

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

Not Restricted

S ECI 2020 00373

WOTCH INC

Plaintiff

v

VICFORESTS

Defendant

JUDGE: Keogh J
WHERE HELD: Melbourne
DATE OF HEARING: 19 April 2021
DATE OF RULING: 19 May 2021
CASE MAY BE CITED AS: WOTCH Inc v VicForests (No 8)
MEDIUM NEUTRAL CITATION: [2021] VSC 268

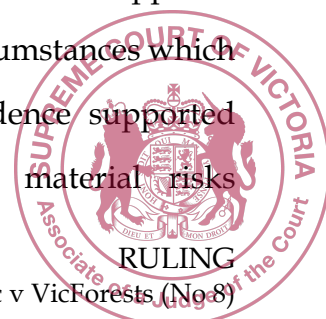
PRACTICE AND PROCEDURE – Application to vary interlocutory injunctions – Timber harvesting operations in State forests – Material change of circumstances – Whether regeneration burning contemplated when orders made – Obligation to regenerate harvested coupes under *Code of Practice for Timber Production 2014* – Risk of regeneration burning to threatened species and habitat – No material change of circumstances – Enforcement of orders not unjust – *Sustainable Forests (Timber) Act 2004* (Vic), s 3.

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



HIS HONOUR:

- 1 This proceeding concerns the legality of timber harvesting operations by VicForests in native forest coupes inhabited by species listed as threatened under the *Flora and Fauna Guarantee Act 1988* (Vic) ('FFG Act') which may affect those species.
- 2 The bushfires which occurred during the 2019/20 fire season caused significant population and habitat losses for some threatened species. WOTCH alleges that State and Commonwealth bushfire biodiversity responses that are currently underway will contain information and make findings which VicForests must take into account in planning and conducting its timber harvesting operations, and that it is unlawful for VicForests to conduct timber harvesting operations in coupes known by it or the Department of Environment, Land, Water and Planning ('DELWP') to contain or be likely to contain threatened species or the habitat of threatened species affected by the bushfires until the impact of the bushfires on those species is fully understood.
- 3 Orders have been made in the proceeding which restrain VicForests from conducting timber harvesting operations in certain identified forest coupes. Those interlocutory injunctions were to remain in place until the trial of the proceeding, which is listed to commence on 20 September 2021.
- 4 By summons dated 29 March 2021, VicForests has applied to amend two of the orders to allow it to undertake regeneration burning in three coupes.
- 5 VicForests argued that when the orders were made WOTCH was seeking to restrain harvesting of timber in the coupes, and that regeneration burning was not expressly canvassed in the applications; under the regulatory regime it is obliged to undertake regeneration activities to ensure biological and ecological characteristics of native flora and fauna within the forests is maintained; and that the regeneration burning which is proposed in the three coupes will meet that obligation and will be undertaken in a way that adequately protects the threatened species and habitat. WOTCH opposed the application and argued there had been no material change of circumstances which rendered enforcement of the earlier orders unjust; and the evidence supported maintenance of the current orders because it demonstrated material risks



to threatened species and habitat from the proposed regeneration burning.

Procedural history

6 The application by VicForests relates to three coupes: Dowse, Facet and Turkey Feet. In each coupe, timber harvesting had commenced before an order was made in this proceeding restraining VicForests from conducting timber harvesting operations. The estimated area harvested is 5.4 hectares, 4 hectares and 5.8 hectares in Dowse, Facet and Turkey Feet respectively.

7 On 29 January 2020, an interim order was made restraining VicForests from conducting timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* (Vic) (*'SFT Act'*) in Dowse coupe.

8 Relevantly, timber harvesting operations is defined in s 3 of the *SFT Act* to mean:

any of the following kinds of activities carried out by VicForests or by any other person or body –

(a) for the primary purpose of the sale, or the processing and sale –

(i) felling or cutting trees or parts of trees;

(ii) taking or removing timber;

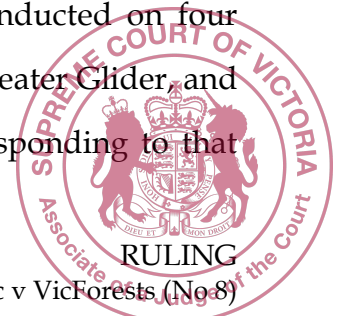
(iii) delivering timber to a buyer or transporting to a place for collection by a buyer or sale to a buyer;

(iv) any works, including road works, ancillary to any of the activities referred to in subparagraphs (i) to (iii); or

...

(c) regeneration burning...

9 There was a contested hearing before McMillan J on 18 February 2020 to determine whether VicForests should be restrained, until final determination of the proceeding, from conducting timber harvesting operations in coupes which included Dowse. At that hearing, VicForests relied on evidence of Mr Paul, its manager of environmental performance, about post-harvest surveys being conducted on four coupes to assess the persistence of threatened species such as the Greater Glider, and the efficacy of habitat retention for protection of that species. Responding to that



evidence, counsel for WOTCH referred to the Scientific Advisory Committee final recommendation under the *FFG Act* for nomination of the Greater Glider as threatened, and made the following submission, quoting from the report of the final recommendation:

‘Timber harvesting in greater glider habitat has been proven to cause declines and/or local extinctions of greater glider populations.’ There is a reference there to a number of scientific sources in the literature. It then says, ‘Timber harvesting practices reduces the number of hollow bearing trees available for denning’ – the denning trees of course are where the greater glider makes its home – ‘and for the female of the species where it has its young, or as a result of regeneration burns after the logging. In addition, it says, ‘the species does not cope well with habitat change. Although all animals may not die from the initial impact, they will die shortly afterwards. This is due to life history traits, affinity with home range, small home ranges, attachment to hollow bearing trees they use for denning, and their specialist diet.’

...

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

Counsel for WOTCH then made specific reference to Dowse coupe:

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

10 In submissions at the hearing on 18 February 2020, counsel for VicForests articulated the case being made against it:

It is clear from the prayer for relief, in particular paragraph (d), that what is sought is a final injunction to restrain VicForests from carrying out timber harvesting operations in any coupe known to VicForests or the department to contain or likely to contain a fire affected threatened species or the habitat of such species unless and until seven matters occur.

11 McMillan J granted the application for interlocutory relief. In reasons delivered on 5 March 2020, McMillan J made the following reference to Dowse coupe:¹

In relation to **Dowse** coupe, the plaintiff relies on detections of seven greater gliders in this coupe or on the coupe boundary and three greater gliders in an

¹ *WOTCH Inc v VicForests (No 2)* [2020] VSC 99, [85].

adjacent coupe on 25-26 January 2020. These detections were not reported to the defendant. Mr Paul deposes that the defendant will give consideration to these detections in its planning of any future timber harvesting operations in this coupe.

McMillan J concluded there was no evidence to support assertions by Mr Paul as to the efficacy of habitat retention for the protection of species such as the Greater Glider, and accepted submissions by WOTCH that the Scientific Advisory Committee recommendation report made it clear Greater Gliders die during or shortly after timber harvesting.² McMillan J concluded that the balance of convenience weighed in favour of the plaintiff:

Whilst the defendant has demonstrated it will suffer some short-term loss, and that long-term loss may exacerbate any likely shortfall in production, this pales in comparison to the potential threat of irreversible environmental damage to the fire-affected threatened species. All five of the threatened species have been identified by the State government as on the path to extinction. It goes without saying that once these species are extinct, there is no going back.³

12 McMillan J found for WOTCH and made the following interlocutory restraining order:

1. Until the hearing and determination of the proceeding, or further order, the defendant, by itself, its employees, servants, agents or howsoever otherwise, be restrained from conducting timber harvesting operations within the meaning of section 3 of the *Sustainable Forests (Timber) Act 2004* within the coupes numbered 312-510-0012 (Kumba), 458-501-0010 (Rock a Rhyme), 347-518-0005 (Dowse), 298-516-0003 (Pony), 298-516-0002 (Brumby), 297-501-0006 (Castella East), 298-504-0001 (Propeller), 349-502-0014 (LaTrobe), 345-528-0001 (Apu), 312-510-0010 (Rumba), 312-510-0011 (Pumba), 388-505-0002 (Wales), and 388-505-0004 (Princess Di) (collectively, 'the coupes').

A limited exception to the restraint on VicForests conducting timber harvesting operations was allowed by Order 2:

2. Nothing in paragraph 1 of this order shall prevent the defendant from undertaking works on any existing road or existing snig track in any of the coupes for the purposes of erosion control in accordance with the *Code of Practice for Timber Production 2014*, but in so doing the defendant is not permitted to fell or damage trees (whether understorey, mid-storey or over-storey).

² Ibid [99]-[100].

³ Ibid [144].

13 Later in March 2020, WOTCH applied to restrain timber harvesting operations in further coupes, including Facet and Turkey Feet. That application was successful, and McMillan J made orders in identical terms to those made on 5 March 2020.

Evidence

14 In support of the application, VicForests relied on affidavits of Matthew Brown and James Gunn affirmed 25 March and 16 April 2021 respectively.

15 Mr Brown is employed by VicForests as a Regeneration Coordinator. The following is a summary of his evidence:

- (a) The *Code of Practice for Timber Production 2014* ('the Code') requires that VicForests regenerate harvested coupes as soon as practical, and take all practical measures to protect areas excluded from harvesting from the impacts of burns and other regeneration activities.
- (b) Preparation of a coupe for regeneration is by regeneration burning, rough heaping without burning or no activity. Timber harvesting leaves logging slash on the forest floor which needs to be removed to enable seed sown to germinate and grow into seedlings. Burning and rough heaping are equally effective methods for preparing a site for sowing and planting, but rough heaping is considered to be more damaging.
- (c) 'Regeneration burning' refers to burning of debris on the forest floor which remains after timber harvesting through the ignition of a controlled fire, called slash burning, or rough heaping of debris in windrows which are then burned like bonfires.
- (d) In the three coupes which are the subject of this application, the most effective regeneration preparation will be by a combination of slash burning and rough heaping and windrow burning.
- (e) The window of opportunity for regeneration burns is generally March and April each year.



- (f) Harvesting in the three coupes occurred between November 2019 and April 2020, so the best time to perform regeneration work is now.
- (g) Regeneration burns, which are undertaken by Forest Fire Management Victoria, a unit of the DELWP, with the assistance of VicForests, are regulated and require carefully developed plans for risk assessment and a contingency plan if the fire escapes the planned burn area.
- (h) The main silviculture method used in each coupe was clearfell, whereby all merchantable trees apart from those retained for wildlife habitat are removed, though there may be some areas of lower harvesting intensity such as seed tree retention. Each coupe contains areas that have not been harvested because they were protected under the coupe plan, or areas which were not harvested before the coupes became the subject of an injunction. Regeneration burning will be undertaken in the clearfell harvested areas. Unharvested areas will be protected from regeneration burns by mineral earth break. There is potential for damage to trees within 20 to 30 metres of the edge of the fire from radiant heat which occasionally causes a tree to die, which is known as 'edge effect'. There is a low risk that a fire will escape the boundaries of a controlled burn. In 2020, of 28 controlled burns undertaken in West Gippsland, only four breached the planned boundaries.

16 Mr Gunn is the Manager of Systems and Practices for VicForests. The following is a summary of his evidence:

- (a) In mixed species forests, Stringybark trees are easily susceptible to catching fire, but usually suffer only superficial burning and crown scorch, and readily survive. In contrast it is much more difficult for trees in an ash forest to catch fire, especially in current conditions, but they are less fire tolerant.
- (b) The planned regeneration burns will be conducted in late autumn 2021 at a time when the moisture content of the forest is higher and temperatures are generally cooler, which will result in lower fire intensity.



- (c) VicForests' new harvesting and regeneration systems, which came into effect in July 2019, have a greater emphasis on lighting fires on the ground, rather than by aerial drip torch from a helicopter, which enables staged ignition and greater control over fire intensity and therefore impacts on retained trees.
- (d) The three coupes contain ash forest, apart from a small patch of mixed species in Dowse. Each coupe contains a few retained trees in the area harvested, and the patches to be burned are adjacent to some areas which will become retained islands if the coupe is eventually harvested.

17 WOTCH relied on the affidavit of Blake Nisbet affirmed 11 April 2021 and an expert report of Dr Andrew Smith dated 30 July 2020. In his affidavit, Mr Nisbet set out detailed observations of the effect of regeneration burns conducted in a range of coupes since 2019 which include:

- (a) A habitat island being visibly damaged by fire, with trees burnt and visibly blackened part way up their trunks, and three dead hollow-bearing trees being burnt and damaged so that they were no longer standing, and another with a visibly severely burnt trunk hollow (Glanworth).
- (b) Escape of fire from the coupe boundary to adjacent forest, with trees burnt and physically blackened (Martell).
- (c) 90% of retained trees being severely burnt and damaged by fire, scorched throughout the canopy with all leaves dead and no green foliage remaining; tree hollows being severely burnt and blackened; the only retained habitat island being severely burned; escape of fire into adjacent forest; and hollow-bearing trees being severely burnt (Bluestreak).
- (d) Hollow-bearing trees severely burnt and damaged by fire, with hollows visibly burnt and blackened (Faith Toe) and hollow-bearing trees severely burnt and damaged by fire (Tori).
- (e) Fire escaping the coupe boundary and a large hollow-bearing tree in the area



adjacent to the coupe engulfed in flames (Amok).

- (f) Five habitat islands burned and damaged by fire, with damage to hollow-bearing trees and burned out hollows (Myrrh).
- (g) Escape of fire to adjacent forest which severely burned a Leadbeaters Possum buffer area (Swing Mid).

18 In his report, Dr Smith stated that high intensity logging in mountain ash forests in the Central Highlands is inconsistent with the Code for reasons which include that it fails to protect habitat trees from the effects of post-logging burning such that they will decline and disappear over time. In relation to Greater Gliders, Dr Smith stated that regional surveys have shown populations eliminated by high intensity logging are unlikely to recover for 60 to 120 years, depending on the number of retained habitat trees in a coupe and the ability of isolated habitat trees to survive without being destroyed by fire, windthrow or post-logging burns. He stated most habitat trees do not survive for the time required for regrowth forest to reach a structure suitable for gliders. Dr Smith viewed photographs of a number of coupes, including Dowse, which he identified as being predominantly located within old growth mixed species forest of above average quality for Greater Gliders.

Submissions

Defendant

19 There has been a material change of circumstances for the following reasons.

20 First, at the time the orders were made by McMillan J, WOTCH sought to restrain the harvesting of timber in the coupes. The issue of regeneration burning was not expressly canvassed in the applications and it is apparent from McMillan J's reasons that her Honour was concerned with logging operations and not regeneration burning activities. VicForests inadvertently failed to realise at the time the orders were made that they went further than necessary.

21 Second, VicForests is obliged to undertake regeneration activities to ensure that the



biological and ecological characteristics of native flora and fauna within forests is maintained, and to do so as soon as practical after timber harvesting. Because of the effluxion of time, VicForests now needs to fulfil this obligation in relation to Dowse, Turkey Feet and Facet coupes.

22 The regeneration activities are being undertaken for one purpose only: long-term ecological benefit to the environment. This is to be weighed against some potential harm to threatened species through damage to individual habitat trees which may be caused by regeneration burning. There is a limited window in any year when regeneration activities can occur. As each year passes, regeneration activities become less effective. Accordingly, the best time to undertake regeneration activities in the three coupes is now, and if that is not done, the opportunity for successful regeneration in future will be greatly diminished.

23 The proposal for regeneration burning in the three coupes accords with the precautionary principle. Regeneration burns are based on guidelines developed by DELWP, and there is scientific support for the suitability of slash burning in some circumstances. Regeneration burning is the subject of a complex regulatory system and requires multiple levels of approval and compliance with various policies and procedures, which require evaluation of the regeneration activities best suited to a particular coupe. Mr Brown describes measures taken to protect adjacent vegetation from the impact of planned burns, and the risk assessment process undertaken and protective measures put in place to ensure burns are safe.

24 There is no absolute obligation under the Code to prevent damage to retained vegetation. Rather, the Code provides that 'all practical measures must be taken to protect areas excluded from harvesting from the impacts of burns and other regeneration activities', which is an acknowledgment that there may be some impacts of undertaking regeneration burns on retained trees or habitat islands in a harvested area.

25 Apart from Swing Mid, the coupes where Mr Nisbet observed tree damage were all

mixed species, whereas the three coupes which are the subject of this application are all ash. As Mr Gunn states, ash forest is less susceptible to ignition during a regeneration fire. Accordingly, the observations of Mr Nisbet are not predictive of any damage that might occur in Dowse, Turkey Feet and Facet coupes. Further, Mr Nisbet's observations show small areas of fire impact which must be considered in the context of the areas over which regeneration burn activities occurred. Considered in context, given the remaining habitat in the harvested coupes, there is nothing to say that the loss of a few hollow-bearing trees is anything other than superficial damage, or that trees damaged by fire will not regenerate and become suitable habitat for threatened species.

26 The extracts from Dr Smith's report are not of great assistance to the Court. Dr Smith's objections are generic and premised on Dowse and Turkey Feet coupes being predominantly mixed species forest. The Timber Release Plan shows that they are ash forest, excepting a small patch of mixed species forest in Dowse coupe. Dr Smith is looking at the global impacts of harvesting techniques undertaken by VicForests up to July 2019 and their potential impacts over the longer-term, but does not do an analysis of the type of burn planned to be undertaken.

Plaintiff

27 VicForests' evidence does not demonstrate any new facts which render the enforcement of the earlier orders unjust, or any material change of circumstances which would allow for or justify variation of the interlocutory orders. In its original application, WOTCH deliberately sought orders injuncting 'timber harvesting operations' to encompass regeneration burning and it is clear from the transcript that regeneration burning was in issue in the original proceeding. VicForests' obligations under the Code were in force at the time the orders were sought and its contention that it has now become aware of those obligations should not be considered to be a change of circumstances.

28 The plaintiff's evidence demonstrates there is a material risk to threatened species and their habitat if VicForests are permitted to undertake regeneration burning in the three



coupes. Mr Nisbet's evidence shows that regeneration burns by VicForests can and do destroy habitat islands and can and do escape containment lines; and that there has been extensive damage caused in the coupes he observed. Mr Nisbet's observations are supported by the expert evidence of Dr Smith.

29 VicForests' obligation to regenerate is not a basis to vary the orders. There is no obligation in the Code to burn the coupes – the question is whether the evidence justifies the burning of the coupes to fulfil the regeneration obligation. On VicForests' evidence, the Court does not have a proper basis for knowing why burning has been chosen to regenerate these coupes and there is no indication that any consideration has been given to threatened species. VicForests' evidence on the long-term ecological benefit of regeneration is given by Mr Brown, who is not an expert on biodiversity conservation or on the habitat of any of the species in issue. The nature of the forest in issue and whether burning is appropriate are substantial and contested issues between the parties that would be more appropriately determined at trial rather than at an interlocutory stage.

30 There is no injustice to VicForests if the current orders are not varied. To the contrary, the preservation of the status quo is necessary to prevent serious and irreversible damage to the subject matter of the proceeding.

Analysis

31 Orders made by McMillan J on 5 March and 29 April 2020 were intended to operate until the final disposition of the proceeding. The orders restrained VicForests from conducting timber harvesting operations within the meaning of s 3 of the *SFT Act* within coupes including Dowse, Facet and Turkey Feet. The planned regeneration burning in those coupes comes within the definition of timber harvesting operations and is an activity VicForests is restrained from conducting by the orders.

32 An interlocutory order may be varied where there has been a material change of circumstances since the original application was heard and the injunction was granted



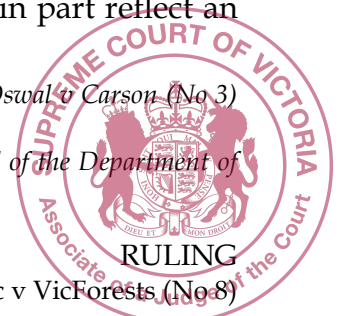
which render its enforcement unjust.⁴ An application to vary orders is not a vehicle to rehear the original application on material which was available at the time it was heard.⁵

33 The object of the proceeding is the protection of threatened species which have been harmed by the 2019/20 bushfires from further harm caused by timber harvesting operations conducted in coupes containing the species or habitat, in particular hollow-bearing trees. To achieve that object, WOTCH applied for interlocutory and permanent injunctions to restrain timber harvesting operations in certain coupes.

34 The interlocutory orders WOTCH applied for and obtained restrained VicForests from conducting timber harvesting operations within the meaning of s 3 of the *SFT Act* in the coupes where there was evidence that threatened species had been observed. It is understandable that at the interlocutory hearings attention focused mainly on one of the activities which came within the definition of timber harvesting operations, that is felling trees. However, it is clear from the submissions made on 18 February 2020 set out in paragraph 9 above that WOTCH contemplated and sought to prevent harm to threatened species and habitat from other activities conducted by VicForests which came within the definition of timber harvesting operations, and that this included regeneration burns after logging. Equally, submissions made on behalf of VicForests demonstrate it clearly understood that the interlocutory relief was aimed at restraining it from conducting activities which came within the definition of timber harvesting operations. While no specific reference was made by McMillan J to regeneration burns, the reasons delivered on 5 March 2020 demonstrate her Honour's concern that the risk to the threatened species which are the subject of the proceeding is extinction, that there was evidence of detection of threatened species in each coupe which was the subject of the application for interlocutory orders, and, preferring the evidence on which WOTCH relied, that individual members of threatened species die shortly after timber harvesting. This final conclusion must at least in part reflect an

⁴ *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 178; *Oswal v Carson (No 3)* [2011] VSC 193, [10] (Ferguson J).

⁵ *Oswal v Carson (No 3)* [2011] VSC 193, [10] citing *Paras v Public Service Body Head of the Department of Infrastructure (No 2)* (2006) 152 IR 352.

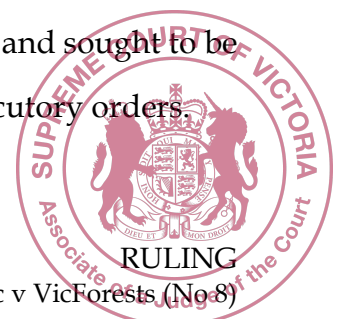


acceptance by her Honour of the Scientific Advisory Committee finding as to the negative impact of regeneration burns on Greater Gliders.

35 At the interlocutory injunction hearings extensive submissions were made for VicForests on the operation of the Code, including that one of its purposes was to provide for the ecologically sustainable management of native forests proposed for cyclical timber harvesting operations, and the conservation of a wide range of environmental values associated with forests. These purposes must contemplate the need for regeneration activity to be undertaken after timber harvesting. In submissions at the hearing on 18 February 2020 VicForests argued that an interlocutory order restraining it could have the effect that it was not allowed any access to the subject coupes for a period of two years. In the circumstances VicForests should have considered activity it was obliged by the Code to undertake in any of the subject coupes in the period during which it contemplated being restrained by the orders sought by WOTCH.

36 Orders made by McMillan J on 29 January, 5 March and 29 April 2020 each restrained VicForests from conducting timber harvesting operations within the meaning of s 3 of the *SFT Act*. In each case an order was made permitting VicForests to undertake certain activities which fell within the definition of timber harvesting operations, but only on the basis that in doing so it was not permitted to damage trees (whether understorey, mid-storey or over-storey). The orders were clearly intended to restrain VicForests from conducting any activity which fell within the definition of timber harvesting operations which might cause harm to threatened species or habitat.

37 The evidence on which VicForests relies contemplates the possibility that damage may be caused to retained trees within the harvested area of a coupe, or to trees in adjacent forest by the edge effect or escape of the fire beyond the burn boundary. On the evidence of Mr Brown damage to habitat trees caused by regeneration burns would not be a rare event. This was part of the risk that was contemplated, and sought to be prevented, by WOTCH when it applied for and obtained the interlocutory orders.



38 Mr Nisbet's affidavit sets out detailed observations of damage to habitat trees caused by regeneration burns conducted in other forest coupes. Those observations are a demonstration of the risks identified by Dr Smith in his report. The evidence on which VicForests relied on this application did not adequately address the risk identified by the evidence of Mr Nisbet and Dr Smith.

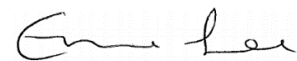
39 For the above reasons I conclude VicForests has not demonstrated a material change of circumstances which justifies variation of the orders made by McMillan J to allow it to undertake the proposed regeneration burns. The evidence does not render enforcement of the orders unjust.

40 VicForests' application will be dismissed. I will hear from the parties as to any consequential orders.

CERTIFICATE

I certify that this and the 14 preceding pages are a true copy of the reasons for judgment of Keogh J of the Supreme Court of Victoria delivered on 19 May 2021.

DATED this nineteenth day of May 2021.



.....
Associate

