good by reference, your Honour, to some of the  
17                  correspondence the defendant has put in evidence.

18                  It is also significant, we say, that the impacts  
19                  even identified by Ms Jiang - there's no evidence that  
20                  VicForests has even taken into account those impacts in  
21                  the planning of coupes containing such species the subject  
22                  of this application.

23                  That brings me then to the correspondence with  
24                  the chief conservation regulator, which is the  
25                  correspondence I have been referring to a little bit,  
26                  your Honour. The Paul and the Jiang affidavits that I've  
27                  just been working through were filed last week. Yesterday  
28                  we received an affidavit from Mr Prowse, one of the  
29                  solicitors for the defendant, exhibiting correspondence  
30                  between VicForests and the chief conservation regulator.  
31                  That correspondence contains information we say is

1 relevant to the serious question to be tried analysis.

2 So if I can take your Honour to that. This is in  
3 the affidavit of Mr Prowse.

4 HER HONOUR: Yes.

5 MS FOLEY: And I'll take your Honour first to the exhibit  
6 ACSP-4.

7 HER HONOUR: Is this the affidavit dated 17 September?

8 MS FOLEY: February, yes.

9 HER HONOUR: February, sorry.

10 MS FOLEY: Yes, your Honour. I believe there's only one  
11 affidavit from Mr Prowse. Your Honour, the letter - the  
12 bundle is not numbered, but it is about four pages from  
13 the back, if that helps.

14 HER HONOUR: Exhibit 4?

15 MS FOLEY: Yes.

16 HER HONOUR: I've got that. Thanks.

17 MS FOLEY: Your Honour, this is a letter dated 6 February 2020  
18 from VicForests to the Chief Conservation Regulator.  
19 Your Honour will see that.

20 HER HONOUR: Yes.

21 MS FOLEY: If we can pass over the first few paragraphs and  
22 take your Honour to the paragraph starting, 'Following the  
23 current significant bushfires' it says 'VicForests  
24 will' - and I emphasise that word - 'undertake a review of  
25 its assessed high conservation values as outlined in our  
26 forest management plan which will include all current  
27 threatened species and any species that may become  
28 threatened.'

29 It then says, 'To assist with this process we are  
30 seeking access to the following information.' It seeks a  
31 range of information. So this shows two things. First,

1 that review will be undertaken. It hasn't yet occurred.  
2 It doesn't appear of course from the Paul or Jiang  
3 affidavits that anything has occurred, and that's then  
4 made clear in this letter. It will occur.

5 Secondly, it evidences a recognition we say that  
6 the impact of the fires does need to be taken into account  
7 and, more than that, that further information is required  
8 to undertake the review. So this is an acknowledgment,  
9 and this letter, your Honour, is from the chief executive  
10 officer of VicForests - she has put in an affidavit  
11 herself, and I will go to that in a minute - recognising  
12 the need for a review and recognising the need for  
13 information, which raises the question: why is VicForests  
14 logging in the meantime? This has not been addressed in  
15 the evidence.

16 Neither the CEO nor Mr Paul nor the head of  
17 biodiversity who we don't hear from at all has seen fit to  
18 explain to the court why VicForests considers it  
19 appropriate, given its legal obligations, to continue  
20 logging in the meantime having recognised the need for  
21 this review.

22 If I can take your Honour to the next letter,  
23 please. This is the response from the Chief Conservation  
24 Regulator. It is ACSP-5, the next exhibit.

25 HER HONOUR: Yes.

26 MS FOLEY: This letter, which seems to have been dated  
27 14 February at the bottom of the letter by hand, there are  
28 a few important features of this that we seek to  
29 emphasise, your Honour.

30 The first is there's a discussion in the first  
31 part of the affidavit, I'm looking under 'Biodiversity

1 information', as to the importance of the data gathered in  
2 their consideration of likely impacts, and of course we  
3 embrace that.

4 It then says, 'As you are aware, information in  
5 relation to the fire impacts will continue to evolve as  
6 fire impacted areas become safe to enter and as further  
7 studies and assessments of species and vegetation  
8 communities are undertaken.' We say that assists the  
9 plaintiff. It shows the current state of information, the  
10 current state of knowledge is incomplete.

11 We can also see from this letter that some  
12 information was provided to VicForests on 14 February.  
13 That's in the next paragraph. It says, 'I understand that  
14 as at 14 February biodiversity division has sent Mr Paul  
15 the list of key biodiversity datasets.' So as recently as  
16 14 February information has been provided to VicForests.  
17 We of course can expect that that's going to be a process  
18 that will continue, and that is made clear in this letter  
19 which talks about in a number of places the evolving  
20 knowledge and information that will be provided.

21 So we say that the response from the regulator  
22 supports the plaintiff's case. The current state of  
23 information is not yet complete, more information is  
24 coming to hand, more research is being done, and that  
25 research will and needs to inform VicForests' actions  
26 going forward.

27 VicForests, as your Honour will have seen from  
28 the submissions that were filed, relies upon the part of  
29 this letter - and it's on page 2, your Honour - in  
30 relation to the current timber harvesting that's ongoing.  
31 If your Honour can see the third full paragraph on that

1 page starting, 'Based on current intensity of harvesting'.

2 HER HONOUR: Yes.

3 MS FOLEY: She says, 'I do not expect that in the short-term  
4 there will be the potential for serious or irreversible  
5 damage from timber harvesting activities in areas and FMAs  
6 not listed above. This is based on an expectation that  
7 existing prescriptions outlined in the code and policy  
8 commitments to modified harvesting techniques are complied  
9 with. It is also based on the expectation that the  
10 intensity of harvesting in these areas will not increase  
11 in the short-term.' VicForests seizes upon that, although  
12 acknowledging that this one person's opinion of course is  
13 not determinative.

14 But we emphasise the next sentence, 'I note the  
15 state of knowledge on biodiversity conservation is  
16 continuously evolving and my position may change in  
17 relation to appropriate management activities as further  
18 information is available.'

19 Now, this is a person with a particular role  
20 within government who has written this letter. Our point  
21 of course is much broader but seizes upon the same  
22 concept, which is while information is still being  
23 gathered, while VicForests is to commence a review and is  
24 seeking information relevant to that, let alone the  
25 governmental reviews that are being undertaken, why has  
26 VicForests decided not to wait? It has not been answered  
27 in the evidence.

28 So to summarise in relation to VicForests'  
29 evidence on a serious question to be tried we say that  
30 when one stands back and looks at this evidence it in fact  
31 supports our case. It supports the plaintiff's core



1 claim, which is that VicForests has not taken into account  
2 the impact of the bushfires in its timber harvesting  
3 planning and operations. We do not see in the operations  
4 that are being conducted absent the undertakings and  
5 interim relief that's been granted by this court taken  
6 into account the research and advice that's already  
7 emerged from the State and Commonwealth responses, each of  
8 which state the populations of fire affected species  
9 outside the burnt areas are of increased importance and  
10 recovery and mitigation will increasingly include options  
11 beyond the fire areas because the fires are unprecedented.

12 Your Honour, I believe I gave last time the  
13 references to those statements which turns to we need to  
14 look to these unburnt areas, we need to look to these  
15 sanctuaries. But I will just identify the pinpoint  
16 references again. DJ-15, which is the State preliminary  
17 Victorian plan, at page 1219, refers to the fact that  
18 mitigation will increasingly include options beyond the  
19 fire areas; page 1245 describes in the identification of  
20 immediate emergency response action as a key action  
21 'protect and manage key unburnt areas and populations';  
22 and at page 1247 another reference in the table 13 to the  
23 protection and management of key populations of species  
24 outside the current fire extent, and it specifically  
25 identifies arboreal mammals. The greater glider is an  
26 arboreal mammal.

27 The Commonwealth level similarly, and we say  
28 unsurprisingly, identifies protection of unburnt areas  
29 described in that document as refuge areas as important.  
30 The reference there is DJ-111, at page 50 of the bundle.  
31 It talks about protecting unburnt areas within or adjacent

1 to recently burnt ground that provide refuge, as well as  
2 unburnt areas that are not adjacent to burnt areas.

3 There's also in DJ-116, page 87, a reference to  
4 the objective of identifying and appropriately managing  
5 refuge areas, those parts of the landscape that escaped  
6 the fire.

7 So we say, your Honour, based on that evidence  
8 that VicForests' own material establishes non-compliance  
9 with section 2.2.2.2 and 2.2.2.3. We specifically rely on  
10 the letter from the CEO, Ms Dawson, which amounts to an  
11 admission of the need for a review and the need for more  
12 information to be taken into account.

13 So with that, your Honour, can I turn then to the  
14 balance of convenience. I will be shorter in relation to  
15 this, your Honour. I addressed your Honour last time in  
16 relation to the factors that we say weigh strongly in the  
17 plaintiff's favour at this stage of the analysis.

18 In short, we say if the injunction is not granted  
19 and VicForests is permitted to harvest timber in the  
20 coupes the subject of the application irreparable harm  
21 will be done to the species in the coupes. But beyond  
22 these individual coupes and beyond the animals that live  
23 in those coupes, because these species are already listed  
24 as threatened - and your Honour has seen the references as  
25 to what 'threatened' means; it is on the path to  
26 extinction - these species have been impacted by the  
27 bushfires, we say there is a real risk of irreparable harm  
28 to the overall population of the species.

29 Since the last hearing VicForests has filed  
30 affidavit material relevant to the question of balance of  
31 convenience and I will address that. The evidence filed

1 by VicForests is directed to establishing the financial  
2 loss that it says it will suffer and has suffered as a  
3 result of the injunction sought over the 15 coupes that  
4 are particularised in the statement of claim.

5 The Creek affidavit is the affidavit of relevance  
6 here, and it describes the impact in two ways: immediate  
7 impact and longer term impact. Can I take your Honour to  
8 that affidavit, please.

9 HER HONOUR: Yes.

10 MS FOLEY: Thank you, your Honour. Looking first to the  
11 immediate impact, your Honour, in paragraph 68 of  
12 the affidavit Mr Creek deposes that VicForests' financial  
13 loss is currently known to be \$76,154, and he says could  
14 reach \$119,154. These sums principally consist of amounts  
15 paid to contractors who are stood down and sums paid to  
16 contractors in respect of the cost of moving equipment  
17 from one coupe to the other.

18 Looking next to what is described as the longer  
19 term impact, I need to take your Honour to an earlier part  
20 of the affidavit. This is paragraph 28 where Mr Creek  
21 deposes to VicForests' customer contracts to supply  
22 timber. At 51 he deposes that VicForests is projecting a  
23 shortfall in its ability to meet its contractual  
24 obligations for the 2020 to 2021 supply year principally  
25 due to the bushfire impact. This estimate is projected at  
26 120,000 cubic metres, and it is made clear by Mr Creek  
27 that it is an estimate only, it's a projection, and that's  
28 at 52.

29 He then deposes that the 15 coupes the subject of  
30 the proceeding represent 67,000 cubic metres in terms of  
31 volume and - this is the critical part at 61 - he says on

1 that basis a loss of the ability to harvest in these  
2 coupes represents a critical addition to the shortfall.  
3 So we already are going to have a shortfall, is the  
4 evidence, but this will add to the shortfall and increase  
5 it.

6 At 68 Mr Creek says he can't quantify the risk.  
7 In other words, he says a figure can't - these are my  
8 words, a figure can't be put on it. What he does say is  
9 it is material and real. So that is the evidence as to  
10 the longer term impact.

11 I gave your Honour the wrong reference there.

12 The material and real reference is 73. My apologies.

13 HER HONOUR: 73, yes.

14 MS FOLEY: The plaintiff makes the following submissions in  
15 relation to the longer term impact evidence. I should say  
16 before I get to that we don't take issue with the figures  
17 for the short-term impact. The immediate impact, we don't  
18 take any issue with that.

19 The longer term impact we do have some  
20 submissions to make in that regard. Firstly, we say any  
21 loss of course is premised on the notion of a fixed  
22 contractual obligation to supply a certain amount of  
23 timber. Mr Creek does not exhibit an example of one of  
24 these customer contracts. We know from public statements  
25 made by VicForests in other contexts that VicForests can  
26 and does rely on force majeure provisions in its  
27 contractual arrangements.

28 We have put into evidence in the third Jacobs  
29 affidavit at exhibit DJ-118 a press release published by  
30 VicForests on 7 February of this year that refers to  
31 reliance on force majeure 'because fires have meant timber

1 supply cannot be guaranteed in the foreseeable future from  
2 East Gippsland and that force majeure is a legal and  
3 administrative step that VicForests is obliged to take if  
4 it knows that circumstances will prevent it meeting  
5 contractual obligations.'

6 Yet Mr Creek's evidence is completely silent  
7 about force majeure, its ability to be invoked here or  
8 otherwise, and of course, your Honour, we say one would  
9 expect in circumstances where a shortfall is going to be  
10 caused by matters outside of VicForests' control that  
11 VicForests would have an ability in its contracts to alter  
12 its obligations. But we have not been given evidence in  
13 relation to that or, critically, an example of the  
14 contracts that we could review ourselves.

15 So we say that the court should put little weight  
16 on the evidence about risks to VicForests of the shortfall  
17 in circumstances where VicForests has chosen not to  
18 provide an example of the contract or a complete picture  
19 in relation to the options open to it to alter its  
20 contractual obligations in relation to supply.

21 Secondly, and Mr Creek's affidavit makes this  
22 good, the shortfall is an estimate only and it might  
23 change. So at 52, for example, Mr Creek says that  
24 VicForests may ultimately be able to supply timber from  
25 fire affected areas. If this occurs, the magnitude of the  
26 risk created by any injunction would change.

27 We also say, your Honour, thirdly, that at  
28 paragraph 69 Mr Creek makes clear that the longer term  
29 impact evidence is given on the basis of an injunction  
30 being in place over a 24-month period. We say that that  
31 assumption doesn't take into account that in that 24-month

1 period governmental responses may well lead to reviews and  
2 alterations to the protections in place that will mean  
3 VicForests may not be able to log in some or all of these  
4 coupes in any event. That would of course mean that the  
5 increased shortfall would be due to government action  
6 rather than the injunctions.

7 Why does that matter? At paragraph 55 Mr Creek  
8 deposes that where VicForests has lost income as a result  
9 of the government's Leadbeater possum recovery program it  
10 has received financial compensation from the government,  
11 and that is substantial. If we can turn to that evidence,  
12 57 and 58, we see in the 2018 financial year the grant was  
13 over \$5.5 million. In 2019 the value had risen to about  
14 \$11 million. This is in relation to the Leadbeater possum  
15 recovery program. Those are significant sums. We say  
16 that what isn't found in this affidavit, and we don't  
17 think he could reasonably say it, is that any losses  
18 sustained by VicForests as a result of changes to  
19 protections in relation to threatened species arising from  
20 the fires wouldn't also lead to compensation from the  
21 government in relation to foregone income.

22 So to summarise our position on the figures and  
23 the evidence in relation to the financial impact we say  
24 while VicForests has put forward a clear evidentiary basis  
25 for its short-term loss, and that's in the order of  
26 between 76,000 to \$120,000, the most that can be said in  
27 relation to the longer term impact is there may be some  
28 longer term impact. But there is not before the court a  
29 sufficient evidentiary basis to make any finding about  
30 what that impact might be in terms of dollar figures or  
31 even what the chances are of it occurring.

1 I want to summarise the position on the balance  
2 of convenience, and before I do that I should briefly  
3 address the affidavit of Ms Dawson, who is the CEO of  
4 VicForests. Does your Honour have that affidavit?

5 HER HONOUR: What date is it? Is it in the convenient - - -

6 MS FOLEY: Yes, 12 February.

7 HER HONOUR: Yes.

8 MS FOLEY: Thank you, your Honour. In relation to the  
9 financial impact of the injunction Ms Dawson's affidavit  
10 relies entirely on the evidence given by Mr Creek. So we  
11 say in that sense it doesn't add much to the analysis,  
12 therefore the focus should be on the detailed evidence  
13 given by Mr Creek. But we do wish to refer your Honour to  
14 a couple of the paragraphs which we say need to be read  
15 quite carefully.

16 Paragraph 23, it says, 'Based on the material  
17 contained in Mr Creek's affidavit, I am satisfied that  
18 assuming VicForests is restrained from harvesting in the  
19 coupes the subject of the statement of claim in this  
20 proceeding for a period of up to two years VicForests will  
21 likely be unable to meet its contracted supply commitments  
22 for the 2020-21 supply year.'

23 Now, it might be read as suggesting that it's the  
24 injunction that would lead to that result. But of course  
25 that's not right. On Mr Creek's evidence it might  
26 contribute to a shortfall, but the projected shortfall is  
27 much larger than the volume of timber that might be tied  
28 up by the injunction.

29 If one looks at paragraph 28 of this affidavit  
30 that does seem to be accepted by Ms Dawson because she  
31 uses the formulation 'materially increase the risk' but we

1 do want to make that clear because paragraph 23 could be  
2 read more broadly.

3 HER HONOUR: I would like to think that any final injunction  
4 application would be completed before two years.

5 MS FOLEY: Yes, we would like to think so too, your Honour.

6 It's a long estimate, but I understand the basis upon  
7 which it's been put and experience in other cases.

8 HER HONOUR: Yes.

9 MS FOLEY: Ms Dawson at 27 also refers to the restrictions on  
10 logging caused by increased Leadbeater possum detections.  
11 Of course we refer to Mr Creek's evidence, which is not  
12 referred to here, which is that VicForests receives  
13 significant compensation for those restrictions. I don't  
14 need to deal with that affidavit in any more detail,  
15 your Honour.

16 I would like to summarise then our position on  
17 balance of convenience. We say this. We say the balance  
18 of convenience strongly favours the grant of injunctive  
19 relief. We say we have not sought injunctive relief in a  
20 broad brush fashion. We have sought it in relation to 15  
21 coupes where logs is active or imminent and where there is  
22 evidence of a threatened species in the coupe.

23 Given the status of these species as threatened  
24 and given the significant impact of the bushfires on  
25 threatened species, we say the risk to the species if  
26 logging is allowed to go ahead is serious and irreparable,  
27 and that is so whether one is looking at the animals in  
28 those coupes right now but also if one is looking more  
29 broadly to the populations as a whole which of course is  
30 critical with threatened species that are on the path to  
31 extinction. It goes without saying, your Honour, but



1 I will say it anyway. Once these species are extinct  
2 there is no going back. They will be lost forever.

3 Against that what we have from VicForests is  
4 evidence of financial loss in the short-term of \$70,000 to  
5 \$120,000. We don't say that that's not significant money.  
6 It is real money. It is not millions of dollars, though.  
7 Although there may be longer term impact, it is not  
8 possible to quantify it at the present time on VicForests'  
9 own admission.

10 Moreover, we say that if we lose ultimately in  
11 the trial and VicForests is able to log in these coupes,  
12 the resource will be available to VicForests at that later  
13 stage. So it is not a resource that is lost forever to  
14 VicForests, unless of course we win. For VicForests, if  
15 we lose at the trial, that resource will become a bonus  
16 for the following supply year.

17 So at the end of the day we say when one compares  
18 the character, the nature of the loss that will be  
19 sustained if logging is permitted to recommence compared  
20 to the VicForests' financial loss the balance is strongly  
21 in the plaintiff's favour. I referred your Honour last  
22 time, and I will refer again, just to the references in  
23 Environment East Gippsland v VicForests [2009] VSC 386 at  
24 paragraphs 98 to 106. Those are my submissions,  
25 your Honour, unless you have questions.

26 HER HONOUR: No, thank you. Mr Waller.

27 MR WALLER: If your Honour pleases. Your Honour, VicForests'  
28 position is that if your Honour should not grant the  
29 interlocutory injunction that's sought on the basis that  
30 the plaintiff has not met the prima facie case test,  
31 sometimes referred to as the serious question test, as

1 that test has been construed in the authorities and  
2 factoring in the lack of strength of the plaintiff's case,  
3 the balance of convenience favours the refusal of the  
4 injunction.

5 It must be remembered that the serious question  
6 to be tried or prima facie case must be viewed in the  
7 context of the relief sought in the principal proceeding,  
8 as my learned friend said, by reference to the statement  
9 of claim. The statement of claim sets out clearly the  
10 relief that is sought in the prayer for relief. It is  
11 clear from the prayer for relief, in particular paragraph  
12 (d), that what is sought is a final injunction to restrain  
13 VicForests from carrying out timber harvesting operations  
14 in any coupe known to VicForests or the department to  
15 contain or likely to contain a fire affected threatened  
16 species or the habitat of such species unless and until  
17 seven matters occur.

18 My learned friend perhaps somewhat candidly in  
19 her final submission just then said that if VicForests  
20 ultimately succeeds in the principal proceeding then the  
21 resource that would be otherwise tied up would be then  
22 available to it, but that if they win then it would  
23 forever not be available. Thereby my learned friend has  
24 revealed that, although expressed as an 'unless and until'  
25 situation, what is really being sought is effectively a  
26 moratorium on timber harvesting not just in the 15 coupes  
27 that are the subject of this application, your Honour, but  
28 in any coupe known to VicForests or the department that  
29 contain or likely to contain fire affected species or  
30 habitat of such species.

31 We say that when your Honour sees that that is

1 the relief that is ultimately sought that an injunction  
2 should not go in aid of that relief. If we can establish,  
3 your Honour, that that relief would never be granted by a  
4 court in Victoria then your Honour should not grant an  
5 injunction on an interlocutory basis restraining  
6 VicForests from conducting timber harvesting while we wait  
7 for that proceeding to be prepared, heard, determined and  
8 possibly appeals to take place thereafter.

9 Although your Honour expresses some concern or  
10 surprise that 24 months seems a long time, experience  
11 shows in the cases that have gone before that a period of  
12 24 months is not unusual and in fact is a fair estimate of  
13 the time that would be taken for the court to hear the  
14 matter, determine the matter and for any appeal  
15 potentially to be heard as well.

16 So in the My Environment litigation, for  
17 instance, where there were injunctions or undertakings  
18 given, the matter ran for about two years during which  
19 time VicForests could not have any access to the coupes in  
20 question, notwithstanding that ultimately it was  
21 vindicated both by Justice Osborn and by the Court of  
22 Appeal.

23 So, your Honour, we would say that the court  
24 should look closely at the issue of serious question and  
25 prima facie case because the injunctive relief that it  
26 might grant will have far-reaching effects.

27 But, more to the point, the question of serious  
28 question or prima facie does not involve any discretion on  
29 the part of the court as opposed to the issue of balance  
30 of convenience, which is classically a discretionary  
31 exercise.

1           The serious question or prima facie limb of the  
2 test involves the application of legal principle.  
3 Your Honour may have noted that reference to legal  
4 principle by my learned friend was almost non-existent.  
5 Reference was made instead to the various facts that are  
6 marshalled in aid of an argument that a serious question  
7 exists.

8           But we say when your Honour has regard to, first  
9 of all, the legal framework in which the obligation arises  
10 and, secondly, the question that has been framed for  
11 ultimate decision by our learned friends it's clear that  
12 that first limb of the interlocutory injunction test has  
13 simply not been met.

14           Your Honour, my learned friend took your Honour  
15 to the legal framework by which it is said that the timber  
16 harvesting to be conducted by VicForests will be unlawful.  
17 We don't dispute that the code does give rise to legally  
18 enforceable obligations. But, your Honour, the code, a  
19 subordinate instrument given effect by legislation, is  
20 part of a legislative scheme which plainly seeks to  
21 balance potentially competing interests or purposes: the  
22 maintenance of native fauna and flora on the one hand and  
23 the ecologically sustainable long-term timber production  
24 capacity of forests on the other.

25           It has been acknowledged repeatedly in this court  
26 and indeed by the Court of Appeal in My Environment that  
27 the statutory scheme regulating timber harvesting in  
28 Victoria under which the code is made and under which it  
29 is enforceable against VicForests has multiple purposes  
30 and that the regulatory scheme and the instruments made  
31 pursuant to it itself is an occasion on which a compromise

1 has been adopted between those potentially competing  
2 purposes or interests.

3 The fact that those statutory instruments are  
4 directed at the fulfillment of multiple purposes needs to  
5 be borne in mind. The fact that this scheme seeks to  
6 achieve multiple purposes, your Honour, is apparent in the  
7 code itself. But it is also plainly apparent in the  
8 legislation, as I say, that gives the code a legislative  
9 effect.

10 So, for instance, your Honour, the Conservation,  
11 Forests and Lands Act of 1987 sets out in paragraph 4 the  
12 objects of the Act; that is to say, 'The object of this  
13 Act is to set up a legislative framework to enable the  
14 Minister to be an effective conserver of the State's  
15 lands, waters, flora and fauna', that's (a); and (b) 'to  
16 make provision for the productive, educational and  
17 recreational use of the State's lands, waters, flora and  
18 fauna in ways which are environmentally sound, socially  
19 just and economically efficient.'

20 The power to make a code of practice is given  
21 under that Act. Part 5 of that Act refers to codes of  
22 practice, and such codes are prescribed as legislative  
23 instruments having enforceable effect by reason of  
24 schedule 2 of Subordinate Legislation (Legislative  
25 Instruments) Regulations of 2011. Compliance with a code  
26 of practice such as the code in question is not required  
27 unless the code is incorporated in or adopted by either a  
28 relevant law or a condition specified in an authority  
29 given under a relevant law. That's set out in section 39  
30 of the Conservation, Forests and Lands Act.

31 Another important piece of legislation,

1 your Honour, is the Sustainable Forests (Timber) Act of  
2 2004. The purposes of that Act are set out in section 1  
3 and are described in these terms. It is important to  
4 note, your Honour, that paragraphs 1(ab), (ac), (ad) and  
5 (ae), those additional purposes were added to the Act in  
6 2013 and 2014 after the decisions in the Brown Mountain  
7 case, that's Environment East Gippsland v VicForests, and  
8 the My Environment case, that's My Environment and  
9 VicForests.

10 Those purposes provide that 'the main purposes of  
11 this Act are (a)' - and this was always there - 'to  
12 provide a framework for sustainable forest management and  
13 sustainable timber harvesting in State forests.' Then  
14 (ab), one of the new provisions, 'To provide for the  
15 granting of long-term access to timber resources in State  
16 forests'; (ac), again a new provision, 'To foster  
17 investment in and returns from timber resources in State  
18 forests'; (ad), again another new provision, 'To establish  
19 and provide for the enforcement of timber harvesting  
20 safety zones to reduce risks to public safety and  
21 disruption of timber harvesting operations'; and (ae), 'To  
22 deter activities that create risk to public safety and  
23 timber harvesting safety zones and that cause disruption  
24 to timber harvesting operations.'

25 So your Honour can see from the added provisions  
26 the purposes that are now sought to be carried forward by  
27 this Act. Section 5 of this Act sets out what are  
28 described as principles of ecologically sustainable  
29 development which are intended to guide sustainable forest  
30 management. Those principles include, your Honour, a  
31 statement that, 'The following matters' - this is in

1 subsection (4) of section 5 - 'are to be considered as  
2 guiding principles of ecologically sustainable  
3 development.' There set out sub (a), 'That  
4 decision-making processes should effectively integrate  
5 both long-term and short-term economic, environmental,  
6 social and equity considerations.'

7 So within that very subparagraph one sees the  
8 potentially competing matters or the different matters  
9 that are to be balanced in any decision-making processes  
10 that are undertaken, not just environmental matters,  
11 your Honour. My learned friend perhaps unremarkably,  
12 given the case that she prosecutes, speaks only of  
13 conservation matters and sees the operation of the  
14 precautionary principle and other sections of the code on  
15 which she relies as solely going to conservation matters.

16 But, your Honour, we would encourage your Honour  
17 to see that this scheme is more nuanced than that and it  
18 does involve necessarily an integration of a number of  
19 matters, including relevantly economic matters,  
20 environmental matters, social matters and equity  
21 considerations. It has to be borne in mind  
22 that - your Honour, if this is not in the evidence,  
23 your Honour would know and can take judicial notice of the  
24 fact that the timber industry is not just about dollars  
25 for VicForests, it's about jobs, it's about jobs for  
26 harvesters and haulers, it's about jobs for those who  
27 receive the timber products and it's about the social and  
28 communal infrastructure that is built around places like  
29 Orbost where timber harvesting has been and continues to  
30 be a critical part of their life.

31 Your Honour, we say that in bringing the court's

1 attention to this matter the court should have regard to  
2 these other matters, not just we say the conservation  
3 matters that have been put under the spotlight in my  
4 learned friend's submissions.

5 The next paragraph that I take your Honour's  
6 attention to in the legislation is section 5(4)(b) which  
7 is a statutory statement, as it were, of the precautionary  
8 principle.

9 The next matter I would take your Honour's  
10 attention to is subsection (d). One of the guiding  
11 principles is the need to develop a strong, growing and  
12 diversified economy which can enhance the capacity for  
13 environment protection and, sub (e), the need to maintain  
14 and enhance international competitiveness in an  
15 environmentally sound manner. So again your Honour sees  
16 within that subsection itself the need to strike the  
17 balance between the competing matters.

18 As I say, the Court of Appeal made a number of  
19 important statements in its judgment, which is at [2013]  
20 42 VR 456, about the potentially conflicting economic,  
21 environmental, social and equity considerations that all  
22 need to be weighed up in the context of a decision-making  
23 process aimed at ecologically sustainable development.

24 In that Act, your Honour, Part 6 deals with  
25 the management of timber harvesting and, pursuant to  
26 section 46 within that part, VicForests and any person  
27 undertaking timber harvesting in the State must comply  
28 with any relevant code of practice relating to timber  
29 harvesting. So your Honour sees again the enforceability  
30 of the code is underpinned by section 46 of the  
31 Sustainable Forests (Timber) Act of 2004.



1           The code itself, your Honour, which contains the  
2 provisions on which our learned friends' case is built is  
3 in evidence as an exhibit to Ms Jacobs' first affidavit.  
4 It's exhibit DJ-6. Your Honour will see there is an  
5 introductory foreword by the then Minister for Environment  
6 and Climate Change who makes it clear in that foreword at  
7 page 5 of the code that, 'The code itself is aimed at  
8 striking a balance between conserving biodiversity to  
9 sustain our natural assets and meeting the needs of  
10 industry' and goes on to say 'the native forests and  
11 plantation timber industry in Victoria employs over 25,000  
12 people and generates more than \$400 million annually in  
13 log production.'

14           The purposes of the code are then spelt out more  
15 clearly in section 1.2.2, and it's clear from that part or  
16 that section at page 22 of the code that the purpose of  
17 the code is to provide direction to timber harvesting  
18 managers, harvesting entities and operators to deliver  
19 sound environmental performance when planning for and  
20 conducting commercial timber harvesting operations in a  
21 way that achieves four aims.

22           The first is to permit an economically viable,  
23 internationally competitive, sustainable timber industry;  
24 secondly, is compatible with the conservation of the wide  
25 range of environmental, social and cultural values  
26 associated with forests; thirdly, provides for the  
27 ecologically sustainable management of native forests  
28 proposed for cyclical timber harvesting operations; and,  
29 finally, in a way that enhances public confidence in the  
30 management of timber production in Victoria's forests and  
31 plantations.

1                   It is true that within the code there is a  
2                   differentiation between what are described as code  
3                   principles, operational goals and mandatory actions. We  
4                   accept that clauses 2.2.2.2 and 2.2.2.3 are mandatory  
5                   actions. A mandatory action is described in the code in  
6                   section 1.2.8 as an action to be conducted in order to  
7                   achieve an operational goal.

8                   Pausing there, an operational goal is the desired  
9                   outcome for each specific area of timber harvesting  
10                  operations to meet a code principle. A code principle is  
11                  a broad outcome that expresses the intent of the code for  
12                  each aspect of sustainable forest management. So again we  
13                  say when one finally focuses in on the two clauses of the  
14                  code upon which this case relies one sees that they don't  
15                  appear in a vacuum but they are informed by the  
16                  operational goals and code principles within the code  
17                  itself and that the code itself is the product of a  
18                  legislative framework that seeks to take into account a  
19                  number of potentially competing matters.

20                  Having said that, your Honour, we say that what  
21                  the plaintiff is seeking in this case to do is to ask the  
22                  court at an interlocutory stage to accept that it will  
23                  potentially succeed in a case at trial that will extend  
24                  the operation of the precautionary principle in a manner  
25                  that is frankly unprecedented. My learned friend at the  
26                  outset of her submissions today said that she did not  
27                  resile from anything that was said on the last occasion,  
28                  and on the last occasion as reflected in your Honour's  
29                  judgment on 28 or 29 January at paragraph 24 your Honour  
30                  accepted that the plaintiff's case was seeking to extend  
31                  the operation of the precautionary principle in an

1           unprecedented way or words to that effect.

2                         We say that there is no basis in law for the  
3           precautionary principle to be given that unprecedented  
4           extensive operation. In fact the case that has been spelt  
5           out before you today by my learned friend flies in the  
6           face, we say, of case law in this State which we would say  
7           is binding on this court. In particular I refer to the  
8           matter in *My Environment v VicForests* where as part of  
9           that case, as his Honour Justice Osborn carefully  
10          explained in his judgment, the plaintiff sought to  
11          restrain VicForests from conducting timber harvesting  
12          operations after the devastating 2009 bushfires on the  
13          basis that the expert evidence that the plaintiff relied  
14          upon from a Professor Lindenmayer established that  
15          43 per cent of the habitat of the Leadbeater possum within  
16          the Victorian reserve system had been damaged by the 2009  
17          fires and that there was a strong case therefore accepted  
18          by the court based on that evidence for an overall  
19          strategic review of the current reserve and exclusion zone  
20          system as a result of the 2009 fires. Professor  
21          Lindenmayer's evidence was that the 2009 fires had had a  
22          massive negative impact on Leadbeater possum.

23                         These matters are dealt with by his Honour  
24          Justice Osborn in his decision, which was upheld by the  
25          Court of Appeal and indeed no ground of appeal related to  
26          this part of his judgment. His Honour's decision is at  
27          [2012] VSC 91. His Honour deals with this argument at  
28          paragraph 298 onward.

29                         His Honour notes - and having regard to the fact  
30          that in that case there was a coupe called Gun Barrel  
31          where VicForests intended to conduct variable retention

1 harvesting of a kind, although we would say not as  
2 sophisticated as the variable retention harvesting that  
3 VicForests currently conducts and proposes to conduct in  
4 these coupes the subject of this application.

5 His Honour said in that case at 295, 'It is not  
6 possible to conclude that the variable retention  
7 harvesting of Gun Barrel is likely to cause loss of  
8 habitat which would materially affect the overall  
9 provision of areas which provide habitat and potential  
10 habitat for the LBP. The FMP balances objectives relating  
11 to ecologically sustainable development and provides an  
12 overall scheme of reserves and zones. It adopts a  
13 precautionary approach in principle and seeks to implement  
14 that approach through a discrete system of controls. As  
15 VicForests emphasises, the LBP reserve system was  
16 finalised in 2008, including areas immediately adjacent to  
17 the Gun Barrel coupe boundary. The reserve system  
18 reflects the Central Highlands Regional Forests Agreement  
19 reached between the Commonwealth and State governments.  
20 The reserves immediately in the vicinity of the Gun Barrel  
21 coupe were not affected by the 2009 fires.'

22 Pausing there, one sees parallels with our case.  
23 First, as Ms Dawson in her affidavit explains, much of the  
24 forest areas of Victoria are protected by permanent  
25 reserves and only a very small fraction of forest area is  
26 actually available for timber harvesting at all.

27 So in paragraph 15 of her affidavit Ms Dawson  
28 notes that at a landscape level Victoria has approximately  
29 7.12 million hectares of native forest on public land and  
30 of that approximately 4.7 million hectares is protected  
31 within dedicated and informal reserves; 4.7 million out of

1 7.1 million.

2 She goes on to say that in a typical year  
3 VicForests harvests between 2,500 and 3,000 hectares  
4 equating to 1.7 per cent of the area that's allocated to  
5 it or 0.04 per cent of the total forest estate, which  
6 equates to four trees out of every 10,000.

7 She also provides at paragraph 17 of her  
8 affidavit some pie charts showing how much is harvested,  
9 noting the national parks and reserves that can never be  
10 harvested comprising 56 per cent of the forest, an  
11 allocation of State forest through which an allocation  
12 order may permit, subject to conditions, VicForests to  
13 harvest of some 26 per cent and unallocated State forest  
14 where harvesting might be permitted by the regulator or  
15 the minister of 18 per cent. But within the allocated  
16 State forest, that is the area that is permitted under the  
17 allocation order for harvesting subject to the  
18 prescriptions being met, the amount that is annually  
19 harvested by VicForests is effectively less than two trees  
20 in every 1,000. That's the 0.17 per cent I referred to.

21 It is also worth - - -

22 HER HONOUR: I'm not sure I understand those figures. Harvest  
23 2,500 to 3,000 hectares.

24 MR WALLER: Yes.

25 HER HONOUR: Which is 0.17 per cent of the area allocated.

26 MR WALLER: Yes.

27 HER HONOUR: Are we looking at the - or 0.04 of the total  
28 forest estate. So is that looking at - if you look at the  
29 pie chart, that's the whole circle.

30 MR WALLER: Yes. So if your Honour is on page 4 of the  
31 affidavit the 0.17 per cent is the percentage of the blue

1 area that's in the pie chart above and the 0.04 per cent  
2 would be the percentage of the pie chart above, which  
3 would be so small a segment that it wouldn't be probably  
4 visible to the naked eye. The blue area in the pie chart  
5 below is extracting the 26 per cent, which is part of the  
6 allocated State forest, and saying that within that in a  
7 given year VicForests harvest less than two trees in every  
8 1,000.

9 It has to be recalled that this reserve system  
10 itself, as Justice Osborn says in his judgment, is the  
11 result of the balancing that is undertaken and which is  
12 reflected in the legislative scheme. His Honour says at  
13 paragraph 295 - - -

14 HER HONOUR: I think what I'm asking is when she says it's  
15 equivalent to four trees in 10,000 does that mean out of  
16 the area of 26 per cent or out of the whole of the forest  
17 area, 100 per cent.

18 MR WALLER: The latter, your Honour. Out of the 100 per cent.

19 If we look only at the - - -

20 HER HONOUR: Yes, so that's why - - -

21 MR WALLER: It's four trees out of the whole, and 17 trees out  
22 of the blue segment. What his Honour says and we would  
23 say is equally relevant today is that the reserve system  
24 itself reflects this desire to give effect to the various  
25 competing needs to be satisfied by the forest generally,  
26 and obviously by reserving absolutely some 56 per cent of  
27 the overall forest estate in which of course no harvesting  
28 could ever take place one sees that there is ample  
29 protection built into that reserve system. Of course  
30 within the blue section VicForests is constrained and must  
31 comply with all of the prescriptions that are set out in

1 the code, the management prescriptions and standards that  
2 are set out pursuant to those subordinate instruments.

3 So VicForests by no means has open slather in the  
4 blue section, and that is why in a given year so little of  
5 the blue section is actually harvested by VicForests. But  
6 what this application seeks to do, of course, is to deny  
7 VicForests the right to even harvest that.

8 HER HONOUR: This is the native forest on public land that we  
9 are looking at.

10 MR WALLER: Yes.

11 HER HONOUR: What percentage is that of the whole of Victoria,  
12 for example? The figures are within the - - -

13 MR WALLER: I think, your Honour, there might be some maps  
14 attached to - - -

15 HER HONOUR: I think did I see a map which showed Victoria and  
16 the area.

17 MR WALLER: Attached to, for instance, Ms Dawson's affidavit as  
18 exhibit 2 is a map of zoning within eastern Victoria,  
19 bearing in mind this is where the forest estate is  
20 principally located. One sees on that map by reference to  
21 the shaded areas, the pink shaded area is the parks and  
22 reserves. That's the area that's absolutely protected.

23 HER HONOUR: Yes, that's the Wilson's Prom and areas like that.

24 MR WALLER: Yes. They are very large tracts. In the forest  
25 management plan, which is exhibit MD-1 to Ms Dawson's  
26 affidavit, that is a map of the whole of Victoria.

27 HER HONOUR: Yes.

28 MR WALLER: Your Honour can there see relative to the State of  
29 Victoria as a whole the area that is regarded and  
30 effectively protected as a park and reserve in the light  
31 green shaded area. The area that is subject to an

1 allocation order is in dark green. But even within the  
2 dark green area, as Ms Dawson states, it is only a very  
3 small fraction that is ultimately harvested in a given  
4 year.

5 HER HONOUR: Yes, that's what I saw. Yes.

6 MR WALLER: What Justice Osborn had to decide in that case was  
7 whether to accept an argument of the plaintiff, My  
8 Environment, relying on the evidence of Professor  
9 Lindenmayer, that because 43 per cent of the habitat of  
10 the Leadbeater possum within the reserve system had been  
11 damaged by the 2009 fires there should be effectively a  
12 moratorium on any harvesting until such time as a review  
13 had been conducted which might provide additional  
14 protection in light of those fires for the Leadbeater  
15 possum.

16 His Honour accepted at paragraph 298 that 'there  
17 is a strong case on the basis of Prof. Lindenmayer's  
18 evidence for the overall strategic review of the current  
19 reserve/exclusion zone system as a result of the 2009  
20 fires.' He accepted the evidence of Professor Lindenmayer  
21 that the 2009 wildfires had had a massive negative impact  
22 on the Leadbeater possum.

23 He accepted later in paragraph 298 that Professor  
24 Lindenmayer and others had prepared a scientific paper  
25 which analysed the effects of the fires on trees with  
26 hollows and which predicted that there would be a  
27 substantial proportionate increase in the number of  
28 collapsed trees that could not be used for nesting or  
29 denning habitats by arboreal marsupials over the period  
30 2011 and 2067.

31 His Honour, however, notes in paragraph 300,



1 'Prof. Lindenmayer's view is that it is critical to  
2 undertake conservation actions at the individual tree  
3 level, tree patch and stand level within coupes, within  
4 landscapes and also other large ecological regions. In  
5 turn, unburnt forest within areas currently designated for  
6 timber production constitute key refugia for LBP and other  
7 hollow dependent species. Prof. Lindenmayer's view is  
8 that without steps to prevent loss of areas of unburnt  
9 forest, and especially areas supporting living HBT, there  
10 is a high risk that the LBP may become extinct within the  
11 next 20 to 30 years.'

12 So the scenario painted by the plaintiff in that  
13 case we say is very similar, if not identical, with  
14 the scenario painted by the plaintiff before you today;  
15 namely that, because of fire in other areas where the  
16 Leadbeater possum might exist, the areas of unburnt forest  
17 currently designated for timber production, they  
18 constitute effectively critical habitat or key refugia for  
19 the Leadbeater possum and other hollow dependent species  
20 and that they therefore must be protected.

21 His Honour said at 301, 'I accept this opinion on  
22 the assumptions stated, but the central dispute in this  
23 case is not whether substantial steps should be taken to  
24 prevent loss of living HBT, but what steps should be taken  
25 in respect of Gun Barrel.' In other words, 'I have to  
26 look at the coupe the subject of this proceeding.'

27 Then his Honour noted in paragraph 302 that there  
28 was a letter from the department confirming that the  
29 department was undertaking a review of existing management  
30 prescriptions for the Leadbeater possum and, 'The  
31 proposition that the overall system of reserves and

1 exclusion zones should be reviewed does not, however,  
2 compel the conclusion that the variable retention  
3 harvesting of Gun Barrel has the capacity to materially  
4 affect the overall adequacy of such a system.'

5 His Honour says at 303, 'Such review will  
6 necessarily involve an evaluation of factors bearing on  
7 the sustainable ecological use of the whole of the forest  
8 affected by the FMP. Such a review involves policy  
9 considerations not readily justiciable before this Court.'

10 Paragraph 304, 'Prof. Lindenmayer has sought to  
11 promote a fundamental change of strategy by way of  
12 correspondence with the relevant Minister.' That is then  
13 explained as an urgent measure where Professor Lindenmayer  
14 wanted all areas of 1939 regrowth to be effectively  
15 exempted from logging.

16 But what his Honour went on to say in 309 is,  
17 'More fundamentally, the resolution of the major forest  
18 planning issues raised by Prof. Lindenmayer's letter  
19 cannot be achieved in this proceeding. First, the  
20 evidence does not permit a conclusion to be reached as to  
21 the appropriateness of the proposal over the whole of the  
22 forest area in question. Secondly, the issue ultimately  
23 involves questions of policy judgment which are not the  
24 province of the Court. The necessary decision raises  
25 questions of sustainable ecological development and net  
26 community benefit which involve discretionary judgements  
27 as to the weight to be given to particular factors and the  
28 resolution of their balance. The discretion to make this  
29 judgement is not vested in this Court.'

30 His Honour there referring again to the balance  
31 of the competing interests: environmental on the one hand,

1 economy, social on the other. His Honour says in a  
2 paragraph of the judgment that was never challenged on  
3 appeal that those matters are necessarily matters not for  
4 the judiciary but for the executive and guided by the  
5 legislature.

6 We say this proceeding which seeks to extend the  
7 operation of the precautionary principle in an  
8 unprecedented manner is seeking to revisit the argument  
9 that was effectively rejected by Justice Osborn in My  
10 Environment, because what my learned friend says is, 'The  
11 area that has not been affected by the fires in which you  
12 are about to log should be effectively subject to a  
13 moratorium on timber harvesting because areas which were  
14 affected by the fires have put additional pressure on  
15 certain threatened species and on their habitat and that  
16 until such time as the review has taken place, the  
17 research conducted, the policy developed and implemented  
18 and promulgated, until that time VicForests should be  
19 absolutely prohibited from engaging in timber harvesting.'

20 We say, your Honour, that when one has regard to  
21 Justice Osborn's decision and some other matters that  
22 I will come to your Honour should be satisfied that there  
23 is not a sufficiently strong prima facie case which would  
24 underpin the first requirement that your Honour must be  
25 satisfied of in granting interlocutory injunctive relief.

26 Pausing there, of course my learned friend puts  
27 emphasis on balance of convenience and says, 'If the trees  
28 are harvested, they can't be replaced or not replaced soon  
29 and only after decades may the forest be regenerated.'

30 But we would say, your Honour, that that balance  
31 of convenience, the discretionary consider, should not

1        overshadow the critically important task of the court in  
2        considering prima facie case and serious question to be  
3        tried because in any situation where VicForests is about  
4        to harvest a part of the forest that argument would apply.  
5        In any situation where VicForests is going in to harvest  
6        trees, those trees once harvested are until decades later  
7        gone. It can't be the situation that all a plaintiff has  
8        to do is call in aid a subordinate instrument expressed in  
9        general terms and tie up the harvesting in that coupe or a  
10       series of coupes until a trial takes place many months  
11       later because the balance of convenience, it is said, so  
12       clearly favours retaining the status quo.

13                Your Honour, if your Honour is satisfied that the  
14       strength of the case that's promulgated in the proceeding  
15       which relies effectively and seeks effectively to overturn  
16       existing law in this State, then we say that would be to  
17       ignore the critical requirement that must first be  
18       satisfied regarding the grant of an injunction on an  
19       interlocutory basis.

20                The other matter that we rely on, your Honour, is  
21       the critical matter that there is no allegation in the  
22       pleaded case and we say nor could there be on the state of  
23       the evidence that VicForests has not applied existing  
24       prescriptions in the code and adhered to all of its policy  
25       commitments, nor that it will not do so in the future.

26       HER HONOUR: I think the case, as I understand it, is because  
27       of the unprecedented nature of the recent fires; that's  
28       what's the case is based on.

29       MR WALLER: Yes.

30       HER HONOUR: And the material that is being relied on by your  
31       side does not and it would be hard for it to take into

1 account that because it's so recent.

2 MR WALLER: Yes. We understand the case as being the plaintiff  
3 saying, 'We don't say that you are not complying with the  
4 existing prescriptions. We say the existing prescriptions  
5 are inadequate in light of the fires and you need to wait  
6 until new prescriptions are put in place, having regard to  
7 the impact of the fires and until that time,  
8 notwithstanding that those prescriptions do not yet exist,  
9 you must stand down.'.

10 HER HONOUR: I think I understand it as, 'You should wait until  
11 everybody understands the impact of the catastrophic  
12 fires,' because I think it would be common ground that the  
13 recent fires probably are the most catastrophic that have  
14 occurred in recent times. I may be wrong about that.

15 MR WALLER: We don't dispute that the fires have had a  
16 significant impact and a catastrophic impact on the State  
17 of Victoria, and that that impact has affected various  
18 aspects of life in the State, obviously flora and fauna to  
19 some extent, but also affected VicForests and its  
20 contractors. Your Honour sees in the evidence of  
21 Ms Dawson the serious impact that the fires have had on  
22 their capacity to continue with their livelihoods.

23 HER HONOUR: Yes.

24 MR WALLER: So it's a balancing exercise, your Honour. We also  
25 say that the letter from the Victorian Chief Conservation  
26 Regulator is of critical importance when one has regard to  
27 the fact that the office of the Chief Conservation  
28 Regulator, newly created in 2019 I think and wholly  
29 focused on conservation issues, despite what I have said  
30 about the balance, this particular office of the  
31 conservation regulator plainly by its name and in the

1 substance of what it does is an office established by the  
2 department early in 2019 following the independent review  
3 of timber harvesting regulation and its mission stated in  
4 its policy documents, which Mr Prowse exhibits as exhibits  
5 1 to 4 of his affidavit, is to oversee the regulatory  
6 functions in conservation and environment in the State of  
7 Victoria by doing a number of things, including monitoring  
8 compliance with regulatory requirements and taking  
9 enforcement action against non-compliance. That's the  
10 office of the conservation regulator, and the Chief  
11 Conservation Regulator is the person who leads that  
12 office.

13 With that in mind and bearing in mind that part  
14 of the role of the office of the conservation regulator is  
15 to monitor and regulate VicForests harvesting practices,  
16 and that is apparent, your Honour, in the documents  
17 exhibited by Mr Prowse as part of exhibit ACSP-2, the  
18 compliance and enforcement policy of the Office of  
19 Conservation Regulator, states on page 10, 'The OCR  
20 monitors compliance with the laws it applies. We do this  
21 to identify and address non-compliance and to maintain a  
22 credible threat of detecting non-compliance.'

23 Its role on page 11 is described as to  
24 investigate, 'Where the OCR has reason to believe a breach  
25 of the law may have occurred we may investigate.' Later on  
26 that page at 3.5, 'If a breach of legislation has been  
27 determined the OCR will assess whether enforcement action  
28 is appropriate.'

29 In exhibit ACSP-3, which is a document described  
30 as a statement of regulatory intent dated June 2019, on  
31 page 5 of that document under the heading, 'Timber

1 harvesting in State forests', the relevant pieces of  
2 legislation, some of which I have taken your Honour to,  
3 are there set out, including the Sustainable Forests  
4 (Timber) Act and the Conservation, Forests and Lands Act,  
5 as well as the Flora and Fauna Guarantee Act, noting as a  
6 key provision of the Sustainable Forests (Timber) Act that  
7 it requires VicForests to comply with the code of practice  
8 for timber production of 2014, noting on page 6 that the  
9 main regulatory instrument used by the OCR to regulate  
10 timber harvesting is the code, noting on the same page  
11 that compliance with the code is mandatory and enforceable  
12 through the Conservation, Forests and Lands Act, the  
13 Forests Act and the Sustainable Forests (Timber) Act of  
14 2004, and noting on page 9 as one of its key roles, being  
15 to monitor compliance, that 'we will use a range of tools  
16 to monitor compliance with the law, including using  
17 community intelligence, spot checks and audits of  
18 VicForests in the planning and harvesting cycle.'

19 On page 10 it is stated, 'The OCR will undertake  
20 compliance inspections on coupes that are planned to be  
21 harvested or in which harvesting is under way to monitor  
22 VicForests' compliance with the regulatory framework.' So  
23 this office, newly created whose role is to among other  
24 things monitor compliance by VicForests, we would say that  
25 a letter from the Chief Conservation Regulator noting that  
26 VicForests intends to not harvest in the meantime in the  
27 East Gippsland FMA, having regard to the impact of the  
28 fires, noting that VicForests was justified in not  
29 undertaking commercial harvesting operations in the East  
30 Gippsland forest management area until further information  
31 reduces the scientific uncertainty of the potential for

1 serious or irreversible environmental damage, noting also  
2 that in other areas, other FMAs, forest management areas,  
3 where there have been significant fire impacts that  
4 VicForests should wait until further information is at  
5 hand to assess whether there is a potential for serious or  
6 irreversible damage and to reduce scientific uncertainty,  
7 noting that in respect of those coupes and going on to  
8 note that 'based on the current intensity of harvesting  
9 I do not expect in the short time that there will be  
10 potential for serious or irreversible damage from timber  
11 harvesting activities in areas and FMAs not listed above',  
12 we say that that is a critically important matter that the  
13 court can take into account not because it's a  
14 self-serving statement from someone aligned to VicForests  
15 but, on the contrary, it's from an independent regulator  
16 whose role is to monitor compliance by VicForests with,  
17 among other things, the code and in particular the  
18 precautionary principle and the other clause whose mandate  
19 plainly is solely conservation focused effectively telling  
20 VicForests that it is no breach of the precautionary  
21 principle to conduct harvesting in the coupes the subject  
22 of this proceeding, putting aside two which are fire  
23 affected and in respect of which we understand no  
24 injunction is sought, that that, your Honour, should give  
25 this court comfort that there has been no breach of the  
26 precautionary principle, notwithstanding that further  
27 information and reviews and assessments have been  
28 conducted.

29 Those reviews and assessments are referred to  
30 expressly in the letter and the conservation regulator is  
31 saying that it is appropriate that VicForests wait for



1 those reviews as they might apply to other FMAs, in  
2 particular East Gippsland, but that in respect of FMAs  
3 that are not fire affected, subject of course to  
4 VicForests continuing to comply with its prescriptions and  
5 policy commitments, including its commitment to conduct  
6 modified harvesting techniques, subject to that, there is  
7 no breach of the code.

8 We would say, your Honour, that that is a matter  
9 that we say supports the position taken by VicForests both  
10 in what it proposes to do on the ground but also the  
11 position it's taken in this application and in continuing  
12 to oppose this application before your Honour today.

13 I don't know when your Honour breaks for lunch, I'm sorry.

14 HER HONOUR: I will break for lunch. Is that a convenient  
15 time?.

16 MR WALLER: It is a convenient time, your Honour.

17 HER HONOUR: All right. We will reconvene at 2.15. How much  
18 longer will we go on this two-hour assessment?

19 MS FOLEY: I apologise for that, your Honour.

20 MR WALLER: We will certainly finish today. With the benefit  
21 of some - - -

22 HER HONOUR: You have to finish today because I'm doing  
23 something else tomorrow.

24 MR WALLER: Yes, your Honour. I would have thought I will go  
25 no more than 45 minutes, I would have thought.

26 HER HONOUR: All right. Very well. I will reconvene at 2.15.

27 MR WALLER: If your Honour pleases.

28 LUNCHEON ADJOURNMENT

29

30

31

1 UPON RESUMING AT 2.17 PM:

2 HER HONOUR: Mr Waller.

3 MR WALLER: Your Honour, with the agreement of our learned  
4 friends, we propose to play a short video.

5 HER HONOUR: Yes.

6 MR WALLER: Which depicts from the air, an aerial view of the  
7 eastern part of the state, and in particular - - -

8 HER HONOUR: This is the one in the helicopter?

9 MR WALLER: Indeed. That's the one we want to play and I will  
10 then say something about that.

11 HER HONOUR: Yes.

12 (A video was played to the court.)

13 MR WALLER: Your Honour, I mentioned that this video was made  
14 available by the department I think on 14 February, last  
15 Friday.

16 HER HONOUR: Yes.

17 MR WALLER: And I understand it was taken very shortly before  
18 that. It is very recent. The second point to note is  
19 that the areas that were seen on that video were in the  
20 eastern part of the state, not the forest management areas  
21 which this particular application before your Honour is  
22 concerned. That's significant for this reason.

23 Your Honour has seen evidence before the court,  
24 in particular in the letter from the Chief Conservation  
25 Regulator of 14 February noting that VicForests has  
26 determined not to undertake any commercial harvesting  
27 operations in the East Gippsland forest management area  
28 until further information becomes available; that is to  
29 say that, notwithstanding large areas within the East  
30 Gippsland FMA were unscathed or undamaged by the fire,  
31 VicForests is leaving the entire FMA alone until further

1 information comes to hand and, likewise, it will in  
2 accordance with the direction of the Chief Conservation  
3 Regulator, likewise cease harvesting at the moment in  
4 other FMAs where there have been significant fire impacts  
5 such as the north-east FMA and the Tambo FMA and the  
6 north-east corner of the Central Gippsland FMA.

7 So what's happening in the Central Highlands has  
8 to be seen in the context of what is happening in other  
9 parts of the state. This, we say, is relevant to what was  
10 said by my learned friend about IPAs, that is the  
11 immediate or the interim protection areas, immediate  
12 protection areas. Because VicForests has publicly  
13 committed, as acknowledged by the Chief Conservation  
14 Regulator, not to harvest any unburnt trees within the  
15 FMAs that have been significantly affected by the fires,  
16 for instance in the whole of the East Gippsland FMA, the  
17 areas that have been affected are being effectively  
18 compensated at least for the moment by those areas where  
19 VicForests has publicly acknowledged it will not for the  
20 moment continue to harvest.

21 It's also important to note, your Honour, that  
22 the area that we are dealing with in this proceeding in  
23 the Central Highlands involves VicForests harvesting an  
24 area predominantly of 1939 regrowth. Your Honour might  
25 remember in the My Environment case it was Professor  
26 Lindenmayer's contention that until further notice all  
27 1939 regrowth ought not be harvested. The fact that there  
28 is abundant 1939 regrowth in the Central Highlands  
29 demonstrates graphically that forests do recover after  
30 fire. Yes, it takes decades, but harvesting does not  
31 bring to an end habitat. Forests do regenerate.

1                   But, more to the point, when we speak of habitat  
2                   it has to be noted and it is clearly made clear in  
3                   Mr Paul's affidavit that no habitat of the threatened  
4                   species in question is being removed because, despite the  
5                   coupes being harvested in a selective way by variable  
6                   retention harvesting, the prescriptions in play and the  
7                   policy commitments given by VicForests ensures that every  
8                   habitat tree is protected. Where a prescription such as a  
9                   prescription to protect the glider is triggered then  
10                  VicForests, certainly even beyond its planning, will react  
11                  in real-time and make sure that those areas are protected.

12                  So to suggest as may have been that what  
13                  VicForests proposes to do in these coupes is to  
14                  effectively clear-fell them so that they look like an area  
15                  perhaps depicted in the burnt areas on that video is  
16                  certainly not the case. This can be seen graphically, for  
17                  instance, if we take as an example an exhibit in Mr Paul's  
18                  affidavit.

19 HER HONOUR: Mr whose?

20 MR WALLER: Mr Paul, Mr Bill Paul's affidavit.

21 HER HONOUR: Yes, of the 12th?

22 MR WALLER: This is the affidavit of 12 February.

23 HER HONOUR: Yes.

24 MR WALLER: To put this into context before we do that can  
25                  I just mention, as Mr Paul does, without necessarily  
26                  taking your Honour to these paragraphs now that in  
27                  paragraph 53(c) of his affidavit he notes that there are a  
28                  large number of coupes that were on the TRP, the timber  
29                  release plan, in the East Gippsland FMA and in the Tambo  
30                  FMA and the north-east FMA that are fire affected and the  
31                  timber harvesting activities and planning in those coupes

1 are effectively in abeyance until the department's fire  
2 impact assessment is complete. So that confirms again  
3 what is acknowledged in the conservation regulator's  
4 letter that I took your Honour to.

5 HER HONOUR: Yes.

6 MR WALLER: Mr Paul in his affidavit from paragraph 62 on deals  
7 in some detail with the various management procedures and  
8 planning standards and prescriptions that apply to the  
9 threatened species in question in this proceeding. When  
10 he gets to the section on habitat trees on paragraph 78 of  
11 his affidavit he sets out there in paragraph 78 to 81 the  
12 requirement that in respect of ash and high elevation  
13 mixed species coupes in the Central Highlands FMAs all ash  
14 eucalypts originating before 1900 must be retained. So  
15 that's the old forest trees. All of them have to be  
16 retained.

17 Then in paragraph 79, 'Further, at least 40  
18 habitat trees per 10 hectares must be retained for the  
19 length of the rotation in ash forests originating since  
20 1900.' In paragraph 80, 'In respect of mixed species  
21 coupes in the Central Highlands FMAs at least 40 habitat  
22 trees per 10 hectares must be retained.' In paragraph 81,  
23 'In north-east FMAs the habitat tree requirements are four  
24 to five trees per hectare for both ash and mixed species.'

25 He then at paragraph 86 deals with the  
26 significant government policy announcements that came out  
27 in November 2019 where the government announced that it  
28 was now policy to phase out all timber harvesting in  
29 native State forests by 2030 and to implement the  
30 immediate protection areas comprising 96,000 hectares as  
31 well.

1                   Similarly - - -

2 HER HONOUR: Just getting back to 87, what's an initial  
3                   step-down in 2024?

4 MR WALLER: That was - - -

5 HER HONOUR: Is that a starting of the phasing out?

6 MR WALLER: Yes, it's a tapering 25 per cent per annum - sorry,  
7                   25 per cent over two years for the remaining six years or  
8                   eight years of the cycle.

9 HER HONOUR: There's 10 years.

10 MR WALLER: No, 24/25 20 per cent, 26/27, 28/29 and then 30.

11                   So it would be 24/25, 25 per cent. 25/26 another  
12                   25 per cent. So that's 50 per cent. And then by 2030 it  
13                   would come down to zero per cent.

14 HER HONOUR: Yes.

15 MR WALLER: So that's the tapering or the initial step-down  
16                   that's referred to. He also makes reference to the  
17                   November announcement last year of the immediate end to  
18                   harvesting of old growth; that is to say all ash eucalypts  
19                   originating before 1900 must be retained. In paragraph 91  
20                   he refers to additional large tree protection and giant  
21                   tree protection measures, and sets them out there as well.  
22                   So all of these are in addition to the specific  
23                   prescriptions that apply in relation to the threatened  
24                   species the subject of this proceeding.

25                   In paragraph 100 onward he then talks about  
26                   VicForests coupe planning process which demonstrates that  
27                   it's a very sophisticated process which we would say in  
28                   itself is an example of the precautionary principle in  
29                   action. He then in paragraph 110 onwards talks about  
30                   VicForests silvicultural systems which details the very  
31                   recently updated systems for variable retention harvesting

1           that VicForests has developed and which it is  
2           implementing.

3                       He then in paragraph 115 onwards talks about  
4           VicForests' policy of identifying and managing high  
5           conservation values via coupe reconnaissance, coupe  
6           transects, pre-harvest surveys and also at 135 of his  
7           affidavit speaks about post-harvest surveys. So he sets  
8           out in some detail the careful attention to the planning  
9           process that VicForests undertakes prior to commencing  
10          harvesting.

11                      In the process of dealing then with the subject  
12          coupes, which he does from paragraph 141 onward, he  
13          exhibits to his affidavit some maps which he describes as  
14          context maps. I wanted to take your Honour to one such  
15          map which is exhibit WEP-14 relating to the Brumby coupe.  
16          This is actually not a context map. It's a harvest map, a  
17          harvesting map.

18   HER HONOUR:   What is it?   Exhibit number?

19   MR WALLER:    Exhibit 14, your Honour.

20   HER HONOUR:   Just a moment.

21   MR WALLER:    If your Honour reads that map with WEP-13

22                      your Honour will understand what the various shading and  
23                      various markings on the page indicate.

24   HER HONOUR:   So I have 14.   So I read it with?

25   MR WALLER:    Yes, with 13.   So 13 is the high conservation value  
26                      map for the Brumby coupe. Your Honour will see that map  
27                      indicates, first of all, the retention islands which are  
28                      hatched; that is to say the diagonally hatched areas will  
29                      not be harvested.

30   HER HONOUR:   Yes.

31   MR WALLER:    And your Honour will see that various habitat trees

1 are retained within those areas as marked, and various  
2 other habitat trees outside of those areas are also  
3 retained. Your Honour will see that in the blue area at  
4 the top is a description of selection harvesting, which is  
5 a more precise manner of harvesting where specific trees  
6 are taken out rather than a clear-felling or a seed tree  
7 retention method. In the green areas the clear-felling  
8 and seed tree retention harvesting takes place, although  
9 in that area there are significant areas of variable  
10 retention islands that are maintained.

11 HER HONOUR: What's the sort of scale that we are looking at  
12 here? I'm looking at it on the computer.

13 MR WALLER: Yes, there's a scale on the bottom. It looks like  
14 it's one centimetre is - 1 to 3843 down the bottom. There  
15 is a scale down the bottom right-hand corner, your Honour.

16 HER HONOUR: I see. Yes, I see. One equals 3843 somethings  
17 metres. I see, the full black line is 95 metres, I think.

18 MR WALLER: Yes.

19 HER HONOUR: And the whole length would be 190.

20 MR WALLER: And that gives you an indication.

21 HER HONOUR: That gives you an idea. So within the yellow you  
22 have got the little hatched areas with green around it.  
23 They are saved.

24 MR WALLER: Yes.

25 HER HONOUR: And then the yellow area is the clear-felled area?

26 MR WALLER: Yes.

27 HER HONOUR: And then what's the green - - -

28 MR WALLER: The blue is the selection harvested area, and that  
29 is - - -

30 HER HONOUR: Yes.

31 MR WALLER: It is a much more focused process of taking trees.



1 HER HONOUR: Yes. So you look at an area and you say, 'We'll  
2 take these two or three.' What are the red dots in the  
3 selected harvest area?

4 MR WALLER: They show the density of the type of habitat tree  
5 that's present. I think there's a closer or a more  
6 detailed vision of that in exhibit 14, the next exhibit.

7 HER HONOUR: I see, yes.

8 MR WALLER: So even within the clear-fell area, or the CFE STR  
9 area there are some dots which indicate - those are  
10 locations where the harvester, if possible, is to retain  
11 additional trees. These are seed trees which will then  
12 help to regenerate the coupe.

13 HER HONOUR: I follow.

14 MR WALLER: What that shows, your Honour, and that's just an  
15 example, is that this is not wholesale clear-felling by  
16 any means.

17 HER HONOUR: Yes.

18 MR WALLER: And the process by which those maps are created is  
19 a careful one and one which we say demonstrates VicForests  
20 being very mindful of certainly the prescription  
21 obligations and the precautionary principle generally.

22 In the My Environment case itself at paragraph  
23 271 Justice Osborn said, 'If it is accepted that the TRP  
24 relates to coupes which have themselves been produced by a  
25 balanced planning exercise which takes account of  
26 considerations of ecologically sustainable development and  
27 if it is further accepted that the logging will comply  
28 with the prescriptions designed to protect LBP habitat  
29 within such coupes, My Environment faces a difficult task  
30 in establishing that logging will breach the precautionary  
31 principle.'

1                   We would say that just as it might be accepted  
2                   that the TRP, that is to say the preparation of the TRP,  
3                   involved a balanced planning exercise, so too the  
4                   preparation of coupe plans and harvesting maps likewise  
5                   involves a very careful, balanced planning exercise taking  
6                   into account considerations of ecologically sustainable  
7                   development. That's why those particular trees are  
8                   retained. That is why if there is a greater glider  
9                   prescription that upon the sighting of five greater  
10                  gliders in a certain area a particular number of trees  
11                  have to be retained, that all of that will be adhered to  
12                  and that the habitat, as it were, of these threatened  
13                  species are not being destroyed but in fact maintained and  
14                  protected.

15                  So we say that if your Honour was to not accede  
16                  to this injunction it does not mean that the habitat will  
17                  not be protected. It will be protected. These maps will  
18                  ensure that the harvesting is conducted in a careful way  
19                  taking into account all of those values. Of course, if  
20                  any other sightings are brought to VicForests' attention  
21                  then there's no reason to believe that VicForests will not  
22                  have regard to those as well. It's clear from the  
23                  evidence of Mr Paul that every detection that's brought to  
24                  his attention he says will be taken into account by  
25                  VicForests.

26                  Your Honour, a reference was made by my learned  
27                  friend to the evidence of Ms Jiang and contrasting that  
28                  data with the data in the State report and saying that  
29                  there was a clear serious question to be tried, as it  
30                  were, arising from the inconsistency between the data in  
31                  one and the data in the other.

1           First of all, we would say that in referencing a  
2 serious question to be tried my learned friend is seeking  
3 to set up the impact of the fires itself as a serious  
4 question to be tried. We say that that would be a false  
5 issue on this application.

6           Secondly, we say that the reason why the data is  
7 different is because it is clear that the State report was  
8 based on data available as at 7 or 11 January,  
9 notwithstanding that the report is published later, and as  
10 is clear from Ms Jiang's second affidavit her data which  
11 was provided by the department is current as at 23 or  
12 27 January.

13           It's also clear, your Honour, that when one looks  
14 at the State report the fire impact has been considered on  
15 the basis that it is likely that the fires will continue  
16 and it is conducted in a very binary way of burnt  
17 area/unburnt area.

18           The fact is the fires did continue but not to the  
19 extent that was predicted, and that's why the later  
20 information, the later data that is represented in  
21 Ms Jiang's evidence is superior to the data that's  
22 reflected in the State report.

23           But, be that as it may, your Honour, we say the  
24 evidence of Ms Jiang shows that populations of threatened  
25 species in the areas the subject of this proceeding are  
26 quite distinct from and remain unaffected by fire impacts  
27 in the east of the state, and that large areas of modelled  
28 habitat which support those threatened species are  
29 unaffected by the fires. She deals with that at a  
30 granular level in her table. We say that should provide a  
31 further measure of comfort that the harvesting that is

1 sought to be undertaken by VicForests in this area is not  
2 going to have the effect on the threatened species or  
3 their habitat that our learned friends contend.

4 Your Honour, I have said something about the  
5 precautionary principle. But, as Justice Osborn carefully  
6 explained both in the Brown Mountain decision in the  
7 Environment East Gippsland case in 2010 and more recently  
8 in the My Environment decision in 2012 it is not the  
9 intention of the precautionary principle to avoid all  
10 risks. His Honour in his judgment in My Environment, for  
11 instance, gives some examples of how the precautionary  
12 principle might work in practice.

13 So he says, and this is in paragraph 268 of his  
14 judgment, 'To take two ... examples, if a patch of forest  
15 were found to contain the only living examples of a  
16 previously undiscovered species of flora (such as the  
17 Wollemi pine) it would, on its face, be contrary to the  
18 precautionary principle to destroy it in the course of  
19 timber harvesting, despite the absence of an Action  
20 Statement under the FFG Act or a prescription applicable  
21 to it under the FMP. Likewise, if a species of fauna  
22 thought to be extinct were rediscovered (as the LBP was in  
23 1961), destruction of its essential habitat would, on its  
24 face, be contrary to the precautionary principle, despite  
25 the absence of an AS under the FFG Act or a prescription  
26 under the FMP. In each case, the threat of serious or  
27 irreversible damage to the environment would be  
28 accompanied by substantial uncertainty as to the survival  
29 of the species if harvesting continued.'

30 'Nevertheless, as these examples illustrate, it  
31 will be easier to identify a threatened breach of the

1 precautionary principle when a specific action threatens  
2 direct serious or irreversible damage to an aspect of the  
3 environment of extreme sensitivity and/or novel qualities.  
4 The more generalised the threat and the more indirect and  
5 less immediate the damage to a sensitive aspect of the  
6 environment, the more difficult it will be to be satisfied  
7 that the precautionary principle requires abstinence from  
8 a particular action.'

9 His Honour said, 'As I said in the Brown Mountain  
10 case, the requirements of the precautionary principle fall  
11 to be considered in the light of the whole of the evidence  
12 bearing on the relevant facts as it now is, and not as it  
13 was at the time VicForests completed planning for  
14 operations in the coupes in issue.'

15 His Honour said the precautionary principle  
16 embraces the concept of proportionality, and his Honour  
17 said as I said earlier that where it is shown that the  
18 harvesting will comply with prescriptions designed to  
19 protect species or habitat then a plaintiff in the  
20 position of our learned friends will face a difficult task  
21 in establishing that logging will breach the precautionary  
22 principle.

23 Our learned friends rely in their written  
24 submissions, I believe, on the fact that interlocutory  
25 injunctive relief was granted in other cases where the  
26 precautionary principle was invoked. We would say this  
27 case before your Honour is different. First, in the My  
28 Environment case no injunctive relief was granted on an  
29 interlocutory basis. There was an undertaking given.

30 Interlocutory injunctions were granted in the  
31 Brown Mountain case and by a Federal Court judge in the

1 Friends of Leadbeater Possum case. In neither of those  
2 cases, though, did your Honour have the comfort of a  
3 letter from the Chief Conservation Regulator indicating  
4 that the proposed harvesting would not breach the  
5 precautionary principle.

6 HER HONOUR: That's a new position, though, isn't it?

7 MR WALLER: Sorry.

8 HER HONOUR: That's a new position, though, isn't it?

9 MR WALLER: Yes, that's what distinguishes our case from those  
10 cases.

11 HER HONOUR: Because you have got this new person.

12 MR WALLER: We have got a new person, we have got a person who  
13 is focused squarely on conservation, whose job it is to  
14 monitor VicForests' compliance with the statutory  
15 requirements and who is effectively saying that what  
16 VicForests proposes in the Central Highlands would not  
17 breach the precautionary principle, noting as she does  
18 that VicForests has itself agreed not to conduct any  
19 harvesting in the east of the state and accepting that it  
20 won't conduct harvesting in other fire affected FMAs.

21 But in the Friends of Leadbeater Possum case, for  
22 instance, the plaintiffs in that case relied heavily on  
23 the fact that there was no greater glider action  
24 statement, notwithstanding that the species had been  
25 recently listed as threatened. That's not the case here,  
26 your Honour.

27 Here we have the newly released action statement  
28 for the greater glider. Although it doesn't have  
29 statutory force because it has not yet been incorporated  
30 into the code or its subordinate instruments, VicForests  
31 has acknowledged that it is bound to comply with it and is

1 complying with it as if it were the law. In that sense  
2 VicForests is not only complying with the legal  
3 prescriptions; it is going above and beyond its  
4 obligation. It is taking on and treating as binding the  
5 action statement in relation to the greater glider.

6 For that reason we say your Honour shouldn't  
7 accede to a submission that this is no different to other  
8 cases where courts have granted interlocutory injunctive  
9 relief where the issue of the precautionary principle has  
10 been raised. We say the closest analogue is the case  
11 I went to earlier, namely the decision of Justice Osborn  
12 where faced with an argument very similar to this  
13 his Honour said that would not constitute a breach of the  
14 precautionary principle. We say the matters that  
15 his Honour adverted to there are highly relevant and  
16 pertinent and that his treatment of the principle, we say,  
17 represents a statement of the law in Victoria by which we  
18 say all parties are bound.

19 Our learned friends rely in addition to the  
20 precautionary principle on clause 2.2.2.3. We have said a  
21 number of things in our written submissions as to why that  
22 generalised allegation about a failure to comply with that  
23 part of the code is misplaced. It appears that the  
24 plaintiff is elevating is that obligation, an obligation  
25 to consider relevant research and advice related to the  
26 planning and conduct of timber harvesting operations as  
27 imposing on VicForests a requirement to wait until such  
28 advice and research is ready and exists, and also is  
29 requiring VicForests not only to wait and then adhere but  
30 to actively require VicForests to obtain such advice. We  
31 say that is an overstatement of that requirement and it

1 would, we say, be no different to the overstatement of  
2 the precautionary principle which his Honour Justice  
3 Osborn rejected as a matter for the policy makers, not for  
4 the courts, to change.

5 So, put bluntly, if it was the view of  
6 government, advised by its conservation regulator, that  
7 given the fires that have just taken place VicForests  
8 should be prevented from harvesting in any part of the  
9 Central Highlands then the government could make that  
10 policy decision. The government has not shied away from  
11 making other policy decisions such as the decisions we saw  
12 in November 2019. The fact that it has not and, more to  
13 the point, that its Chief Conservation Regulator has  
14 effectively given a green light to VicForests to harvest  
15 subject to the conditions there set out in the Central  
16 Highlands we say speaks eloquently to the state of affairs  
17 that your Honour has to consider in this matter.

18 In relation to balance of convenience,  
19 your Honour, we say in the time available VicForests has  
20 put forward evidence of the financial loss that it will  
21 suffer in the short-term. My learned friend has not taken  
22 issue with those figures. Plainly, if an injunction is to  
23 go and that injunction to remain in force for a period of  
24 up to 24 months, then the loss that VicForests will incur  
25 will increase.

26 It is not only VicForests' situation that the  
27 court should take into account. Your Honour has evidence  
28 before your Honour through the evidence of Ms Dawson of  
29 the impact that this is having on the industry generally,  
30 and that is to say those who VicForests contract with to  
31 harvest and to haul timber, and likewise on the clients



1 that VicForests is contractually obliged to supply. For  
2 my learned friend to say, 'Well, VicForests could flick  
3 the force majeure switch and thereby excuse itself from  
4 its contractual obligations' is to ignore the situation of  
5 those with whom VicForests contracts.

6 Separately, it ignores, your Honour, the flow-on  
7 effects that harvesting has as I say in relation to the  
8 communities that are supported by the activities that are  
9 undertaken in harvesting timber in the Central Highlands.  
10 There is already a shortfall predicted for the 2020/21  
11 year and if your Honour is to issue an injunction in  
12 respect of these 15 coupes that shortfall will be  
13 significantly increased by 67,000 cubic metres, and for  
14 that reason we say it's a significant amount of timber  
15 that would otherwise be tied up.

16 Our learned friends did not refer in their  
17 submissions to one other matter that we say factors into  
18 the balance of convenience, your Honour. Your Honour  
19 knows that the price that an applicant for injunctive  
20 relief must pay is the provision of an undertaking as to  
21 damages. With that in mind, my instructors wrote to my  
22 learned friend's instructors, and this is exhibited to the  
23 affidavit of Ms Dawson.

24 HER HONOUR: Yes.

25 MR WALLER: As exhibit 7, a letter from Baker & McKenzie of  
26 11 February to the Environmental Justice Australia noting  
27 that 'undertakings as to damages were already provided by  
28 the plaintiff as a condition of their obtaining urgent  
29 interlocutory relief. We are instructed that our client  
30 anticipates its loss and damage recoverable pursuant to  
31 your client's undertakings in the event your client is not

1 successful in its application to be heard on 18 February  
2 2020 will be in excess of \$100,000 and we are also  
3 instructed that our client anticipates that if your client  
4 is successful in obtaining the interlocutory injunction  
5 sought by your client pending the hearing and  
6 determination of the proceeding then our client's loss and  
7 damage will likely be substantially higher than that  
8 amount. We also anticipate various of our client's  
9 customers and contractors will sustain similar or greater  
10 loss and damage. Your client has not provided any  
11 information or documents that go to your client's ability  
12 to satisfy any orders as to damages made by the court  
13 recoverable by our client pursuant to the undertakings.  
14 Please provide the following information by Wednesday,  
15 11 February: first, documents recording your client's  
16 current financial position, including its most recent  
17 financial statement and accounts and a copy of its most  
18 recent bank accounts, and any other information and  
19 documents in your client's possession which demonstrate  
20 your client's capacity to meet the award of damages  
21 described above. Please do not hesitate to contact the  
22 writer with any queries.'

23 The response from Environmental Justice Australia  
24 the following day states, 'As was made clear by our  
25 client's counsel at the hearing of the interim injunction  
26 application, our client does not say that it is in the  
27 position to satisfy an award of damages arising from the  
28 giving of the usual undertaking. Our client's position is  
29 that the question of its capacity to satisfy any award of  
30 damages arising from the usual undertaking is not a factor  
31 which should weigh heavily in the court's determination of

1 whether an interlocutory injunction is granted in this  
2 proceeding,' and reliance is placed on a decision of  
3 Justice Forrest in *Environment East Gippsland v VicForests*  
4 regarding the ability of a plaintiff to satisfy an  
5 undertaking.

6 We say, your Honour, that on the  
7 authorities - and we refer to this in our written  
8 submissions - a factor which courts have taken into  
9 account in considering the balance of convenience is the  
10 likely practical adequacy of any undertaking as to damages  
11 which the plaintiff may give, that that does represent an  
12 important discretionary consideration.

13 We say that the approach of the plaintiff here is  
14 high handed in refusing to provide any information at all  
15 concerning its financial position but indirectly seeking  
16 to rely, as it were, on the fact that in a particular  
17 case, another case, a judge was prepared not to require  
18 security for an undertaking given.

19 The authorities that Justice Forrest refers to in  
20 that decision make it clear that one of the matters taken  
21 into account whether security for an undertaking is  
22 required is the strength of the plaintiff's case. We say  
23 in this case, where the plaintiff's case for the reasons  
24 we have advanced is weak, for the plaintiff to expect to  
25 obtain an injunction which would have the practical effect  
26 of preventing VicForests from harvesting in any of the 15  
27 coupes for a period that on the evidence set out in  
28 Mr Paul's affidavit could run to two years without putting  
29 forward an undertaking that has any value at all is not a  
30 position that the court should accept. It effectively  
31 demonstrates an attitude that VicForests will bear the

1 entire burden even if it is successful. Even if  
2 ultimately after some months VicForests' position is  
3 vindicated, then it won't be able to turn to the plaintiff  
4 who brought the proceeding as defendants routinely are  
5 able to following the grant of an injunction so that the  
6 law can redress the damage that has been caused by the  
7 injunction being granted.

8 We say that's a powerful discretionary  
9 consideration that to a large extent neutralises the  
10 balance of convenience that my learned friend spoke to  
11 earlier and that in any event the issue of serious  
12 question or prima facie case should not be equated with  
13 balance of convenience but should be the principal  
14 determinant in whether or not an injunction should go in  
15 this case.

16 Before I sit down, your Honour, I misstated the  
17 position earlier when I said that the plaintiff was not  
18 pressing an injunction in respect of two of the coupes,  
19 mainly Wobby and Mt Wills Creek. Those coupes are in fire  
20 affected areas and VicForests, the evidence demonstrates,  
21 has no current intention to harvest in them. It would  
22 require department approval before it could do so. In  
23 those circumstances, your Honour, we say no injunction  
24 ought go as there is no imminent threat in respect of  
25 those coupes.

26 Our learned friends' solicitors wrote to my  
27 instructing solicitors on the 17th, yesterday, stating  
28 that having regard to certain paragraphs in Mr Paul's  
29 affidavit, 'In light of that information our client is  
30 prepared not to seek interlocutory relief in respect of  
31 these coupes at the hearing tomorrow if your Honour client

1 agrees to provide 14 days notice prior to commencement of  
2 operations in these coupes.'

3 Your Honour, I have no such instructions to  
4 provide 14 days notice. We say that on ordinary  
5 principles where there is no imminent threat there ought  
6 be no interlocutory relief. If matters change, then of  
7 course our learned friends can approach the court. But it  
8 is not the position where a party can demand an  
9 undertaking and if it is not given - a demand that notice  
10 be given in circumstances where VicForests has no  
11 obligation to give that notice and if it agrees to that in  
12 respect of these coupes then there may be other coupes  
13 that are then referred to later.

14 We know, your Honour, that this proceeding,  
15 although today is concerned with 15 coupes, began with an  
16 application concerning 10 coupes. That then grew. Now  
17 it's 15 coupes. We know that the prayer for relief which  
18 I took your Honour to, paragraph (d), is unlimited and  
19 refers to final injunction to restrain VicForests in  
20 respect of any coupe containing fire affected threatened  
21 species or habitat of such species.

22 We see this, your Honour, as potentially the thin  
23 edge of a wedge in circumstances where there is no proper  
24 legal basis for an injunction having regard to the matters  
25 that we have taken your Honour to today and in our written  
26 submissions, which we rely on. If your Honour pleases.

27 HER HONOUR: Thank you, Mr Waller. Ms Foley?

28 MS FOLEY: Thank you, your Honour. I have nine points to make  
29 in reply. I will endeavour to be brief.

30 The first point, your Honour, is this and I want  
31 to be very clear about it, although it is clear on our

1 statement of claim. We are not seeking by way of final  
2 relief a moratorium on logging forever in the coupes.  
3 Paragraph (d) of the prayer for relief is quite clear  
4 about this. The final injunctive relief is sought unless  
5 and until certain things occur: broadly stated, the  
6 conclusion of the governmental responses; that the  
7 research and advice be taken into account; and that these  
8 matters are evaluated and the prescriptions developed  
9 accordingly. We are not seeking a moratorium.

10 The argument advanced by Mr Waller, with respect  
11 to him, is the classic straw man argument. It is not what  
12 we are seeking by reason of our statement of claim and  
13 also by reason of the arguments that I have made.

14 I made a reference in oral argument to areas in  
15 coupes where logging may never be able to occur. Let me  
16 explain that reference. It was in the context of a  
17 possible scenario whereby the outcome of governmental  
18 reviews might lead to protection by legislation or  
19 prescriptions of areas in the coupes that are the subject  
20 of the proceeding.

21 So, for example, if the immediate protection area  
22 review leads to changes in the forest area that impacts  
23 these coupes that might mean that some areas of the coupes  
24 can't be logged. That is a possibility, and of course we  
25 rely on that as one of the reasons why VicForests should  
26 wait until the reviews are completed. Why log in a coupe  
27 now if the government in a few months time might do  
28 something arising out of these reviews to protect species  
29 in the coupes? That's the point.

30 But we are not seeking that outcome in this  
31 litigation. If the governmental reviews occur and there

1 are no consequential changes in practice that impact these  
2 coupes, then there is nothing in our proceeding that will  
3 prevent VicForests from going ahead and logging in the  
4 coupes.

5 The second point, your Honour, is this. My  
6 learned friend in written submissions and also orally has  
7 suggested to your Honour that our case is an unprecedented  
8 expansion of the precautionary principle. We say not so.  
9 The case is founded on a breach of statutory duty, the  
10 requirement to comply with the code and a provision of the  
11 code, the precautionary principle, that has been found in  
12 several decisions to be enforceable. We also deal with  
13 the twin provision, section 2.2.2.3.

14 Yes, we are dealing with a unique set of facts in  
15 the sense that the bushfires are unprecedented. But that  
16 doesn't make the case novel in the sense that my learned  
17 friend is putting it. It makes it an application of  
18 established principle to a particular set of facts which  
19 this court and the Court of Appeal does every day of the  
20 week, your Honour.

21 My learned friend commented that I hadn't in my  
22 oral submissions referred to case law as if that was to  
23 suggest that we don't have a foundation for this case.  
24 It's quite the opposite. Because there is no dispute  
25 anymore - there may have been some years ago, but there is  
26 no longer any dispute - that the precautionary principle  
27 is an enforceable obligation and we invoke that principle,  
28 it is a straightforward application of that principle,  
29 there is no controversy and I don't need to take  
30 your Honour through those cases. The defendant doesn't  
31 dispute that it is an enforceable obligation.

1                   But even if one is looking at the facts and how  
2                   different is this to cases that have been argued, we say  
3                   that there are clear parallels between this case and the  
4                   Brown Mountain decision, which was Environment East  
5                   Gippsland v VicForests [2010] VSC 335, can I just take  
6                   your Honour for a moment to one part of that which will  
7                   make good this point. Does your Honour have that decision  
8                   available?

9   HER HONOUR: I do.

10   MS FOLEY: Thank you.

11   HER HONOUR: What's the name of it?

12   MS FOLEY: Environment East Gippsland v VicForests [2010] VSC  
13                   335.

14   HER HONOUR: Yes, I've got that.

15   MS FOLEY: Thank you. If your Honour could go to paragraph  
16                   601, please.

17   HER HONOUR: Yes.

18   MS FOLEY: You'll see there the statement, 'I have come to the  
19                   conclusion that the precautionary principle does require  
20                   the logging of the Brown Mountain coupes to be delayed  
21                   until the completion of the FMZ review process for the  
22                   following reasons.'

23                   If we go down there are a number of reasons, but  
24                   I want to take you in particular to subparagraph (c) and  
25                   (e). In (c), 'I am satisfied that the threat of serious  
26                   and irreversible damage to the environment in respect of  
27                   the Powerful Owl and the Sooty Owl is attended by a  
28                   material lack of scientific certainty', and then refers to  
29                   a review of the current POMA and SOMA system, and then in  
30                   (e) a reference to the threat being able to be addressed  
31                   by adaptive management, which is one of the aspects of the



1 precautionary principle that needs to be considered, 'The  
2 re-evaluation of the system of POMAs and SOMAs is  
3 underway' and so on.

4 We seek in reality no more than the same kind of  
5 outcome as in Brown Mountain but on a far stronger factual  
6 basis because we are here dealing with the aftermath of  
7 catastrophic bushfires. In Brown Mountain the court  
8 ordered a halt to logging in coupes with recorded presence  
9 of the same owl species, the powerful owl and the sooty  
10 owl, pending the outcome of the POMA and SOMA reviews  
11 without any such catastrophe having occurred and without  
12 evidence, as we have here, that the existing POMAs and  
13 SOMAs were damaged or unsuitable for the species in any  
14 way.

15 We say we have far greater evidence here of the  
16 substantial damage that has occurred to the sooty and  
17 powerful owl habitat and is currently being assessed in  
18 the two governmental responses.

19 We also say that the situation with the greater  
20 glider IPA is akin to the SOMA and POMA review. It is  
21 similarly a fixed requirement for habitat protection  
22 across the landscape and, as in Brown Mountain, there is  
23 evidence before the court that the department is actively  
24 currently in the process of finalising those boundaries  
25 which is not yet complete.

26 So we say that, yes, this case might involve some  
27 unique facts in the form of the bushfire impact. But the  
28 fact that the legal principles that we are looking at  
29 might need to be developed to apply to those facts doesn't  
30 mean there's no serious question to be tried. Even a  
31 completely novel case, your Honour, which this is not,

1 might indeed raise a serious question.

2 In making the submission - this is my third  
3 point - that our case flies in the face of authority my  
4 learned friend relied heavily on the My Environment v  
5 VicForests decision [2012] VSC 91. Your Honour, we  
6 address this in our written submissions at paragraphs 27  
7 to 31 in quite some detail and I rely on those paragraphs.  
8 I will add this. Again we are dealing with a different  
9 set of facts because the fire damage here is of a very  
10 different character, and so too are the governmental  
11 reviews that are being conducted.

12 In that decision there was one species. Here we  
13 have five. In that decision that one species hadn't even  
14 been detected in the single coupe that was in issue in the  
15 case. Here we have put direct evidence before the court  
16 of species in the coupes.

17 Moreover, the case was conducted on a different  
18 basis. It was a case that was framed differently, as is  
19 evident from the description of the case at paragraph 16  
20 of the reasons. Some similar issues were raised, but the  
21 core of the case was quite different. Here we have a case  
22 that is squarely focused on non-compliance with 2.2.2.2  
23 and 2.2.2.3.

24 Paragraphs 298, 301 and 302 of that judgment are  
25 important because there the judge makes the point that the  
26 case concerned not the consequences of the review  
27 generally but what steps were relevant with respect to the  
28 single coupe in issue, Gun Barrel. What was determined  
29 was there was an inadequate connection between the review  
30 process and that coupe.

31 Here of course we say that connection has been

1 made out because of the evidence that we have put forward  
2 about the content of the reviews, what they are looking  
3 at, the species of most immediate concern that they have  
4 identified which include the species we are concerned with  
5 in this proceeding, and also significantly the prospect of  
6 alterations to the actions statement which was not an  
7 issue in that proceeding. There are a range of reasons,  
8 your Honour, why the case is quite different.

9 The fourth point I wish to address your Honour is  
10 in relation to the Dawson evidence at paragraphs 15 to 17  
11 of that affidavit, and this is the pie chart point if  
12 I can call it that. It was a little unclear at least to  
13 me - and I'm sure that's my fault - but it seemed to be in  
14 aid of a submission that, 'We don't harvest very much  
15 really when you look at this chart. In the scheme of  
16 things it's just such a tiny slice.' From VicForests'  
17 perspective as a timber harvester of course that might be  
18 right.

19 But we say let's look at it from the perspective  
20 of the threatened species. These species we know before  
21 the bushfires were on the path to extinction. That is why  
22 they were identified and listed as threatened. We are now  
23 in an even worse position post bushfires. So doesn't that  
24 make these coupes, these patches of land, so much more  
25 incredibly important, so much more valuable from a  
26 biodiversity perspective?

27 What matters in relation to the protection of  
28 these species is the preservation of whatever habitat  
29 might be left. If that doesn't mean much from VicForests'  
30 perspective when one looks at the overall amount of forest  
31 and how much they are harvesting then we say, 'What harm

1 is there in waiting? You've said that there's going to be  
2 a review. You've said you are needing more information to  
3 conduct it. What harm is there in waiting until you have  
4 that information that you have said you need?'

5 The fifth point I wish to make, your Honour, is  
6 in relation to this issue of prescriptions, and it's  
7 really to address the submission my learned friend made  
8 which suggested to your Honour - I believe the VicForests  
9 evidence expressly says this - 'The current prescriptions  
10 are being complied with and really what the plaintiff is  
11 talking about is changing the prescriptions.'

12 That is not right in the sense that we have made  
13 the point, and I have taken your Honour to the documents  
14 that show these, that the prescriptions didn't just  
15 require certain areas or values to be established; it  
16 requires maintenance. In circumstances where we know  
17 there's been impact in the East Gippsland area which form  
18 part of those protections we say the prescriptions are not  
19 currently being met.

20 So this case is not just about prescriptions  
21 needing to be changed but about a review being undertaken  
22 to make sure that what is currently prescribed will be met  
23 at the present time by adding new areas in to take into  
24 account the areas that have been burnt. So it is also  
25 about VicForests being able to say, 'We can meet the  
26 prescriptions because we have taken into account what has  
27 changed.' If one does otherwise one is not giving effect  
28 to that notion of maintaining the protection.

29 I can use, your Honour, the greater glider as an  
30 example. My learned friend referred to this idea of, 'We  
31 comply with the prescription. Five greater glider in one

1 kilometre, that triggers the protection under the action  
2 statement.' It's obvious, your Honour, that if the number  
3 of greater glider are diminished by reason of fires that  
4 prescription and that triggering the need for five greater  
5 glider in one kilometre in order to get protection may at  
6 the moment be worthless because you may never get five in  
7 a kilometre because the numbers are so reduced.

8 This is a very important point, your Honour,  
9 because for these prescriptions to have any value the  
10 changed situation simply must be taken into account,  
11 otherwise the identifications we saw on the screen of the  
12 two greater gliders playing in the tree next to the area  
13 of land that's been harvested will trigger nothing on  
14 their own. You need to see five in a kilometre, but we  
15 may never get there, which may mean that the last greater  
16 gliders might die because the trees are logged because  
17 VicForests says, 'Ah, but we met the prescription.' It is  
18 a worthless statement. We are asking for value and  
19 meaning to be given to the content of these important  
20 prescriptions, your Honour.

21 If I can address my sixth point, which is the  
22 letter from the OCR and the weight that's been given to  
23 it. My learned friend said that the court should draw  
24 comfort from this letter. We would say that the court  
25 must take care in placing weight on that letter for a  
26 number of reasons.

27 Firstly, there's no affidavit from the OCR. It  
28 is correspondence put into a solicitor affidavit from  
29 VicForests. We do not know the content of the meetings,  
30 what was said. We do not know what documents were given  
31 to the OCR, what transpired to lead to that

1 correspondence. We have VicForests' letter carefully  
2 setting out its position with this litigation in mind, no  
3 doubt, and the OCR responding in kind. But we have no  
4 other information. So care must be taken.

5 But we also say that it is, when one looks at it,  
6 a heavily qualified letter, as one might expect when  
7 dealing with one government department - someone within  
8 one government department writing to a statutory  
9 corporation. The qualifications, your Honour, if I can  
10 take you to it. We have already noted one of them, and  
11 that is, 'My position may change if further information is  
12 available.' That's important.

13 Another qualification is this. It is stated in  
14 that letter that, 'Based on the current intensity of  
15 harvesting I don't expect in the short-term there will be  
16 the potential for serious or irreversible damage.' We ask  
17 can we safely assume that the intensity of harvesting will  
18 not increase, which is referred to in this paragraph, when  
19 in the Creek affidavit at 52 VicForests has said it  
20 intends to meet its contracted supply commitment from  
21 non-fire affected FMAs, which we say means VicForests will  
22 be harvesting at an increased intensity in those FMAs to  
23 meet those same contracted supply obligations without  
24 harvesting in East Gippsland. So is that a safe  
25 assumption for the regulator to make? We don't know  
26 because we are not given the underlying material to test  
27 it.

28 We also say of course this is not a legal  
29 opinion. It's the view of someone within government.  
30 It's focused on 2.2.2.2. It's not looking at all at  
31 2.2.2.3. It can't take the place of this court's judgment

1 on the question that this court is seized with: is there a  
2 serious question to be tried? So we say the court must pay  
3 regard to the qualified language in that letter.

4 I'm going to stay with this correspondence in  
5 order to address my seventh point, which goes to my  
6 learned friend's statements about VicForests' operations  
7 in East Gippsland and also in the north-east FMA coupes.  
8 Again we say some care needs to be taken. There has been  
9 no formal policy statement put before the court. There  
10 has been nothing in the affidavit of the CEO setting out a  
11 commitment in any concrete terms.

12 What we have, apart from what was said at the Bar  
13 table, is in the letter to the regulator. It says this,  
14 and I'm looking, your Honour, at ACSP-4, the letter from  
15 VicForests to the regulator. 'In relation to our  
16 discussion around harvesting in fire affected areas,  
17 VicForests agrees that it will not undertake any timber  
18 harvesting operations in the East Gippsland forest  
19 management areas until appropriate biodiversity impact  
20 assessments have been completed by DELWP. I would like to  
21 review this position with you as soon as possible after  
22 31 March 2020 if those assessments haven't been completed  
23 by that time.'

24 We say that's not a commitment to not be logging  
25 in East Gippsland forever. It's obviously a position  
26 which may change and we have no idea when that will be.

27 HER HONOUR: That suggests at least until 31 March.

28 MS FOLEY: That's right. But the way it was being put by my  
29 learned friend was, 'We can take some comfort in terms of  
30 the protections that there are some areas in East  
31 Gippsland that we are not going into, but we could. So

1 they are affording protection.'

2 But of course if one is looking, let's take the  
3 greater glider as an example, at the vast amount of land  
4 that was required under the action statement to be  
5 protected - and that's to be protected permanently - you  
6 cannot be saying now that we've lost an amount of that by  
7 reason of the fires and we are saying, 'Let's pause  
8 because we might need this area in the Central Highlands,'  
9 you can't say to give comfort, 'Oh, but we might  
10 temporarily stop in East Gippsland. There might still be  
11 land there that can be added in.'

12 It might only be for a month or two months. The  
13 protection needs to be going forward. It needs to be land  
14 that we can incorporate on an ongoing basis for protection  
15 for this species. Again that's why we say we need to wait  
16 until we have full information, until all of the  
17 governmental responses have given all of the information  
18 that's needed to properly assess the situation. Why jump  
19 in now with an inadequate knowledge base?

20 Mr Waller also said that there's no harvesting in  
21 the north-east FMAs, and yet there are four coupes  
22 involved in this proceeding that are in the north-east  
23 FMA: first, the Timber Top Wales coupe, which is the  
24 subject of the undertaking relevant to the injunction; the  
25 Timber Top Princess Di coupe, listed as presently active  
26 in VicForests' material and letters; and then there are  
27 two additional coupes, Fraser Creek also known as Wobby,  
28 and the Mt Wills coupe, and we have asked for notice in  
29 relation to those.

30 So, again, without material having been put  
31 forward in an affidavit from the CEO of one of these other



1 senior people from VicForests we don't see that the court  
2 can accept that evidence from the Bar table that  
3 VicForests is not logging in that area.

4 If I can turn to the eighth point, your Honour,  
5 and that is the issue of security. We do rely on the  
6 Environment East Gippsland case [2009] VSC 386, in  
7 particular paragraphs 2, 10, 110 to 102. I referred to  
8 that last time and I won't take your Honour to it. We say  
9 that the same conclusions apply here. We are dealing with  
10 public interest litigation. The importance of the  
11 protection of threatened species is enshrined in the  
12 litigation in issue in this proceeding, including in the  
13 Flora and Fauna Guarantee Act.

14 In addition to Environment East Gippsland there  
15 is also Environment East Gippsland (No. 2) [2009] VSC 421,  
16 and these of course aren't the only kinds of cases,  
17 your Honour, where a valuable undertaking has not been  
18 insisted upon. Your Honour will be aware of numerous  
19 cases in the Federal Court in recent years brought by  
20 refugees who are held on Nauru or Manus Island seeking and  
21 being granted injunctive relief to be brought to Australia  
22 for medical care. In those cases, and there have been  
23 many of them, it is mandatory injunctions that are being  
24 sought and granted at costs to the Commonwealth to bring  
25 those people out to Australia and give them care here. In  
26 those cases valuable undertakings of course have not been  
27 able to be given.

28 There is a body of case law and we do rely upon  
29 it to support the view that in exceptional cases - and  
30 ours is one of them - the undertaking or the inability to  
31 provide valuable security for it should not be held

1           against the plaintiff in seeking the injunctive relief it  
2           seeks in this kind of case.

3                       The final point is a short one, your Honour, and  
4           it relates to the two coupes that my learned friend - - -

5 HER HONOUR: Just stopping you there, the alternative is should  
6           I infer that if an undertaking is required it couldn't be  
7           met?

8 MS FOLEY: You can give an undertaking - - -

9 HER HONOUR: Are you an associated incorporation of \$2 or - - -

10 MS FOLEY: We can't say to the court that we could meet damages  
11           of the kind that VicForests has put before the court and  
12           we don't put our position forward on that basis. We do  
13           not tell the court that we could meet an undertaking of  
14           \$100,000.

15 HER HONOUR: So you could not?

16 MS FOLEY: No, we could not.

17 HER HONOUR: As an organisation.

18 MS FOLEY: That's right, your Honour. Those are my  
19           instructions.

20 HER HONOUR: Yes.

21 MS FOLEY: So we are not asking the court to find that we can  
22           give a valuable undertaking. We do not ask that.

23 HER HONOUR: Yes.

24 MS FOLEY: The final point, your Honour, related to the two  
25           coupes that my learned friend has said weren't pressed and  
26           then explained to your Honour was the subject of a request  
27           by us simply for notice if there was an intention to log.  
28           My learned friend said at the same time, 'Well, of course  
29           if matters change in relation to the coupes the plaintiff  
30           can approach the court.' We would like to be in a position  
31           to approach the court, and that is why we ask for notice.

1 I understand my learned friend's instructions are  
2 that notice can't be given and for that reason they remain  
3 as part of the application at this time.

4 HER HONOUR: Yes.

5 MS FOLEY: Those are my submissions, your Honour.

6 HER HONOUR: Thank you. Very well. That completes the  
7 hearing. For the purposes of reviewing all of the matters  
8 that were put before me today the injunction that has been  
9 granted runs out at 4.15 today, I think I'm right in  
10 saying that. So that should be continued pending delivery  
11 of judgment, written reasons.

12 MS FOLEY: We seek that, yes, your Honour.

13 HER HONOUR: Yes. So if you could send in further orders  
14 saying 'until further order'.

15 MS FOLEY: Thank you.

16 HER HONOUR: That is meaning until judgment is delivered.

17 MS FOLEY: We will attend to that.

18 HER HONOUR: Yes.

19 MR WALLER: Will that order note that the plaintiff by their  
20 counsel are giving an undertaking which they have  
21 acknowledged has no value?

22 HER HONOUR: I'm looking at the orders of 29 January. There's  
23 an undertaking. Then there are variations I think to the  
24 orders. On 7 February the undertaking was repeated on  
25 those orders.

26 MR WALLER: Yes.

27 HER HONOUR: You have heard what Ms Foley said in court.

28 MR WALLER: Yes, your Honour.

29 HER HONOUR: It's a matter for you, if you wish to put  
30 something in 'Other Matters'. I don't know that it needs  
31 to be if it is said in open court.

1 MR WALLER: I think your Honour has heard what the parties have  
2 said about that.  
3 HER HONOUR: Yes.  
4 MR WALLER: So the order will be continued.  
5 HER HONOUR: The undertaking should continue. So it just needs  
6 to be continued until further order.  
7 MR WALLER: And I think in respect of some coupes there was not  
8 an order but I think cross-undertakings.  
9 HER HONOUR: Yes.  
10 MR WALLER: So we will fashion - - -  
11 HER HONOUR: Perhaps get together and - - -  
12 MR WALLER: We'll fashion an order that continues the status  
13 quo.  
14 HER HONOUR: Continues the status quo, yes. Thank you, both of  
15 you, for your submissions. Next time when we have an  
16 estimate we will think about that, and I will be in touch  
17 when I can deliver reasons.  
18 MR WALLER: If your Honour pleases.  
19 HER HONOUR: Thank you.  
20 ADJOURNED SINE DIE  
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