

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

Not Restricted

S ECI 2020 00373

WOTCH INC

Plaintiff

v

VICFORESTS

Defendant

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JUDGE: Keogh J  
WHERE HELD: Melbourne  
DATE OF HEARING: 16 August 2022  
DATE OF RULING: 26 August 2022  
CASE MAY BE CITED AS: WOTCH Inc v VicForests (No 9)  
MEDIUM NEUTRAL CITATION: [2022] VSC 503

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PRACTICE AND PROCEDURE – Pleadings – Late Amendment – Plaintiff articulated form of final relief sought in closing submissions – Defendant argued relief represented a brand new case, and that it would suffer irremediable prejudice if leave to amend was granted – Whether relief open on current pleadings – Whether relief sought is consistent with the parties’ conduct of the trial – Leave for plaintiff to amend pleading.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	R Knowles QC, K Foley SC, C Mintz and S Rajanayagam	Environmental Justice Australia
For the Defendant	J Pizer QC, H Redd and F Hudgson	Baker McKenzie



HIS HONOUR:

- 1 Bushfires that occurred during the 2019/2020 fire season caused severe damage to native forests in East Gippsland and North-East Victoria, resulting in the death of native fauna and destruction and damage to habitat, including of species listed as threatened under Part 3 of the *Flora and Fauna Guarantee Act 1998* (Vic) ('FFG Act').
- 2 VicForests is a State body with the responsibility for timber harvesting in State forests in Victoria.
- 3 When planning for or undertaking timber harvesting operations, VicForests must comply with the Code of Practice for Timber Production ('Code') published under Part 5 of the *Conservation, Forest and Lands Act 1987* (Vic).
- 4 WOTCH claims that, in the context of damage caused by the bushfires to threatened species and the habitat of those species, VicForests has failed and will fail to comply with the precautionary principle, which is a mandatory action in the Code.
- 5 The case pleaded by WOTCH alleged, in summary, that VicForests has breached and will continue to breach the precautionary principle by planning and conducting timber harvesting operations in coupes known to contain or to be likely to contain fire-affected threatened species or the habitat of those species:
  - (a) Prior to completion of Commonwealth and State biodiversity responses to the bushfires, and implementation of management actions contained in those responses;
  - (b) Having failed to develop and implement timber harvesting prescriptions to avoid serious or irreversible damage to relevant fire-affected threatened species, wherever practical; and
  - (c) Prior to the identification and finalisation of protection areas for relevant threatened species.

In final submissions WOTCH did not press the allegation of breach summarised in sub-paragraph (c).



6 In the prayer for relief in the Second Further Amended Statement of Claim ('2FASOC'), WOTCH sought declarations and injunctions that mirror the allegations of breach.

7 In final written submissions, WOTCH set out the declaratory and injunctive relief it now seeks. That relief is substantially directed to the allegation of breach in subparagraph (b) above, and precisely states the prescriptions that WOTCH argues would discharge VicForests' obligations under the precautionary principle. WOTCH argues the case reflected by the relief is a permissible and appropriate refinement of the broader case it has always pleaded in response to evidence given at trial. Alternatively, WOTCH argues VicForests was always aware that the prescriptions to be applied by it when planning and conducting timber harvesting operations in order to comply with the precautionary principle was a central issue in the case, and that it joined in running the trial on that issue. WOTCH argues the case now made by it in closing submissions is a reflection of central matters in issue at trial.

8 VicForests argues the relief sought by WOTCH in final submissions is brand new, and not within the pleaded case. Further, VicForests argues that it prepared its defence by reference to the specific case pleaded against it. This was made clear in its opening at trial. If WOTCH was allowed to seek the brand new relief, VicForests would suffer irreparable prejudice. VicForests declined to make final submissions directed to the parts of the case made by WOTCH in final submissions that VicForests characterised as being brand new.

9 Three issues arise as a result of the positions adopted by the parties that I concluded should be resolved before hearing final oral submissions.

10 First, the pleadings should reflect the issues that were in dispute at trial and that are to be the subject of final submissions and judgment.<sup>1</sup> Accordingly, I ordered that WOTCH file and serve a proposed Third Further Amended Statement of Claim ('3FASOC').

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<sup>1</sup> *Tak-Wong v Mura* [2001] NSWCA 366 (*Tak-Wong*).

- 11 Second, it became apparent that if the pleadings issue was not resolved, the parties' final submissions were going to address, in large part, completely different cases and not grapple with all of the matters that are central to the relief WOTCH now seeks. That is inappropriate, particularly having regard to the legal and factual complexity of matters in issue.
- 12 Third was the question of prejudice to VicForests. Without conceding prejudice, WOTCH stated it would not oppose an application by VicForests to re-open its case in order to adduce further evidence to remedy asserted prejudice so as to avoid any dispute about whether the trial was fair. It was necessary to consider the issue of VicForests re-opening its case before hearing final submissions.
- 13 The Code was varied in November 2021. The new Code amends the definition of the precautionary principle, and its application in s 2.2.2.2. Subject to one matter that is not presently relevant, the parties agree that the precautionary principle as it applied prior to amendment in November 2021 is to be construed consistently with the judgment of Osborn J in *Environment East Gippsland Inc v VicForests*<sup>2</sup> ('*Brown Mountain*'). Construction of the amended precautionary principle is in issue. WOTCH's case in final submissions is that the November 2021 amendment did not alter the meaning of the precautionary principle. The pleadings issue will be considered on that basis.

### *Brown Mountain*

- 14 *Brown Mountain* concerned the application of the precautionary principle to VicForests' proposed harvesting of four forest coupes in East Gippsland.
- 15 In *Brown Mountain*, Osborn J considered the stage at which the precautionary principle applied to VicForests' operations, and the information that was relevant to the requirements the principle imposed on timber harvesting operations, and said:

It is plain from these provisions that it is not intended that the precautionary principle will be applied by VicForests only at the strategic planning stage of its operations. VicForests is specifically required to apply it having regard to the results of monitoring and research as they come to light during operations.

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<sup>2</sup> (2010) 30 VR 1.



In the present case the proposal to log the Brown Mountain coupes has provoked a series of investigations, new research, and expert advice. The requirements of the precautionary principle fall to be considered in the light of the whole of the evidence bearing on these matters as it now is and not as it was at the time VicForests completed planning for operations in these coupes.<sup>3</sup>

16 Osborn J considered the circumstances in which the precautionary principle is engaged, accepting on that question the conclusion of Preston CJ in *Telstra Corporation Limited v Hornsbury Shire Council* ('*Telstra*')<sup>4</sup>:

The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate.<sup>5</sup>

17 In relation to the factual assessment of the asserted threat, Osborn J said:

190. In the *Telstra* case, Preston CJ observed relevant factors may include:

- (a) the spatial scale of the threat (for example, local, regional, statewide, national, international);
- (b) the magnitude of possible impacts, on both natural and human systems;
- (c) the perceived value of the threatened environment;
- (d) the temporal scale of possible impacts, in terms of both the timing and the longevity (or persistence) of the impacts;
- (e) the complexity and connectivity of the possible impacts;
- (f) the manageability of possible impacts, having regard to the availability of means and the acceptability of means;
- (g) the level of public concern, and the rationality of and scientific or other evidentiary basis for the public concern; and
- (h) the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts, and the difficulty and expense of reversing the impacts.

191. In my view the statement in another context by Mason J in *Wyong Shire Council v Shirt* that a risk though remote may nevertheless be real and not fanciful or far-fetched is apposite here. At 48 his Honour stated that

<sup>3</sup> *Brown Mountain* (n 2) 45 [179].

<sup>4</sup> (2006) 67 NSWLR 256.

<sup>5</sup> *Telstra* (n 4) 269 [128] cited in *Brown Mountain* (n 2) 47 [188].



'[a] risk which is not far-fetched or fanciful is real and therefore foreseeable.'<sup>6</sup>

18 In relation to the scientific certainty precondition, Osborn J said:

Once again, this is a question of fact and the assessment of it potentially involves complex factors. In the *Telstra* case, Preston CJ postulated that they might include the following:

- (a) the sufficiency of the evidence that there might be serious or irreversible environmental harm caused by the development plan, programme or project;
- (b) the level of uncertainty, including the kind of uncertainty (such as technical, methodological or epistemological uncertainty); and
- (c) the potential to reduce uncertainty having regard to what is possible in principle, economically and within a reasonable time frame.<sup>7</sup>

19 Osborn J concluded that if the plaintiff satisfied the burden of establishing the preconditions for engagement of the precautionary principle, an evidentiary burden shifted to the defendant to show that the threat did not exist or was negligible.<sup>8</sup> If that burden is not discharged, it must be assumed there will be serious or irreversible environmental damage caused by the act or activity in question.

20 Osborn J considered two matters that were relevant to the response required when the precautionary principle is engaged. First, the precautionary principle was not directed to the avoidance of all risks, and permitted the taking of preventative measures without having to wait until the threat was fully known. Osborn J said:

- 204. The degree of precaution appropriate will depend on the combined effect of the seriousness of the threat and the degree of uncertainty.
- 205. The margin for error in respect of a particular proposal may be controlled by an adaptive management approach.
- 206. In the present case the measures in issue by way of survey requirements and management zone reviews respectively are adaptive management measures.<sup>9</sup>

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<sup>6</sup> *Brown Mountain* (n 2) 47-48 (citations omitted).

<sup>7</sup> *Ibid*, 48 [195] (citations omitted).

<sup>8</sup> *Ibid*, 48 [199].

<sup>9</sup> *Ibid*, 49 (citations omitted).

21 Second, Osborn J concluded that what was required was a proportionate response to the threat:

207. ... Measures should not go beyond what is appropriate and necessary in order to achieve the objective in question. The principle requires the avoidance of serious or irreversible damage to the environment “wherever practicable”. It also requires the assessment of the risk weighted consequences of optional courses of action.
208. A reasonable balance must be struck between the cost burden of the measures and the benefit derived from them.
209. The relevant notion of proportionality is however not readily captured by traditional cost benefit analysis.
210. The triggering of the precautionary principle does not necessarily preclude the carrying out of a particular land use or development proposal.<sup>10</sup>

22 On the case before him in *Brown Mountain*, Osborn J concluded:

In summary, the application of the precautionary principle to aspects of this case raises the following fundamental issues:

- (a) is there a real threat of serious or irreversible damage to the environment?
- (b) is it attended by a lack of full scientific certainty (in the sense of material uncertainty)?
- (c) if yes to (a) and (b), has VicForests demonstrated the threat is negligible?
- (d) is the threat able to be addressed by adaptive management?
- (e) is the measure alleged to be required proportionate to the threat in issue?<sup>11</sup>

### **Relevant aspects of the case pleaded by WOTCH**

23 WOTCH pleaded its case by reference to four threatened species: the Greater Glider; Powerful Owl; Sooty Owl; and Smoky Mouse. The prescriptions that WOTCH argues are necessary and that it has now particularised differ for each species. However, neither party argued those differences were relevant to the outcome of the pleadings issues under consideration. Accordingly, it is convenient to consider the issues raised for determination in this ruling by reference to the case WOTCH made in relation to

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<sup>10</sup> Ibid, 49 (citations omitted).

<sup>11</sup> Ibid, 50 [212].





the Greater Glider.

24 First, WOTCH pleaded the Greater Glider is a threatened species under s 10 of the *FFG Act*, on the basis that the species is in a demonstrable state of decline or prone to future threats that are likely to result in extinction.

25 Next, WOTCH pleaded that VicForests was continuing to plan and conduct timber harvesting operations in coupes that contained or were likely to contain the Greater Glider or its habitat.

26 WOTCH then pleaded that by planning and conducting timber harvesting in those coupes VicForests had failed and will continue to fail to comply with the precautionary principle. That allegation of breach is set out in paragraph 23 of the 2FASOC:

By planning and conducting timber harvesting operations following the bushfires in coupes:

- (a) in the Central Highlands, known to VicForests or to [Department of Environment, Land, Water and Planning ('DELWP')] to contain fire-affected threatened species or known to be likely to contain such species, or habitat of such species; and/or
- (b) outside the Central Highlands, known to VicForests or to DELWP to contain or to be likely to contain Greater Glider, or its habitat,

VicForests has failed, and will fail, to comply with s 2.2.2.2 of the Code.

Particulars (a) and (b) to paragraph 23 set out details of the State and Commonwealth bushfire biodiversity response to the date of the pleading. Particulars (aa) and (bb) were directed to what the Commonwealth response was likely to include in future.

Particular (c) articulated the alleged threat as follows:

It was and remains probable or seriously possible that timber harvesting in coupes that contain fire-affected threatened species detections or habitat, posed and continues to pose a threat of serious or irreversible damage to fire-affected threatened species and there was and remains scientific uncertainty as to that threat.

Particular (d) to paragraph 23 of the 2FASOC set out in detail the allegation of breach





of the precautionary principle. That particular commenced:

VicForests has failed, is failing, and will fail to apply the precautionary principle to the conservation of biodiversity values at all, or consistent with relevant monitoring and research ...

Sub-particular (iii) of particular (d), which is centrally relevant to this ruling, alleged breach by reference to harvesting prescriptions applied by VicForests to timber harvesting operations:

failing to develop and implement timber harvesting prescriptions to avoid serious or irreversible damage to relevant fire-affected threatened species, wherever practical, that:

- A. have regard to the impact of the Bushfires on the relevant threatened species;
- B. are proportionate to the threat posed by timber harvesting operations to relevant fire-affected threatened species;
- C. are consistent with, or alternatively have regard to, management actions or recommendations identified for relevant fire-affected threatened species by the State or Commonwealth bushfire biodiversity responses.

As to the management actions, the Plaintiff refers to and repeats:

- (1) the further particulars to paragraph 23(d)(iii)(C) of the Amended Statement of Claim, provided on 15 January 2021; and
- (2) paragraphs (b)(iii) and (b)(iv)(2) of the particulars to paragraph 27 below.

27 Particular (e) to paragraph 23 set out a relevant regulatory position statement.

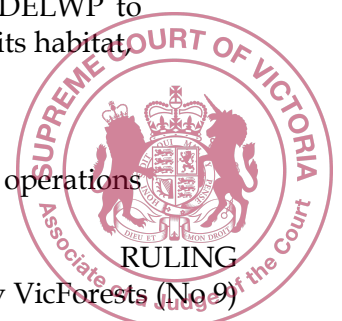
Particular (f) contained further allegations of breach:

VicForests has failed, is failing, and will fail to apply the precautionary principle to the conservation of biodiversity values at all, or consistent with relevant monitoring and research, in coupes:

- i. in the Central Highlands, known to it or DELWP to contain (or be likely to contain) fire-affected threatened species, or habitat of such species; and/or
- ii. outside the Central Highlands, known to it or to DELWP to contain (or to be likely to contain) Greater Glider or its habitat

by:

- iii. failing to carefully evaluate how timber harvesting operations



should be planned and conducted to wherever practical avoid serious or irreversible damage to those species, having regard to the Position Statement, in particular Components 2 and 3 of the Regulator's "Proposition for a package of integrated precautionary measures" at [4.1];

- iv. failing to properly assess the risk weighted consequences of available options, having regard to the Position Statement, in particular Components 2 and 3 of the Regulator's "Proposition for a package of integrated precautionary measures" at [4.1];
- v. harvesting, and planning harvesting, by methods and at locations that do not wherever practical avoid serious or irreversible damage to fire-affected threatened species.

Further particulars may be provided.

28 The further particulars provided by WOTCH on 15 January 2021 that are incorporated in particular (d)(iii)(C)(1) by reference, relevantly included:

- a. for Greater Glider and Smoky Mouse:
  - i. careful management of unburnt areas, including within or adjacent to recently burnt ground that provides refuges; also including unburnt areas that are not adjacent to burnt areas;
  - ii. longer term additional actions, namely: avoid clearing that results in population fragmentation for the species; forestry prescriptions to adapt to prevent habitat patches becoming too small to support viable populations, and avoid salvage logging in burnt parts of its range.

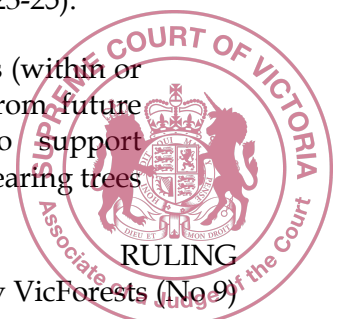
The particulars also alleged the need to undertake recognisance of the Greater Glider, and to protect and manage key unburnt areas and populations at locations within and beyond the fire areas in order to build long-term resilience of the species.

29 Particulars to paragraph 27 of the 2FASOC were also incorporated by reference in paragraph 23(d)(iii)(C)(2). Paragraph 27(b)(iv)(2) is of relevance to this ruling:

The Greater Glider Consultation Document identifies the following actions by way of advice of relevant experts:

...

- (2) specifies management actions, including the following (pp 23-25):
  - A. in the aftermath of bushfires, manage unburnt areas (within or adjacent to recently burnt areas) to reduce risk from future bushfires and protect/maintain this habitat to support population recovery. In particular, protect hollow-bearing trees



from post-fire salvage logging and clean-up operations;

- B. protect all habitat projected to be suitable as refuge sites under future climate change scenarios and establish connectivity to facilitate movement where possible;
- C. identify key subpopulations and implement appropriate measures to ensure suitable habitat is maintained and protected around these subpopulations, as well as in areas where subpopulations have already declined through loss of habitat. When protecting an area, retain sufficient suitable habitat for population viability; and
- D. establish and maintain effective prescriptions in production forests to support subpopulations of the Greater Glider (southern). This includes but is not limited to: appropriate levels of habitat retention, logging exclusion and logging rotation cycles, maintenance of wildlife corridors between logged patches, protection of existing hollow-bearing trees with appropriate buffers, and adequate recruitment of hollow-bearing trees.

30 The relief claimed by WOTCH included a declaration that it is unlawful for VicForests to conduct timber harvesting operations in any coupe known by it or DELWP to contain or be likely to contain the Greater Glider or its habitat until:

- vii. VicForests, having regard to the impact of the bushfires on threatened species, has developed and implemented timber-harvesting prescriptions:
  - 1. to, wherever practical, avoid serious or irreversible damage to fire-affected threatened species,
  - 2. consistent with, or alternatively which have regard to, management actions or recommendations identified for relevant fire-affected threatened species by the State or Commonwealth bushfire biodiversity responses and/or the Position Statement,

consistently with cl 2.2.2.2 of the Code.

WOTCH sought injunctive relief in the same terms.

#### **Amendments proposed by WOTCH**

31 WOTCH now proposes to amend particular (d)(iii) of paragraph 23 of the 2FASOC by adding:

VicForests' timber harvesting prescriptions do not discharge its obligations under the precautionary principle. Prescriptions available to VicForests which would discharge those obligations are set out in Schedule B.



- 32 WOTCH proposes to amend particular (f) to paragraph 23 by deleting (iii) and (iv), and by adding:

Timber harvesting prescriptions as to methods and locations of harvesting, and planning harvesting, which would discharge VicForests' obligations under the precautionary principle are set out in Schedule B.

- 33 Schedule B to the proposed 3FASOC, as it relates to the Greater Glider, reads:

**Schedule B: Timber harvesting prescriptions which would discharge VicForests' obligations under the precautionary principle**

1. VicForests must not undertake timber harvesting operations (within the meaning of s 3 of the SFT Act) in any of the following areas of State forest:
  - a. unburnt forest in the Bendoc region of the East Gippsland Forest Management Area, comprising any forest outside the fire footprint mapped on Agreed Map 07.1C that is located either:
    - i. within the pink rectangle labelled "Errinundra Plateau";  
or
    - ii. north of that rectangle to the New South Wales-Victoria border;
  - b. fire, climate and drought refugia comprising:
    - i. any unburnt forest within the fire footprint mapped on Agreed Map 07.1C, being (1) the areas mapped as class "unburnt (2)" and (2) in coupes that contain areas the subject of (1), areas that are known by the defendant to be unburnt (whether those areas are within or outside the East Gippsland Forest Management Area);
    - ii. pre-1900 Ash forest, as mapped in the defendant's forest age class by decade and forest type datasets; and
    - iii. along gullies, minimum 50m buffers on either side of streams (equal to minimum 100m corridors along streams).
2. VicForests must not undertake timber harvesting operations (within the meaning of s 3 of the SFT Act) in any coupe:
  - a. in areas of State forest not the subject of paragraph 1 above; and
  - b. known by the defendant to contain Greater Glider or to contain Greater Glider habitat;unless:
  - c. the defendant has conducted a pre-logging spotlight survey for



Greater Gliders within the two-year period prior to the commencement of harvesting; and

d. for any coupe with a Greater Glider detection within the coupe or within 140m of the coupe boundary:

i. the following coupe area is retained and not harvested:

1. subject to subparagraph 2(d)(i)(2) below, a minimum of 40% of the coupe area, including that area containing the highest detected density of Greater Gliders in the coupe;

2. in Ash forests with more than one living senescent tree with hollows per hectare, a minimum of 60% of the coupe area, including that area containing the highest detected density of Greater Gliders in the coupe;

3. to the extent not covered by subparagraphs 2(d)(i)(1) and (2) above:

A. a patch of at least 2.5ha around any Greater Glider detection;

B. a corridor at least 100m in width, connecting coupe areas retained pursuant to subparagraphs 2(d)(i)(1) and (2), and linking to a reserve of at least 130ha, within 2km along that corridor; and

ii. in Mixed Species forests (in addition to the matters in subparagraphs 2(d)(i)(1) and (3) above):

1. a minimum of 60% of tree basal area within, and dispersed across, the harvest area is retained; and

2. single tree or small group (not more than 20m diameter) selection harvesting is used.

34 The declaratory and injunctive relief in the proposed 3FASOC has been amended consistently with these particulars.

35 Paragraph 1 of Schedule B, and the corresponding injunctive relief, would prohibit VicForests from planning or conducting timber harvesting operations in four forest areas:

(a) the Bendoc region of East Gippsland;



- (b) forest within the bushfire footprint in East Gippsland that is mapped as class 1 or 2 unburnt;
- (c) pre-1900 ash forest; and
- (d) a minimum 100-metre corridor along streams.

Areas covered by (c) and (d) are not limited to the East Gippsland region.

36 The effect of paragraph 2 of Schedule B is that for any forest area not contained in paragraph 1 that is known to contain Greater Glider or its habitat, VicForests may only undertake timber harvesting operations in accordance with the following adaptive measures:

- (a) pre-harvest spotlight surveys for the Greater Glider;

and where Greater Glider are detected:

- (b) retention of a minimum forest area; and
- (c) retention of forest in minimum-sized patches and minimum-width linking corridors.

### **Evidence and trial**

37 At trial WOTCH relied on the evidence of expert, Dr Andrew Smith. WOTCH filed and served four reports from Dr Smith that were dated 30 July 2020, 2 August 2020, 23 August 2021 and 1 February 2022. Dr Smith has over 35 years' experience in the ecology of possums and gliders, and forest planning and management in Victoria, New South Wales and Queensland. He has had particular experience in the study of the Greater Glider since 1980.

38 VicForests relied on the evidence of expert, Dr Craig Nitschke. It filed and served an expert report of Dr Nitschke dated 22 October 2021. Dr Nitschke has expertise in forestry, landscape planning and ecology. Since 2009 he has studied the role of fire management and climate change on forest composition and the impacts it has on species, including the Greater Glider. He is an Associate Professor in Forest and



Landscape Dynamics at the University of Melbourne.

39 Dr Smith and Dr Nitschke attended a conclave and prepared a joint report dated 18 February 2022.

40 Dr Smith and Dr Nitschke gave concurrent evidence over three days at trial. Their evidence at trial was almost solely directed to issues relevant to the Greater Glider.

41 The evidence given by the Greater Glider experts in their reports and in oral evidence at trial was lengthy and complex.

42 Of particular relevance in relation to the case as it is now articulated by WOTCH, and to the resolution of the matters required to be determined by this ruling, are the fourth and fifth issues identified by Osborn J in *Brown Mountain* – that is, whether the identified threat is able to be addressed by adaptive management measures, and whether those measures are proportionate to the threat. The nature and degree of the threat, and the state of scientific knowledge, are relevant to determination of those issues.

### **Dr Smith's reports**

43 In his report dated 30 July 2020 ('first report'), Dr Smith discussed the need for silviculture systems to match the natural effects of wildfire to allow for the recovery of animal populations after harvesting. He recommended retention of a minimum 60% of coupe area and of all hollow-bearing trees up to 10 per hectare for any coupe that was to be harvested. Dr Smith said in order to reverse Greater Glider population decline, it was necessary 'to survey, plan and dedicate a permanent state and national corridor and fire refuge system linking all reserves and known remaining glider populations.'

44 Dr Smith said, based on high concentrations of glider records, the Errinundra plateau area of East Gippsland was an important population. The Bendoc region is part of the Errinundra plateau.

45 Dr Smith was critical of prescriptions that relied on identification of three or more





gliders per spotlight kilometre, and said in his opinion some level of protection needed to be applied to all forests with Greater Glider.

46 Dr Smith said:

In my opinion a precautionary approach to protection of Greater Gliders in all Victorian Forests in light of the 2009 and 2019/20 wildfires would require:

- a) pre-logging surveys of all coupes,
- b) application of low intensity (at least 60% basal area retention in the loggable area) single tree selection harvesting with priority protection of the largest trees including those with hollows in all coupes with Greater Gliders.
- c) scientifically designed pre-and post fire monitoring to provide proof of effectiveness of mitigation measures and data for genuine Adaptive Management.<sup>12</sup>

He said the Greater Glider is relatively easy and cost-effective to survey.

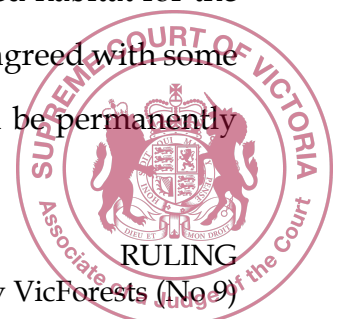
47 In his report dated 23 August 2021, Dr Smith discussed at length his view that VicForests' adaptive management measures were inadequate as a precautionary response to the risk to the Greater Glider, and identified additional measures that he said were required, including:

- (a) mandatory pre-harvest surveys for gliders and glider habitat;
- (b) surveying, mapping and protecting large old habitat trees, retaining larger forest patches, and linking them by wildlife corridors;
- (c) protection of uneven aged and old growth ash forest;
- (d) retention of 60% of basal timber in harvested coupes.

48 Dr Smith was asked whether he agreed with the Office of Conservation Regulator's May 2020 recommendations that relevantly included limiting harvesting within the East Gippsland fire footprint, and postponing harvesting in modelled habitat for the Greater Glider in East Gippsland outside the footprint. Dr Smith disagreed with some aspects of the recommendations, and added that harvesting should be permanently

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<sup>12</sup> Emphasis in original.



postponed in all areas of potential fire refuge. Dr Smith commented on the need to map and retain key refuge areas for the Greater Glider. Dr Smith said glider protection would rely on dedication and protection from timber harvesting of a network of corridors along all drainage lines.

49 In his report dated 1 February 2022, Dr Smith said:

It also remains my opinion that management and mitigation measures proposed in my previous reports (eg increasing the proportion of forest retained in corridors and conservation areas and reducing the intensity of timber harvesting to retain a permanent uneven-aged old growth structure in all Mixed Species and the majority of Ash forests) are considered and proportionate because they allow selective harvesting of high value sawlogs to continue at ecologically sustainable rates and while substantially reducing the ecologically unsustainable yield of low value woodchips.

50 Dr Smith was asked to respond to the following question:

Are the adaptive measures you have proposed in your reports (for example, see your first report at [30], [41] and [49], and your second report at [67], [68], [70], [76], [79] final row, and Appendix 1): (a) proportionate to the threat; and (b) consistent with relevant monitoring and research?

He answered yes, giving lengthy reasons that included:

*In my opinion the simplest and most effective approach to protection and maintenance of Greater Gliders in Victorian timber production forest would be to identify, map, protect and link (by protected corridors) all remaining areas of uneven-aged old growth forest with regrowth cohorts older than 40 years and a scattered or dense mature to senescent old tree cohort at a density > 0.75/trees/ha. This approach is likely to protect more than 50% of the Glider population in about 40% or less of the forest including key fire refuges, drought refuges and most remaining areas with living emergent senescent trees that provide hollows. It is also my opinion that this approach is essential for Glider conservation in all remaining Ash forests because so little suitable Glider habitat remains in this forest type. In Mixed Species forest there is an alternative option to sustain Glider populations within logged coupes by low intensity selective harvesting of high value sawlog only.<sup>13</sup>*

51 Dr Smith commented on the need for planning at a local landscape scale, and said:

This indicates that there is a risk that Glider populations retained after harvesting will decline to zero if they are isolated by future clearing. The only way to eliminate this risk is to ensure that retained patches are directly connected to similar retained patches in other adjacent coupes such that the combined area of retained habitat is > 250 ha. This requires simultaneous forward planning across multiple coupes at local landscape scales (areas of

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<sup>13</sup> Emphasis in original.



about 5km by 5km). In my opinion, VicForests and Dr. Nitschke's approach to impact assessment, which considers impacts on one coupe at a time, and at only one point in time, is not capable of accurately predicting or evaluating the severity and reversibility of Glider population trends in response to harvesting.

52 Dr Smith was asked to comment on Dr Nitschke's statements concerning the mitigation of risk to Greater Glider by aggregated retention, and said:

These [sic] is no proof, and in my opinion little or no likelihood, that current timber harvesting practices in Victoria, including dispersed and aggregated retention, will retain any Gliders in logged coupes for reasons that I have previously explained at length (small patch sizes, isolation, post regeneration burning, short rotation cycles, progressive loss of habitat trees, no permanent protection [sic]). Dr.Nitschke states that 8.1% of coupes are to be selectively logged with 60% BA retention. I have not checked this statistic, but if correct I would consider that Gliders in these selectively logged coupes are likely to decline by about 60% in the logged area (see para 56 of my second report) which would protect about 4% of the Glider population in these areas over the long term not 67.7%. I note that Dr. Nitschke has agreed with me that current intensive harvesting (including aggregated and retention harvesting) of Mixed Species and forests with a mix of Ash and Mixed species is not appropriate or ecologically sustainable.

### **Dr Nitschke's report**

53 Dr Nitschke was asked questions framed with reference to Osborn J's interpretation of the precautionary principle in *Brown Mountain*. Those questions included:

Questions 10 to 14 below are based upon Justice Osborn's observations about how the precautionary principle, once engaged, is to be applied.

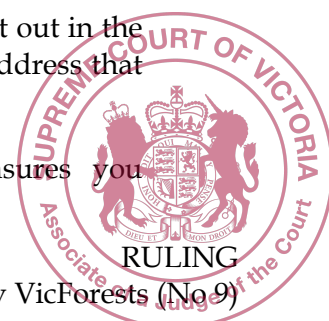
Question 10: Having regard to the documents and lay evidence describing how each precautionary principle analysis was undertaken, please provide your opinion on the following matters for each precautionary principle analysis (by reference to the time when the relevant analysis was undertaken):

(a) if your answer to Question 9(a) was "yes, the timber harvesting expected to be undertaken in the FMA in question does pose a real threat of serious or irreversible environmental damage to the Greater Glider or its habitat", was that threat negligible?

(b) if that threat was not negligible, will that threat be addressed by VicForests' adaptive management measures set out in the relevant precautionary principle analysis?

(c) if VicForests' adaptive management measures set out in the relevant precautionary principle analysis will not address that threat, what further adaptive management

(d) for any further adaptive management measures you



consider are required, are those measures proportionate to the threat posed by the timber harvesting?

In answering Question 10, please note that the precautionary principle, as described in the Environment East Gippsland Judgment:

(i) requires the avoidance of serious or irreversible damage to the environment wherever practicable but is not directed to the avoidance of all risks;

(ii) dictates caution (and the degree of precaution that is appropriate will depend on the combined effect of the seriousness of the threat and the degree of uncertainty concerning the damage that may occur); and

(iii) allows the taking of precautionary measures without having to wait until the reality and seriousness of the threat have been fully known (and those measures should be a proportionate response to the threat in the sense that they should not go beyond what is appropriate and necessary in order to achieve the objective in question).measures are required?

This question is squarely directed to particulars (d)(iii) and (f)(v) of paragraph 23 of the 2FASOC. Dr Nitschke was asked separate questions directed to the other pleaded allegations of breach of the precautionary principle.

54 Dr Nitschke said in his report that the precautionary principle was engaged by timber harvesting operations expected to be undertaken by VicForests in East Gippsland, on the basis those operations posed a real threat of serious or irreversible environmental damage to the Greater Glider or its habitat.

55 Dr Nitschke described the Bendoc region in East Gippsland as critical for the Greater Glider, and said:

The importance of this refugia cannot be [over]stated<sup>14</sup> and given uncertainties around locations and rates of recovery of [Greater Gliders] in burnt areas within this landscape its conservation status and value for [Greater Glider] is exceptionally high.

Later in his report, Dr Nitschke said:

The harvesting of forests in East Gippsland post-fire, particularly in the Bendoc

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<sup>14</sup> In his report, Dr Nitschke wrote 'understated'. However, I infer from the balance of his comments in relation to the Bendoc region in the report that Dr Nitschke intended to write 'overstated'.



region that was unburnt should not have been considered no less planned.

56 Dr Nitschke commented on the adaptive management measures being adopted by VicForests:

At the coupe-level VicForest's adaptive measures do not alleviate the threats of local scale impacts on [Greater Glider]. In the following section I outlined why this is. I view this as a broad-scale - FMA issue as the policies that are in place for [Greater Glider] that are applied to coupes are applied across FMAs. This is important to consider in the context of understanding the cumulative impacts of implementing policies designed to conserve [Greater Gliders].

The most significant issue identified by Dr Nitschke was that silviculture methods used by VicForests did not mirror natural disturbance. He recommended a shift to uneven silviculture where greater than 60% of the basal area is retained in harvested coupes. Dr Nitschke said 'the shift to uneven silviculture is proportionate and necessary'.

57 Dr Nitschke agreed with Dr Smith on the following further adaptive management measures: pre-harvest surveys for gliders and glider habitat should be mandatory for all coupes; protection of a minimum number of habitat trees per hectare; retaining trees in minimum-sized patches connected to unlogged forest. Commenting on Dr Smith's opinion about the adoption of low-intensity harvesting silviculture methods, Dr Nitschke said:

Irrespective of the economic driver is at play or not, the continued application of even-aged management in mixed species forests and dominant use in ash forests violates the principle of emulating natural disturbance regimes which is a required of ecosystem-based management and therefore ecologically sustainable forest management.

### **Joint expert report**

58 In their joint report, the experts again commented on VicForests' current harvesting practices:

We agree that current harvesting practices are not ecologically sustainable, cause severe declines in [Greater Glider] populations at coupes scales and require significant modification.

The experts further commented:

We agree that current practices of largely even-aged management applied to



areas of forest containing greater gliders or observed greater glider habitat (i.e., contain hollow bearing trees (HBTs) and foraging habitat) is inappropriate and that management requires the application of different silvicultural systems. These new silvicultural systems will require significant improvements in methods of coupe planning, pre-logging survey, habitat tree selection and protection, tree felling, and forest regeneration.

The experts agreed on prescriptions required to address the threat to the Greater Glider:

A minimum threshold of 40% coupe area retention should be applied to all coupes with increases up to 100% in high conservation value stands that are ecological mature (i.e., pre 1900 Ash forests), , [sic] fire or gully refuges, and the unburnt Bendoc region of East Gippsland. Multi-cohort Ash forests, i.e., stands with more than one living senescent tree with hollows/hectare must be managed with the objective of maintaining the existing multi-cohort structure; > 60% retention including retention of all ecologically mature trees should be applied.

59 The experts agreed on the uncertainty around the cumulative impacts of harvesting on Greater Gliders beyond the coupe scale, and said:

To resolve this uncertainty, we strongly advocate for a local-landscape planning approach that addresses issues of patch size, connectivity and isolation within a 1 and 5 km radius of a coupe or aggregation of coupes to better quantify the cumulative and long-term impacts of proposed harvesting on glider populations. This landscape planning approach will need to consider past and planned harvesting as well as past fire histories and be updated if a fire occurs between planning and operations. A critical component for the landscape-planning approach to work is the application of ecologically appropriate silviculture and the retention of critical biological legacies (HBTs and forage habitat) at the coupe-scale. These legacies will contribute to the recovery of gliders in regrowth areas and promote the movement of animals through the landscape matrix.

The experts were agreed on steps that were required to ensure Greater Gliders persisted at a population level within landscapes that were impacted by timber harvesting.

### **Impact evidence**

60 Orders were made that VicForests file and serve affidavit evidence addressing the impact of injunctions sought by WOTCH by 29 November 2021. VicForests filed affidavits by its CEO, Monique Dawson made 29 November 2021, and forensic accountant, Julia Kaye, made 17 December 2021.





61 Kaye assessed the financial impact of injunctive relief on VicForests. Kaye appears to have made her calculations on the basis of VicForests being permanently prohibited from harvesting coupes in which the Greater Glider was likely to be detected. In the background section of her report, Kaye said:

- 1.3 In the Proceedings, WOTCH Inc has sought injunctions preventing VicForests from undertaking the harvesting of timber (and associated activities) in coupes:
- i. in the Central Highlands, that are alleged to contain or are alleged to be likely to contain the Greater Glider, Powerful Owl, Sooty Owl and Smoky Mouse or their habitat; and
  - ii. outside the Central Highlands, that are alleged to contain or are alleged to be likely to contain Greater Glider, or its habitat.

Kaye then summarised her instructions and the three calculations she made:

- 1.7 I have been requested to prepare a report on the potential impact on VicForests in the event that the Court orders injunctions in the form sought by WOTCH Inc in the Proceedings, being the calculation of the costs (both actual and lost opportunity) to VicForests as a result of the injunctive action commenced by WOTCH Inc. I have accordingly performed the following three calculations in respect of VicForests' loss of net profits from certain coupes and coupes where a threatened species (such as the Greater Glider) and /or their habitat are likely to be detected.
- (i) Calculation 1  
VicForests' loss of net profit from 2019 if it is permanently prohibited from harvesting in Injuncted Coupes;
  - (ii) Calculation 2  
VicForests' loss of net profit from 2019 if it is permanently prohibited from harvesting in coupes subject to an undertaking to temporarily cease harvesting; and
  - (iii) Calculation 3  
VicForests' loss of net profit from October 2021 onwards if the Court were to find that no harvesting can be carried out in coupes where threatened species (such as the Greater Glider) are likely to be detected.

**Discussion pre-trial relevant to view**

62 A directions hearing was held on 16 February 2022 to discuss arrangements for a view. The parties agreed there should be a view in the Central Highlands, but differed as to





whether a view of East Gippsland was necessary. Counsel for WOTCH said:

The plaintiff has particularised coupes in East Gippsland as a sample of examples of VicForests' logging and planned logging in greater glider habitat. Beyond those particularised coupes, of which there are four, it's put on – that is, the plaintiff has put on lay and expert evidence addressing VicForests' logging in East Gippsland, and of course the plaintiff's case is that that logging is a contravention of the Code.

And in this regard, Your Honour, it's important to emphasise that not only does the plaintiffs' greater glider expert criticise the defendants' logging in East Gippsland, VicForests own expert, Dr Nitschke, has in his report said that harvesting in East Gippsland post-fire, particularly in the [Bendoc] region that was unburnt, should not have been considered no less planned.

So, what we have is both sides expert evidence on – glider experts saying VicForests should not be planning or logging in this critical, unburnt, glider habitat. But the evidence that we filed is that VicForests is planning to do that. So it's a critical part of the case. It's not, as VicForests has suggested in correspondence, a peripheral issue.

63 In response, counsel for VicForests said:

As to the proposal in relation to East Gippsland, the defendant accepts that the [Bendoc] area is an area with a high concentration of greater glider. But Your Honour will see on the Central Highlands view areas that might be described as significant greater glider terrain or areas with a concentration of a large number of greater gliders in coupes in the Central Highlands.

### Trial

64 In its written opening WOTCH submitted VicForests breached the precautionary principle because its adaptive management measures did not address the threat of serious or irreversible damage to relevant fire-affected species. WOTCH added: 'The expert evidence will also identify what measures *would* address the threat, avoid serious or irreversible damage wherever practicable, and are proportionate to the threat.'<sup>15</sup>

65 WOTCH referred to evidence in the reports of Dr Smith and Dr Nitschke about measures that were required to comply with the precautionary principle. WOTCH concluded:

The plaintiff's case is that the landscape following the catastrophic Bushfires has changed (physically and figuratively), and that the Code requires VicForests to implement effective prescriptions to avoid serious and

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<sup>15</sup> Emphasis in original.



irreversible damage to fire affected species and/or await various matters before it harvests timber and damages fire affected threatened species and their habitat. The reason why can be simply put: if VicForests neither waits nor implements effective prescriptions, these species – which are already on the path to extinction – may never recover.

66 WOTCH made similar submissions in oral opening. WOTCH concluded its oral opening by submitting that the precise form of declaratory and injunctive relief may need to be refined in response to the evidence given at trial, but was likely to feature the adaptive measures and prescriptions already agreed by the parties' experts.

67 In its written opening, VicForests said: 'If, however, the court were to reject [its] submissions, VicForests will seek to be heard on whether the relief set out in the FASOC should be granted.' In a footnote to that submission, VicForests said it had calibrated its evidence to WOTCH's pleaded case and its prayer for relief, and would oppose any application by WOTCH to amend its pleading to seek different relief, on the basis it would suffer irreparable prejudice. VicForests repeated that submission in oral opening.

68 On the third day of trial, objection was taken by VicForests on relevance grounds to part of the evidence WOTCH sought to lead from one of its lay witnesses. In the course of that objection, counsel for VicForests made the following submission:

So one might be forgiven for thinking the density of a greater glider in a coupe could be relevant to whether or not the prescription is triggered. But there are two answers to this. First, it is not the plaintiff's case that VicForests has failed to apply properly its current prescriptions. Rather the plaintiff's case is that the current prescriptions for the greater glider are entirely inadequate.

The plaintiff's further amended statement of claim contains in its particulars of breach of the precautionary principle in paragraph 23(d) an allegation at (iii) that VicForests is failing to develop and implement timber harvesting prescriptions to avoid serious or irreversible damage to fire affected threatened species.

That is the nub of the plaintiff's case, that VicForests' existing prescriptions are inadequate. This was clearly set out in its written opening at paragraphs 83 and 84.

...

At paragraph 84 the submissions go on to mention that, 'The expert evidence will identify what measures would avoid a serious or irreversible damage to the environment.'



69 The trial of the proceeding commenced on 7 March 2022. Evidence concluded on 29 March.

70 Two of VicForests' lay witnesses, William Paul, who previously held the role of Manager, and is now Director, of the Environmental Performance team at VicForests, and James Gunn, Manager of Systems and Practices, were cross-examined on the Greater Glider expert reports, and the prescriptions and adaptive measures the experts said were necessary to comply with the precautionary principle.

71 The Greater Glider experts gave evidence concurrently over a period of three days towards the end of the trial. Their evidence was given under topics that were largely agreed by the parties. Those topics included:

5. The impact of the 2019/20 bushfires on the relative importance of greater glider populations and habitat in unburnt forest, and the precautionary principle analyses undertaken by VicForests after the bushfires
7. The different silvicultural methods used by VicForests, and the effectiveness of the adaptive management measures practised by VicForests to address the threats posed by timber harvesting (including surveys, basal area retention, habitat tree retention, etc.)
8. The harvesting prescriptions considered to be required, or to be necessary or appropriate, by one or both experts to address the threat to the greater glider, including but not limited to:
  - a. pre-harvest species surveys in every coupe containing or likely to contain greater glider habitat
  - b. at least 40% coupe area retention
  - c. refuges
  - d. at least 60% basal area retention and use of single tree selection silviculture methods, and
  - e. configuration of harvesting in coupes

72 A substantial amount of evidence was given by both experts, in examination in chief and cross-examination, about the prescriptions and adaptive measures which they said were necessary and proportionate responses to the threat to the Greater Glider and were required in order to comply with the precautionary principle.



## **Prejudice**

73 VicForests relied on an affidavit of its lawyer, Andrew Prowse, made on 8 August 2022. Prowse said that had WOTCH filed the proposed 3FASOC prior to trial, VicForests would have prepared different lay and expert evidence addressing issues from Schedule B including:

- (a) the impact of VicForests being restrained from harvesting within the area described in paragraph 1;
- (b) the practicability and proportionality of planning for and harvesting in the manner WOTCH described;
- (c) the interactions of prescriptions described.

74 Prowse estimated that if the further steps required to respond to the proposed 3FASOC were taken, the proceeding would not be ready for a further hearing for approximately 12 months. He also said a further hearing of approximately five to ten days duration would be required.

## **Submissions**

### **WOTCH**

75 Particulars (d) and (f) to paragraph 23 have always contained a positive allegation directed to what management actions were required for VicForests to comply with the precautionary principle. That pleading has always been the basis of a claim for a final injunction to restrain VicForests from harvesting in relevant coupes until, having regard to the impact of the bushfires on threatened species, it had developed and implemented timber harvesting prescriptions to, wherever practical, avoid serious or irreversible damage to fire-affected threatened species consistent with s 2.2.2.2 of the Code and the precautionary principle. That relief has always begged the question what are the prescriptions that would comply. The pleadings, and the prayer for relief, were of sufficient breadth to allow WOTCH to seek the relief identified in its closing submissions. The pleading gave VicForests sufficient notice of the case it had to meet. It is clear from the questions it asked its experts that VicForests knew the



adequacy of the prescriptions and adaptive measures applied by it, and the proportionality of prescriptions found to be required on the expert evidence, were central issues in the case. That position was confirmed by WOTCH's written and oral opening submissions, and by the parties' conduct of the trial. It is not necessary that WOTCH amend the pleading, or seek leave to do so, because the relief sought in closing submissions is open on the case as currently pleaded.

76 It is clear from the way VicForests briefed its experts that it understood WOTCH's prescription case stood apart from its case based on the State and Commonwealth bushfire biodiversity responses. If VicForests' characterisation of the type of case open on the pleadings was accepted, then it was unnecessary to seek the opinion of the experts about the adequacy of VicForests' prescriptions and adaptive measures, what further measures were required, and whether those measures were proportionate to the threat.

77 VicForests chose to present its financial impact evidence on the basis that relief sought by WOTCH would result in a total and permanent cessation of timber harvesting in coupes that contained the Greater Glider or its habitat. In fact there was no case pleaded by WOTCH seeking permanent cessation of timber harvesting in every coupe. VicForests chose to commission financial impact evidence that did not respond to WOTCH's pleaded case, or to the species expert evidence obtained by both parties. To the extent WOTCH seeks to permanently restrain VicForests from harvesting coupes in the Bendoc region of East Gippsland, and in pre-1900 ash forest, that represents a proportion of the total assessed by Kaye. VicForests is therefore not prejudiced by that aspect of WOTCH's case.

78 The critical factor is whether VicForests will suffer prejudice if leave to amend the 2FASOC is required and granted. VicForests knew the adequacy of its prescriptions was a critical issue in the case, and should be taken to have understood that the relief ultimately sought would depend on the course of the expert evidence. The relief sought by WOTCH is directed to the very question VicForests asked its species experts, namely what adaptive measures were required to comply with the



precautionary principle. If VicForests did not consider this to be an issue in the case, why did it brief its own experts on that question? Further, VicForests' complaint in oral opening that it conducted its defence by reference to the precise relief that was pleaded is not reflected in its conduct of the trial. The question of what prescriptions were required to respond to the threat to the Greater Glider and comply with the precautionary principle was the subject of evidence at trial. Neither party objected to this course. VicForests has made forensic decisions in preparation for and running the trial. It should not now be permitted to resile from the way it conducted the trial. It is noteworthy that, WOTCH having said it would not oppose an application by VicForests to reopen its case and adduce further evidence to remedy any asserted prejudice, VicForests has indicated clearly it does not intend to reopen. The other factors relevant to an application to amend do not weigh heavily against leave being granted.

79 The relief now being sought is a significant refinement of the prayer for relief in the 2FASOC. However, the nature of the case necessitated that approach. Flexibility is especially appropriate in a case where the plaintiff seeks equitable remedies.<sup>16</sup> Flexibility is also not uncommon in other types of proceedings,<sup>17</sup> including where expert evidence is important in moulding relief.<sup>18</sup> The precise terms of relief were, in large part, inexorably connected to the expert evidence, which itself must respond to material that comes to light in the course of discovery and the trial itself. This approach is consistent with the way in which relief was resolved in *Brown Mountain*.<sup>19</sup>

### **VicForests**

80 The relief now being sought by WOTCH is different from the relief claimed in, or available on, the original pleading, and is brand new. The Court may only grant that relief if:

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<sup>16</sup> *Windemac Pte Ltd v Jada Ex Beverages Pty Ltd* [2013] VSC 1, [27].

<sup>17</sup> *Secure Logic Pty Ltd v Paul William Noble (No. 4)* [2021] NSWSC 1250, [17]-[18].

<sup>18</sup> *Beck v Colonial Staff Super Pty Ltd & Ors* [2015] NSWSC 723, [171]-[205].

<sup>19</sup> *Brown Mountain* (n 2) 92-96 [753]-[777]; *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 at 96, 96-98 [1]-[12] ('Costs Ruling').



- (a) the plaintiff is given leave to amend its pleadings to seek the different relief; or
- (b) the parties chose to disregard the pleadings and 'to fight the case on additional issues chosen at the trial'.<sup>20</sup>

81 WOTCH's current pleading does not allege that, to comply with the precautionary principle, VicForests would need to implement a suite of specific timber harvesting prescriptions to avoid serious or irreversible environmental damage. Rather, the current pleading alleges the 'negative' case, that VicForests has breached the precautionary principle by failing to develop and implement timber harvesting prescriptions that avoid serious or irreversible damage to relevant species, and that:

- (a) have regard to the impact of the bushfires on the species;
- (b) are proportionate to the threat posed by the timber harvesting operations to the species; and
- (c) are consistent with, or have regard to, management actions or recommendations identified by the State or Commonwealth bushfire biodiversity responses.

The critical point is that the particulars challenge the adequacy of VicForests' current adaptive management measures, but do not contain a 'positive' allegation that VicForests must implement different adaptive management measures to comply with s 2.2.2.2 of the Code.

82 Where a plaintiff makes an allegation of the second kind, the specific measures in question form an essential part of the allegation, and are an essential ingredient of the plaintiff's cause of action. Consequently, the plaintiff's pleading must identify those measures. That is so because a key question for the Court is whether the measures proposed by the plaintiff are proportionate to the threat in question. Because the current pleading does not propose any adaptive management measure, it should be

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<sup>20</sup> *Ingot Capital Investments Pty Ltd v Macquarie Equity Markets Limited* (2008) 73 NSWLR 653, 710 [424] (Ipp JA); *Stefanovski v Digital Centre Australia (Assets) Pty Ltd* (2018) 368 ALR 607, 623-5 [63]-[65]; 628 [74] ('*Stefanovski*').





understood as being confined to an attack on what VicForests has been doing, and not embracing a separate allegation setting out what VicForests should be doing.

83 VicForests did not choose to run a different case from that disclosed in WOTCH's pleadings. VicForests made it clear in its written and oral opening that it had prepared its evidence, and would run its case, in response to the case pleaded against it. That proposition is also supported by the fact that a breach of s 2.2.2.2 of the Code constitutes an offence. It is inherently improbable that VicForests would agree to disregard the current pleading in that circumstance.<sup>21</sup>

84 VicForests' financial impact evidence, given by Dawson and Kaye, was predicated on the injunctive relief pleaded by WOTCH. All of that evidence is largely wasted now that WOTCH does not press that form of injunctive relief. Had it been on notice of the brand new relief now sought by WOTCH, VicForests would have prepared different evidence, for instance as to:

- (a) the proportionality and practicality of pre-harvest surveys and other adaptive management measures now proposed;
- (b) the location of key Greater Glider populations in the Bendoc region;
- (c) the cost and impact of permanent protections in the Bendoc region;
- (d) the cost and practicality of implementing the proposed additional measures;
- (e) whether, when viewed either separately or as a package, the elements of the new measures are proportionate to the relevant threat;
- (f) evidence as to VicForests' decisions concerning the new measures, including going to those decisions being guided by the requisite evaluation and assessment required by the precautionary principle.

85 WOTCH did not put VicForests on notice that it would be seeking the brand new relief. The course of the trial was such that WOTCH did not reveal what it now says

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<sup>21</sup> *Vines v Australian Securities & Investments Commission* (2007) 233 FLR 1, 14 [55] (Spigelman CJ).



the precautionary principle requires of VicForests. No VicForests witness was cross-examined about the practicality, proportionality or implications of the new measures. The very first time VicForests was made aware of the new measures was when it read WOTCH's closing submissions.

86 VicForests would suffer irreparable prejudice if WOTCH were granted leave to amend its pleading. A fundamental requirement for a fair trial of allegations of a contravention of the law requires the party making the allegations to identify its case clearly and distinctly.<sup>22</sup> WOTCH has not complied with this requirement, and VicForests has been taken by surprise.

87 It is no answer to say that the case should be reopened to allow VicForests to respond to the brand new case WOTCH seeks to make. This litigation has been long, complicated and expensive. Re-opening the case would cause further delay and substantial inconvenience to witnesses involved in the proceeding.<sup>23</sup> It will not serve the efficient, timely and cost-effective resolution of issues in the proceeding, would be detrimental to other litigants in the Court awaiting resolution of their cases,<sup>24</sup> and bring the system of justice into disrepute.

## Analysis

88 A narrow approach should not be taken to ascertaining whether a case is open on the pleadings.<sup>25</sup> The context in which the pleading is to be understood includes the nature of the claim, the practicability of identifying the precise relief before the conclusion of trial, and how the case was litigated. If the parties had fair notice of what was in issue, a fair amount of tolerance can be justified in determining whether those issues were open on a party's pleaded case.<sup>26</sup>

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<sup>22</sup> *Barnes v Forty Two International Pty Ltd* (2014) 316 ALR 408, 435 [119] (Beach J); *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486, 502 [25] (French CJ, Gummow, Hayne and Kiefel JJ).

<sup>23</sup> *Teo Tran T/As Canberra Direct and as Canberra Mailing v Calvoista Australia Pty Ltd* [2010] ACTCA 5 [51]-[55].

<sup>24</sup> *Re Owies Family Trust (No 3)* [2021] VSC 114, [50]-[51].

<sup>25</sup> *Baird v Queensland* (2006) 156 FCR 451, 455 [17] (Allsop J) ('*Baird*'); *Wotton v Queensland* (No 5) (2016) 352 ALR 146, 170 [62] ('*Wotton*').

<sup>26</sup> *Stefanovski* (n 20) 625 [65].



89 For the following reasons I reject VicForests' conception of the case pleaded by WOTCH in the 2FASOC.

90 First, the words used in paragraph 23(d)(iii) and (f)(v) of the pleading invite consideration of whether there are prescriptions and adaptive measures that would avoid serious or irreversible damage to the Greater Glider.

91 Second, understood in that way, the pleading is consistent with the analysis of the precautionary principle by Osborn J in *Brown Mountain*. The pleading separately alleged the first three issues identified by Osborn J have been satisfied, so that the precautionary principle is engaged in respect of the threat to the Greater Glider, and that the threat is not negligible. There may be cases where the threat and degree of scientific uncertainty are such that the only proportionate response involves prohibition of the land use in question. However, even in such a case, it would be necessary, before coming to that ultimate conclusion, to consider whether the threat was able to be addressed by adaptive management that was practicable and proportionate. In other words, whether adaptive management can address the threat is a natural and, at least in most cases, a necessary consideration.

92 Third, paragraph 23(d)(iii) of the 2FASOC raised for consideration timber harvesting prescriptions, adaptive measures and proportionality. In other words, that pleading was addressed in part to the fourth and fifth issues identified by Osborn J in *Brown Mountain*.<sup>27</sup> Particular (f) to paragraph 23 raised the issue of compliance with the precautionary principle in a somewhat different way. Reference to methods of harvesting again raised the issue of what adaptive measures might meet the precautionary principle. The reference to locations raised as an issue whether compliance with the precautionary principle required that harvesting not occur in some forest areas.

93 Fourth, it is not the case that the 2FASOC was silent as to the prescriptions and adaptive measures required to satisfy the precautionary principle. The management

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<sup>27</sup> *Brown Mountain* (n 2) 50 [212(d)-(e)].



actions pleaded in paragraph 23(d)(iii)(1) and (2) are a broad description of the sorts of steps that might be required to satisfy the precautionary principle. Relevantly the adaptive measures mentioned include the need for habitat refuges, protection and management of key populations of species in priority locations, and avoiding clearing that results in population fragmentation and habitat patches becoming too small.

94 Fifth, the pleadings are consistent with the declaratory and injunctive relief sought. WOTCH did not seek an injunction that permanently prohibited VicForests from conducting timber harvesting operations in coupes known to contain or be likely to contain the Greater Glider or its habitat. The relief sought by WOTCH contemplated timber harvesting occurring in coupes subject to prescriptions and adaptive management that addressed the threat to the relevant species. For example, it was contemplated that VicForests would develop and implement timber harvesting prescriptions that wherever practical avoided serious or irreversible damage to the Greater Glider in light of the impact of the bushfires on the species in compliance with the precautionary principle.

95 Sixth, I do not accept VicForests' submission that the sub-parts to particulars (d)(iii) and (f) are to be read as cumulative, so that the allegation in the particular is only made out if all the sub-parts are established. Neither particular is drafted in that fashion.

96 Seventh, the pleading is to be understood in the context of the case as it was prepared by the parties and opened by WOTCH.<sup>28</sup> In his first report, Dr Smith briefly addressed adaptive measures that were required by the precautionary principle in light of the bushfires. In an earlier ruling in this proceeding published on 21 August 2020,<sup>29</sup> I considered Dr Smith's first report in the context of an application by WOTCH for an interlocutory injunction, and referred to Dr Smith's opinion about adaptive measures that were required to comply with the precautionary principle.<sup>30</sup> In relation to

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<sup>28</sup> *Baird* (n 25) 455 [17] (Allsop J); *Wotton* (n 25) 170 [62].

<sup>29</sup> *WOTCH Inc v VicForests* (No 5) [2020] VSC 528.

<sup>30</sup> *Ibid* [34(f)].

whether there was a serious question to be tried:

Further, the plaintiff argues that VicForests is failing to comply with the precautionary principle because the outcome of its activities does not effectively address the threat to relevant species. Consideration of whether VicForests' response in the Central Highlands to the bushfires complies in process and outcome with the precautionary principle is a complex question to be resolved at trial.<sup>31</sup>

97 I have summarised above the steps taken by the parties to obtain further reports from the Greater Glider experts, the questions the experts were asked to address, and the extensive analysis by the experts in their reports of the adaptive measures that were required to comply with the precautionary principle by responding to the threat to the Greater Glider. It is also relevant to consider WOTCH's written and oral opening at trial and, more importantly, the agreed topics and concurrent evidence given by the Greater Glider experts. I conclude that, in that context, the 2FASOC is to be understood as raising for consideration the issue of the adaptive measures required to respond to the threat to the Greater Glider, and whether those measures were proportionate to the threat.

98 VicForests sought to justify steps taken in preparation for and at trial, such as the question they asked Dr Nitschke, set out at paragraph 53 above, and evidence given by the Greater Glider experts in response to concurrent evidence topic 8, by submitting:

The plaintiff's challenge would succeed if this court were to conclude that VicForests measures should have included, but did not include, that single additional measure. So if you challenge the existing measures, all you need to show is that one thing that should have been done wasn't done.

Later in submissions counsel added:

Now, those two additional questions – what additional measures and are they proportionate – we say were relevant for Dr Nitschke to elaborate on his view, if it be his view, that the current measures of VicForests were not adequate. Why were they [in]adequate? Well, because there are these further measures that should be undertaken or adopted, and they are proportionate. That is why those questions were asked of Dr Nitschke.

VicForests' own submission recognises that the 'negative' case as conceived of by it

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<sup>31</sup> Ibid [44].



cannot be advanced without consideration of the ‘positive’ case as a natural corollary. Further, the reasoning in *Brown Mountain* demonstrates that the distinction sought to be drawn by VicForests between the ‘negative’ case and the ‘positive’ case is artificial. The answer to the question ‘is the threat able to be addressed by adaptive management?’ was always relevant to the case brought by WOTCH, and the relief that might be granted if it succeeded. If the answer to the question is no, relief might involve prohibiting the relevant land use. If the answer is ‘yes’, relief might be moulded accordingly. Amendments in the 3FASOC do not advance a new ‘positive’ case, but a more precise articulation responding to the issues identified in *Brown Mountain* relevant to application of the precautionary principle. Even if VicForests’ ‘negative’ case concept, and its justification for asking Dr Nitschke the question set out in paragraph 53, were accepted it would still be necessary for it to address the expert evidence about adaptive measures that were proportionate and necessary to address the threats to the species, if it wished to defend the allegation that its timber harvesting operations had and would continue to breach the precautionary principle.

99 Eighth, the extent to which VicForests’ lay witnesses gave evidence in chief and were cross-examined on adaptive measures that Dr Smith and Dr Nitschke said in their reports were required and proportionate must be considered in the context of how evidence was assembled and put before the Court. There was an opportunity after the Greater Glider expert reports had been obtained and served for VicForests to file further lay witness affidavits addressing questions of practicality and proportionality of the adaptive measures the experts said were necessary. In this regard, a number of things are relevant:

- (a) There has been an enormous amount of evidence filed and served by both parties addressing issues including VicForests’ precautionary principle analysis, pre-harvest surveys, basal area retention, retained patch sizes in harvested coupes and linking corridors, and refuge areas.
- (b) As I have already observed, VicForests asked Dr Nitschke what further adaptive measures were required, and he responded to that question in detail;





- (c) VicForests did obtain evidence about proportionality from Kaye and Dawson;
- (d) VicForests' lay witnesses Paul and Gunn were challenged in cross-examination about aspects of the opinions of Dr Smith and Dr Nitschke and relevant adaptive measures, including pre-harvest surveys, silviculture systems and basal area retention, prohibition on timber harvesting in the Bendoc region and pre-1900 ash forest, local landscape planning, connectivity and patch size issues. This was done in circumstances where VicForests, having been served with the reports of Dr Smith, and having asked for and obtained an opinion from Dr Nitschke about the adaptive measures he considered were necessary to comply with the precautionary principle, did not file further affidavits from those witnesses relevant to the practicability and proportionality of the adaptive measures.

100 I accept the submission by WOTCH that a degree of flexibility is appropriate where the availability and form of an equitable remedy is heavily dependent on expert evidence that must respond to the lay evidence that is marshalled and given at trial.

101 I accept the submissions by WOTCH that, considered in context, the case set out in its proposed 3FASOC is within the scope of the current pleadings. However, it is necessary that WOTCH amend its 2FASOC as proposed so that the issues to be determined are expressed clearly in the final form of the pleading.<sup>32</sup>

102 The factors relevant to an application for leave to re-plead were usefully summarised by Vickery J in *Namberry Craft Pty Ltd v Watson*.<sup>33</sup>

103 For the above reasons, given the nature of the amendment being sought is within the scope of the current pleading, considered in the context of evidence preparation and the trial, the factors summarised by Vickery J do not weigh heavily against leave being granted to amend the 2FASOC. Further, the amendment will allow determination of issues that are clearly in contest in the proceeding. I conclude in the circumstances of

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<sup>32</sup> *Tak-Wong* (n 1).

<sup>33</sup> [2011] VSC 136, [38] (citations omitted).





this case that WOTCH should be given leave to file and serve a 3FASOC in the form proposed.

104 I do not accept VicForests will be prejudiced by the amendment in the manner and to the extent outlined in the Prowse affidavit. The evidence of Prowse is predicated on an assumption that the case WOTCH seeks to make in the proposed 3FASOC is brand new, and that VicForests had no notice of this case until it received WOTCH's written final submissions. For reasons already given, I do not accept either of these propositions. However, for three reasons, it is appropriate that VicForests have a limited opportunity to re-open its case. First, WOTCH has conceded it would not oppose VicForests re-opening its case to address issues in the proposed 3FASOC. Second, it may be necessary to consider whether *Browne v Dunn*<sup>34</sup> issues arise in respect of the harvesting prescriptions and adaptive measures that WOTCH seeks to rely on, and how to address those issues in terms of fairness to VicForests, and the weight given to affected evidence.

### **Conclusion**

105 I will order that WOTCH be given leave to file and serve a 3FASOC in the form proposed. I will hear from the parties as to any consequential orders as to re-opening of the defendant's case and costs.

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<sup>34</sup> (1893) 6 R 67.