

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: McMillan J
WHERE HELD: Melbourne
DATE OF HEARING: 18 February 2020
DATE OF JUDGMENT: 5 March 2020
CASE MAY BE CITED AS: WOTCH v VicForests (No 2)
MEDIUM NEUTRAL CITATION: [2020] VSC 99

PRACTICE AND PROCEDURE – Interlocutory injunction – Whether serious question to be tried – Whether balance of convenience favours granting injunction – Timber harvesting of State forests – Whether bushfires affect application of Code of Practice – Threatened species of greater glider, powerful owl, sooty owl, smoky mouse and alpine tree frog – *Conservation, Forests and Lands Act 1987* (Vic) – *Flora and Fauna Guarantee Act 1988* (Vic) – *Sustainable Forests (Timber) Act 2004* (Vic) – *Environment East Gippsland Inc v VicForests* [2009] VSC 386 – *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 – *MyEnvironment v VicForests* [2012] VSC 91 – *Friends of the Leadbeater’s Possum v VicForests* (2018) 231 LGERA 75.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms KE Foley and Ms C Mintz	Environmental Justice Australia
For the Defendant	Mr IG Waller QC, Mr H Redd and Ms RV Howe	Baker McKenzie

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HER HONOUR:

Introduction

- 1 The plaintiff, WOTCH,¹ brought this interlocutory injunction application to prevent the defendant, VicForests, from undertaking timber harvesting operations in 15 forest coupes in Victoria. The plaintiff submits that each of these coupes contains, or is likely to contain, threatened species, or habitat of threatened species, that have been affected by the devastating 2019/2020 bushfires.
- 2 The relevant threatened species are: the greater glider, powerful owl, sooty owl, smoky mouse and alpine tree frog ('the threatened species').
- 3 In its statement of claim, the plaintiff alleges that it is unlawful for the defendant to harvest timber in coupes known to the defendant or the Department of Environment, Land, Water and Planning ('DELWP') to contain or be likely to contain a species identified as threatened pursuant to the *Flora and Fauna Guarantee Act 1988* ('FFG Act') and affected by the recent bushfires, or habitat of such species. The plaintiff submits that there are currently underway State and Commonwealth bushfire biodiversity responses, the findings of which will be relevant to the defendant's actions as they relate to threatened species, and that those responses have not yet concluded. The plaintiff submits that, by continuing to harvest timber in the coupes, the defendant is not able to act consistently with its obligations to consider any relevant findings when planning and conducting harvesting operations.
- 4 Whilst the statement of claim seeks broader relief, the interlocutory injunction application relates only to 15 of the coupes named in the plaintiff's two summonses (jointly, 'the application').

Procedural history

- 5 By generally indorsed writ filed 28 January 2020, the plaintiff sought an urgent interim injunction to prevent the defendant from harvesting timber in ten forest coupes in Victoria. The application was heard urgently in the Practice Court on 29 January 2020.

¹ The acronym stands for 'Wildlife of the Central Highlands'.

At the hearing, the defendant informed the Court that logging was currently underway in only three of the ten coupes identified in the application. The defendant further informed the Court that it would not commence or recommence logging in any of the remaining seven coupes prior to the determination of the interlocutory application without giving 48 hours' notice to the plaintiff.

6 Later the same day, the Court published reasons for ruling and granted an interim injunction, with certain exceptions, in relation to the three coupes, namely: Kumba, Rock a Rhyme and Dowse.² The orders included other procedural and scheduling matters.

7 On 3 February 2020, the Court made orders by consent varying the ruling to permit the defendant to remove certain felled timber from within Kumba.

8 On 5 February 2020, the plaintiff filed its statement of claim. The plaintiff did not particularise one of the original ten coupes, Castella Hills, and later confirmed by email to the Court that it was no longer seeking interlocutory relief in relation to that coupe, given the defendant's statements in Court on 29 January 2020 that it was not scheduled for harvesting.

9 On 7 February 2020, the plaintiff filed a summons seeking to extend the interim injunction to a further six coupes, namely: Rumba, Pumba, Wales, Princess Di, Wabby and Mt Wills Creek. The application was heard that day and resulted in the defendant giving an undertaking not to conduct logging in the additional six coupes until the date of listing of the interlocutory injunction application.

10 The interlocutory injunction application was heard on 18 February 2020 in relation to the 15 coupes.

The parties

11 The plaintiff is an association incorporated under the *Associations Incorporation Reform Act 2012*. It conducts citizen science in Victoria's forests to document and report on

² *Wildlife of the Central Highlands Inc v VicForests* [2020] VSC 10.

the presence of biodiversity values that attract protection from logging under the State regulatory scheme. The plaintiff has conducted hundreds of surveys to document and report on the presence of biodiversity values and submitted more than 150 reports to government since about 2015, some of which have resulted in the protection of areas of forest otherwise scheduled for timber harvesting.

- 12 The plaintiff's standing to bring the application is not in dispute. It is clear that the plaintiff has standing as its interest goes beyond mere intellectual or emotional concern and it has a specific involvement in these regions.³
- 13 The defendant is a state body established in 2003 by an Order in Council made under the *State Owned Enterprises Act 1992*. Its principal function is to undertake the management, sale and supply of timber resources in Victorian State forests on a commercial basis.

Summary of the applications and evidence

- 14 In the prayer for relief, the plaintiff seeks, inter alia:
- (a) a final injunction to restrain the defendant from carrying out timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* in any coupe known by the defendant or DELWP to contain or be likely to contain a fire-affected threatened species (as defined in the FFG Act) or habitat of such species unless and until the following bushfire responses have been completed and adopted in certain ways by the defendant:
 - (i) phases 2 and 3, alternatively phase 2, of a biodiversity response to the bushfires commenced by DELWP in early 2020 ('the State biodiversity response');
 - (ii) the medium term response of a wildlife and threatened species bushfire recovery process commenced by the Commonwealth Department of Environment and Energy in early 2020 ('the Commonwealth

³ *Environment East Gippsland Inc v VicForests* [2009] VSC 386, [64]-[71] (Forrest J) ('EEG').

biodiversity response’);

- (b) a final injunction in relation to timber harvesting in the 15 coupes the subject of this application;
- (c) a final injunction in relation to timber harvesting in any coupe known to the defendant or DELWP to contain or be likely to contain the greater glider or its habitat unless and until the boundaries of the immediate protection area (‘IPA’) for the greater glider are finalised;
- (d) a final injunction in relation to timber harvesting in any coupe known to the defendant or DELWP to contain or be likely to contain the powerful owl or sooty owl or suitable habitat unless and until the powerful owl management action and/or the sooty owl management action allocation are reviewed by DELWP in light of the bushfires;
- (e) various declarations that such timber harvesting is unlawful.

15 The plaintiff seeks an interlocutory injunction to restrain the defendant from carrying out timber harvesting operations only in the 15 coupes identified on the timber release plan dated December 2019 and listed in the attached schedule.

16 The plaintiff filed six affidavits in support of its applications, being the:

- (a) affidavit of Ms Danya Jacobs filed 28 January 2020;
- (b) second affidavit of Ms Danya Jacobs filed 7 February 2020;
- (c) affidavit of Mr Jake Ross McKenzie filed 7 February 2020;
- (d) affidavit of Ms Hayley Forster filed 7 February 2020;
- (e) third affidavit of Ms Danya Jacobs filed 14 February 2020; and the
- (f) second affidavit of Mr Jake Ross McKenzie filed 14 February 2020.

17 The defendant has filed six affidavits, being the:

- (a) affidavit of Mr Deon Kriek filed 12 February 2020;
- (b) affidavit of Ms Monique Dawson filed 12 February 2020;
- (c) affidavit of Mr William Paul filed 12 February 2020;
- (d) affidavit of Ms Ruizhu Jiang filed 14 February 2020;
- (e) affidavit of Mr Andrew Prowse filed 17 February 2020; and the
- (f) second affidavit of Ms Ruizhu Jiang filed 17 February 2020.

18 The evidence filed by the parties is voluminous. At this interlocutory stage, the Court considers it appropriate to confine its consideration of the evidence produced to that to which the parties directed the Court's attention in submissions, and in particular the evidence which it is necessary to consider in light of the approach the Court has taken.⁴

The Victorian forest management regime

19 The regime is set out in the Court's reasons for the interim injunction ruling. For completeness, they are set out in greater detail below.

20 Section 46(a) of the *Sustainable Forests (Timber) Act 2004* ('SFT Act') imposes an obligation upon the defendant to comply with any relevant Code of Practice relating to timber harvesting. The relevant Code of Practice is the *Code of Practice for Timber Production 2014* ('Code'), which was published under pt 5 of the *Conservation, Forest and Lands Act 1987* ('CFL Act').⁵

21 The plaintiff submits that the defendant is in breach of two sections of the Code, and therefore in breach of the SFT Act.

⁴ *Friends of the Leadbeater's Possum Inc v VicForests (No 3)* (2018) 231 LGERA 75, 78 [7] ('Leadbeater's Possum').

⁵ The Code is a prescribed legislative instrument in Schedule 2 of the *Subordinate Legislation (Legislative Instruments) Regulations 2011* (Vic).

The Code of Practice

22 Section 2.2.2.2 of the Code requires:

The **precautionary principle** must be applied to the conservation of biodiversity values. The application of the precautionary principle will be consistent with relevant monitoring and research that has improved the understanding of the effects of forest management on forest ecology and conservation values.

23 The Code defines the 'precautionary principle' as follows:

when contemplating decisions that will affect the environment, careful evaluation of management options be undertaken to wherever practical avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various options. When dealing with threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

24 Section 2.2.2.3 of the Code requires:

The advice of relevant experts and relevant research in conservation biology and flora and fauna management must be considered when planning and conducting timber harvesting operations.

25 Sections 2.2.2.2 and 2.2.2.3 are 'mandatory actions' within the meaning of s 1.2.8, which states:

Mandatory Actions are actions to be conducted in order to achieve each operation goal. **Timber harvesting managers, harvesting entities and operators** must undertake all relevant mandatory actions to meet the objectives of the Code. Mandatory Actions are focussed on practices or activities. Failure to undertake a relevant Mandatory Action would result in non-compliance with this Code.

Management procedures and planning standards

26 The Code incorporates two documents under s 31(2) of the CFL Act, being:

- (a) *The Management Standards and Procedures for timber harvesting operations in Victoria's State forests 2014* ('the management procedures'); and
- (b) *Appendix 5 to Management Standards and Procedures for timber harvesting operations in Victoria's State forests 2014: the Planning Standards for Timber harvesting operations in Victoria's State Forests 2014* (the 'planning standards').

Forest Management Zones and Forest Management Plans

- 27 Between 1995 and 2004, the Secretary to DELWP (then known by other names) made Forest Management Plans ('FMP's) for the East Gippsland, Central Highlands and Gippsland regions under s 22 of the *Forests Act 1958*.
- 28 The FMPs establish a Forest Management Zone ('FMZ') scheme that delineates State forest the subject of the FMPs into three zones:
- (a) General Management Zones ('GMZ'), where logging is permitted;
 - (b) Special Management Zones ('SMZ'), where logging is permitted subject to specified management in order to conserve identified conservation values; and
 - (c) Special Protection Zones ('SPZ'), where logging is prohibited in order to protect identified conservation values.

Timber Release Plans

- 29 Logging operations in State forests in Victoria are planned under a Timber Release Plan ('TRP') prepared under s 37 of the SFT Act.
- 30 On or about 24 December 2019, the defendant published notice of a change made to a TRP in the Victoria Government Gazette.
- 31 The defendant concurrently published a new TRP as a consolidated document, incorporating all of the changes made to previous versions of the plan. The TRP includes an online interactive map and a schedule that identify areas selected for logging as individual 'coupes' that carry identification numbers. The 15 coupes in question are all identified on this TRP.

Forest Management Areas

- 32 The management of State forests is divided geographically into areas known as forest management areas ('FMAs'). These are departmental geographical areas used for forest planning, including timber supply from State forests. The defendant's customer agreements and harvesting and haulage contracts are based on supply of timber

resources from FMAs. The relationship between each coupe and the FMA in which it is located is included in the schedule attached to these reasons.

Bushfire response

- 33 On 20 January 2020, the Commonwealth Department of Environment and Energy published a preliminary analysis of fire-affected threatened species ('the Commonwealth preliminary analysis'). It includes all species listed as threatened under the Commonwealth regime and states that the list 'will be refined with further investigation and finer scale data'. Under the heading of 'Next Steps', it is stated:

Once it is safe to enter fire-affected areas, authorities will be able to more accurately assess the severity of the fires and the impacts on individual species. Future updates of this dataset will incorporate that information.

- 34 A preliminary report of the State biodiversity response was published on 23 January 2020 and is entitled *Victoria's bushfire emergency; Biodiversity response and recovery, Preliminary report – Version 1* ('State preliminary report'). The introduction begins:

The current fires are exceptional in size and impact. Existing [DELWP] fire management processes are well underway, including Bushfire Rapid Risk Assessments for all assets and biodiversity is an important part of this work. However, it is recognised that under climate change we are entering a new world in terms of the scale and complexity of managing fire impacts on biodiversity. Multiple large-scale active fires and the increasing proportion of areas that have been burnt multiple times since 2000, has expanded the context in which mitigation needs to be framed. For example, there is a need to consider the status of species in neighbouring states and mitigation will increasingly include options beyond the fire areas.

- 35 The State preliminary report identifies each of the threatened species as species of 'most immediate concern'. It also states that experts have identified that the key actions necessary for immediate and short-term implementation include the protection and management of key unburnt areas and populations.

- 36 On 11 February 2020, the Commonwealth Department of Agriculture, Water and the Environment released a provisional list of 113 animal species that have been identified by experts as the highest priorities for urgent management intervention following the fires. That list is the focus of a report dated 9 February 2020 entitled *Rapid analysis of impacts of the 2019-20 fires on animal species, and prioritisation of species for management*

response – preliminary report alongside a document summarising that report dated 11 February 2020 (together, ‘Commonwealth preliminary report’). It states:

The 2019-20 bushfires have had severe impacts on many animal species. The fires have covered an unusually large spatial extent, and in many areas they have burnt with unusually high intensity. Some species were considered threatened before the fires, and the fires have now likely brought them even closer to extinction. ...

This paper presents a draft framework to rapidly evaluate which animal species are in most urgent need of emergency action over the coming weeks and months, viewed at a national scale.

37 The plaintiff also directed the Court to a report dated January 2020 published by the National Threatened Species Recovery Hub.

The threatened species

38 The application concerns five species, namely: the greater glider, powerful owl, sooty owl, smoky mouse and alpine tree frog. Species at risk may be listed on both a State and a Commonwealth list.

39 The relevance of the threatened species in relation to each coupe is included in the schedule attached to these reasons.

State protection regime

40 The State list is created by the FFG Act. Under s 10, the Governor in Council may, on the recommendation of the Minister, and by order published in the Government Gazette, specify, in a list, any taxon or community of flora and fauna that is ‘threatened’.

41 Section 11(1) of the FFG Act provides that a species is eligible to be listed as ‘threatened’ if it is in ‘a demonstrable state of decline which is likely to result in extinction or if it is significantly prone to future threats which are likely to result in extinction’. The FFG Act establishes a Scientific Advisory Committee (‘SAC’), the functions of which include advising the Minister on the listing of threatened species.

42 Once a species is listed, the Secretary to DELWP must prepare an action statement

(‘AS’) for that species as soon as possible, which sets out what has been done to conserve and manage that species and what is intended to be done, and may include information on what needs to be done.⁶

43 All five threatened species are listed as ‘threatened’ under the State regime.

Federal protection regime

44 The federal list is created by the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (‘EPBC Act’), under which species may be listed as: vulnerable, endangered, critically endangered or extinct in the wild.

45 A ‘vulnerable’ species is one ‘facing a high risk of extinction in the wild in the medium term future’ as determined in accordance with the prescribed criteria.⁷

46 An ‘endangered’ species is one ‘facing a very high risk of extinction in the wild in the near future’ as determined in accordance with the prescribed criteria.⁸

47 The greater glider and alpine tree frog are listed as vulnerable. The sooty mouse is listed as endangered.

Greater glider

48 The greater glider is the largest Australian gliding mammal, but is more closely related to the ringtail possum than to Australia’s other gliding possums. It typically has thick, dark grey-brown fur dorsally and cream-white fur ventrally, a long bushy tail and distinctively large and furry ears.

49 The greater glider AS was published by the Victorian Government in November 2019; it was the first AS to be published for the species. It does not yet have statutory force as it has not yet been incorporated into the Code or its subordinate instruments, including the management procedures and planning standards. The defendant has nevertheless acknowledged that it is bound to comply with this AS and, as submitted

⁶ *Fauna, Flora Guarantee Act 1988 (Vic)* s 19 (‘FFG Act’).

⁷ *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* s 180(5) (‘EPBC Act’).

⁸ *Ibid* s 180(4)–(5).

by the defendant, is already complying with it as if it were law.

50 The greater glider AS identifies, inter alia:

- (a) the distribution of the greater glider in Victoria as in the Gippsland, East Gippsland and Central Highlands areas;
- (b) the threatened status of the greater glider;
- (c) the threats to the greater glider, which are bushfire, planned burning, drought, timber harvesting and hyper-predation;
- (d) additional conservation measures including the immediate protection of key areas of habitat across eastern Victoria, and attaches an indicative map of these IPAs.

51 The AS cites the SAC final recommendation report, which found that:

- (a) the greater glider is in a demonstrable state of decline likely to lead to extinction;
- (b) the greater glider is significantly prone to future threats that are likely to lead to extinction; and
- (c) the threats are operating and are expected to continue to operate in the future at a level likely to lead to extinction.

52 Further, under the heading of 'Intended Management Actions', there is a listed objective 'To secure populations or habitat from potentially incompatible land use or catastrophic loss'. Under this objective is the listed action of retaining at least 40 per cent of the basal area of eucalypts across each timber harvesting coupe wherever a certain density of greater gliders is identified.

53 The AS was published prior to the bushfires. It identifies, as a 'Conservation Measure', IPAs of more than 96,000 hectares of State forest and then notes: 'When boundaries are finalised, an update to this action statement will be released that

includes the final map.’ The Court was not made aware of any such update.

54 The State preliminary report found that, at 23 January 2020, 26 per cent of the greater glider’s modelled habitat in Victoria was within the current fire extent, and 47 per cent was within the projected impact area. Ms Jiang deposes that she found that, of the 66 per cent of the greater glider’s Victorian habitat found in State forest, 18 per cent was fire-affected.

55 The Commonwealth preliminary report identifies the greater glider as among the 19 mammals requiring urgent management intervention. The plaintiff submits that this is a much more nuanced analysis of vulnerability to fire than the above identification of percentages of modelled habit.

56 Comparing the IPA map and the State preliminary report, Ms Jacobs deposes that about half of the greater glider IPA was in the current fire extent or projected to be impacted by the fires. The plaintiff submits that there is therefore a real question as to whether the IPAs in the AS have any remaining conservation value.

57 In his affidavit, Mr Paul states:

While the populations of Greater Glider in the East Gippsland fire area have likely been impacted by the fires, the prescriptions in the Action Statement as they relate to the management of timber harvesting, continue to protect those populations in the Central Highlands and other areas unaffected by the fires.

The Great Gliders have a small home range ... The populations in the fire burnt area will be separate from those in the Central Highlands because they will not translocate to that area. Therefore, those populations in the Central Highlands areas, or those any significant distance from the fire burnt area, will not be affected by the fires. The current Action Statement prescriptions therefore remain suitable for those populations unaffected by the fires.

58 In relation to a number of the individual coupes, Mr Paul deposes that he considers it likely that the aforementioned 40 per cent of basal area will be retained. However, given the loss of approximately half the IPA to the bushfires, the plaintiff submits that this figure is insufficient.

59 The plaintiff further submits, as it does in general, that the defendant’s evidence does not take into account the fact that the greater glider IPA is based on pre-bushfire

understanding and knowledge, and that finalisation of the IPA may well mean changes to the protected areas.

Smoky mouse (aka konoom)

60 The smoky mouse is a small native rodent about two to three times the size of the introduced house mouse. Its fur is pale smoky grey above and whitish below.

61 The smoky mouse AS was published in or about 2003 and states, inter alia:

Introduced predators and changed fire regimes are likely to be acting throughout the species in distribution. Timber harvesting, roading and habitat fragmentation are all potential threats in areas of State Forest managed for timber production. ...

Clear-fell logging, and the associated soil disturbance and regeneration burns, destroy Smoky Mouse habitat within the logging coupe. Therefore, it is essential that logging plans and prescriptions leave adequate habitat patches, in a suitable conformation to sustain metapopulation dynamics and to provide a source of animals to recolonise the logged area if suitable habitat returns.

62 In or about 2008, under the EPBC Act, the Commonwealth Minister for the Environment adopted a recovery plan for the smoky mouse, which identified similar issues to the above.

63 The planning standards include a detection-based rule for the smoky mouse for the Central Highlands FMAs to 'Establish a SMZ of approximately 100 ha over each verified record incorporating the detection site wherever possible' and 'Prepare a SMZ plan prior to timber harvesting or road construction commencement, incorporating any relevant information from studies of the species'.

64 The State preliminary report found that, at 23 January 2020, 22 per cent of the smoky mouse's modelled habitat in Victoria was within the current fire extent, and 41 per cent was within the projected impact area. Ms Jiang deposes that she found that, of the 57 per cent of the smoky mouse's Victorian habitat found in State forest, five per cent was fire-affected.

65 The Commonwealth preliminary report lists the smoky mouse as a mammal for urgent management action.

Sooty owl

66 The sooty owl is a medium-large dark owl with short round wings, a very short tail and huge forward-facing black eyes.

67 The AS for the sooty owl was published in June 2001. Under the heading of 'Major Conservation Objective', it states:

For an endangered species to retain its "potential for evolutionary development in the wild" an effective population size ... of 500–1,000 is considered "appropriate at this time" ... This would suggest that the Sooty Owl population should be maintained at least at its current level throughout south-eastern Australia.

At this point, the short-term conservation objective is to prevent further population decline by maintaining good-quality habitat for a population target of at least 500 breeding pairs of Sooty Owl on public land in Victoria.

68 The AS lists as an 'intended management action' the identification of 500 sooty owl management areas ('SOMAs'), which should be based on probable breeding areas. This is reflected in the 'management actions' of the planning standards, which include, for example, 'identify and maintain a target of 100 [SOMAs]' in the Central Highlands FMAs.

69 The plaintiff submits that the SOMAs were impacted by the fires to the extent that there are now fewer than 500 SOMAs of suitable sooty owl habitat and that the prescriptions require review of the SOMA allocation when further research and surveys become available.

70 The State preliminary report found that, at 23 January 2020, 41 per cent of the sooty owl's modelled habitat in Victoria was within the current fire extent, and 59 per cent was within the projected impact area. Ms Jiang deposes that she found that, of the 70 per cent of the sooty owl's Victorian habitat found in State forest, 27 per cent was fire-affected.

Powerful owl

71 The powerful owl is the largest owl found in Australia. It belongs to a family of 'hawk owls' characterised by bright-yellow, large, forward-directed eyes.

72 The AS for the powerful owl was published in 1999. It also identifies the short-term objective of maintaining a target population of 500 breeding pairs within 500 powerful owl management areas ('POMA's) and increasing the population in the longer-term.

73 Under the heading of 'Reasons for conservation status', the AS states:

Since European settlement 65 per cent of Victoria's forest cover has been cleared. Only 5 per cent of freehold land remains forested. This past permanent loss of habitat has likely led to an overall reduction in owl numbers and fragmentation of the original continuous population into a series of small residual populations, each of which is at risk of becoming locally extinct. ...

The Powerful Owl is, therefore, vulnerable to land management practices that reduce the availability of these tree hollows now or in the future.

74 The AS cites a final recommendation of the Scientific Advisory Committee, which determined that the powerful owl is:

- significantly prone to future threats which are likely to result in extinction, and
- very rare in terms of abundance or distribution.

75 The plaintiff submits that the POMAs were impacted by the fires to the extent that there are now fewer than 500 POMAs of suitable powerful owl habitat and that the prescriptions require review of the POMA allocation when further research and surveys become available.

76 The State preliminary report found that, at 23 January 2020, 23 per cent of the powerful owl's modelled habitat in Victoria was within the current fire extent, and 35 per cent was within the projected impact area. Ms Jiang deposes that she found that, of the 48 per cent of the powerful owl's Victorian habitat found in State forest, 14 per cent was fire-affected.

Alpine tree frog

77 The alpine tree frog is a relatively small frog, growing to around 3 cm in length. Its colouration is highly variable, with green, brown and grey forms. Adults have a black stripe running from its nostrils to its foreleg. Despite its name, the alpine tree frog does not climb well and spends much of its time on the ground, where it feeds.

78 In around 2014, a conservation advice was prepared in respect of the species under the EPBC Act.

79 The State preliminary report prepared by the Department's biodiversity unit found that, at 23 January 2020, 23 per cent of the alpine tree frog's modelled habitat in Victoria was within the current fire extent, and 98 per cent was within the projected impact area. Ms Jiang deposed that she found that, of the 14 per cent of the alpine tree frog's Victorian habitat found in State forest, only one per cent was fire-affected.

Detections in the coupes

80 In relation to **Pony** and **Brumby** coupes, the plaintiff relies on detections of the greater glider on 27–29 December 2017 in both coupes and 14–15 January 2020 in Pony coupe. The defendant has records of each of these detections. Mr Paul deposes that the defendant will give consideration to and take these detections into account in its planning process.

81 In relation to **Apu** coupe, the plaintiff relies on a detection of a great glider on 16–17 January 2020. This detection was not the subject of any notification to the defendant. Mr Paul deposes that the defendant will give consideration to this detection in its planning of timber harvesting operations in this coupe.

82 In relation to **Castella East** coupe, the plaintiff relies on detections of greater glider within and adjacent to the coupe on 6–7 December 2018. Those detections were reported to and recorded by the defendant. Mr Paul deposes that the defendant will give consideration to this detection in its planning of timber harvesting operations in this coupe.

83 In relation to **Rock a Rhyme** coupe, the plaintiff relies on detections of three greater gliders in this coupe over the period 20–21 January 2020 and 23–24 January 2020. These detections were not reported to the defendant. Mr Paul deposes that the defendant will give consideration to these detections in planning any further timber harvesting operations in this coupe.

- 84 In relation to **LaTrobe** coupe, the plaintiff relies on FPSP⁹ survey results of two greater gliders and five sooty owls which occurred in October and November 2018. Detections of both species are recorded in the defendant's records. Mr Paul deposes that the recorded detections will be taken into account in the planning of timber harvesting operations in this coupe.
- 85 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 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.
- 86 In relation to **Propellor** coupe, the plaintiff relies on 26 detections of the greater glider as part of the FPSP. Each of these detections is recorded by the defendant. Mr Paul deposes that the defendant has given consideration to and taken these detections into account in its planning process.
- 87 In relation to **Kumba** coupe, the plaintiff relies on detections of the greater glider, powerful owl, sooty owl and smoky mouse. Each of the detections has been recorded by the defendant. Mr Paul deposes that the defendant has given consideration to and will take these detections into account in its planning process.
- 88 In relation to **Pumba** coupe, the plaintiff relies on detections of the greater glider and sooty owl by the FPSP. Those detections are recorded by the defendant. Mr Paul deposes that the defendant has given consideration to and will take these detections into account in its planning process.
- 89 In relation to **Rumba** coupe, the plaintiff relies on detections of the greater glider, sooty owl and powerful owl made in or adjacent to the coupe as part of the FPSP. Some of these detections are recorded by the defendant. Mr Paul deposes that the defendant has given consideration to and will take these detections into account in its

⁹ This is the forest protection survey program, which involves DELWP collecting pre-harvest data.

planning process.

90 In relation to **Princess Di** coupe, the plaintiff relies on detections of the greater glider as part of the FPSP on 7 December 2018. A detection of one greater glider is recorded by the defendant, as well as a detection of one greater glider in an adjacent coupe. Mr Paul deposes that the defendant has given consideration to and taken these detections into account in its planning process.

91 In relation to **Wabby** coupe, the plaintiff relies on FPSP survey results of the alpine tree frog made on or around 24 September 2019. No frogs were found in this coupe according to the FPSP data; rather, the frog locations are in an adjacent SPZ closer to another coupe called Birabeen.

92 In relation to the **Mt Wills Creek** coupe, the plaintiff relies on FPSP survey results for the sooty owl made on 19 August 2019. Mr Paul deposes that the defendant has given consideration to this FPSP data in the planning of its timber harvesting activities in this coupe.

Defendant's evidence

Affidavit of Mr William Paul

93 Mr Paul is the Manager of Environmental Performance for the defendant.

94 Mr Paul provides, inter alia, considerable details of:

- (a) the defendant's planning systems and data;
- (b) the regulatory framework for timber harvesting, including much of the above;
- (c) specific species prescriptions and habitat tree prescriptions;
- (d) government policy announcements as to the phasing out of timber harvesting in native State forests by 2030; and
- (e) the defendant's identification and management of 'high conservation values' ('HCV').

- 95 In relation to the current prescriptions, Mr Paul deposes that the defendant 'is applying or exceeding applicable prescriptions for threatened species and their habitat'. The prescriptions referred to include the AS, IPAs, POMAs and SOMAs.
- 96 Mr Paul deposes that the greater glider AS prescriptions are suitable for populations in the Central Highlands because those populations are not fire-affected. He refers to the fact that the POMAs and SOMAs have all been established. He further deposes that the defendant 'has appropriately and cautiously responded to detections of threatened species and habitat values within the coupes'.
- 97 On the whole, Mr Paul's affidavit fails to address the thrust of the plaintiff's case, which is that the current prescriptions were made pre-fires and therefore the foundations on which those prescriptions were made have now changed fundamentally. His affidavit contains no evidence that the defendant has considered the impact of the bushfires on threatened species or factored that information into how to manage detections in coupes that are to be harvested. The affidavit does not refer to the State preliminary report, the Commonwealth preliminary analysis or the Commonwealth preliminary report, either in relation to completed or anticipated planning of coupes.
- 98 Mr Paul deposes that the defendant 'is not harvesting, nor intending to harvest habitat of fire-affected threatened species'. This is contrary to the plaintiff's evidence of the detections of those species in the coupes, and in some cases, is contrary to the defendant's own maps. For example, the HCV map and harvesting retention map for Castella East coupe, which is exhibited to Mr Paul's affidavit, identifies seven observations of greater gliders within the area planned for logging.
- 99 Finally, Mr Paul gives evidence about the defendant conducting post-harvest surveys on four coupes 'for the persistence of fauna, including threatened species such as greater glider, to assess the efficacy of habitat retention for those species'. He deposes:

On a preliminary basis, those results are showing that those species (including the Greater Glider) remain within and around the harvested area of the coupe beyond the conclusion of harvesting.

100 No evidence was provided to support that assertion, the underlying material that might found it is not exhibited and the statement contradicts the scientific literature, which makes it clear that greater gliders die during or shortly after timber harvesting.¹⁰

Affidavits of Ms Ruizhu Jiang

101 Ms Jiang's first affidavit includes a table setting out the proportion of the threatened species that are present in fire-affected areas. Those figures are stated earlier in these reasons under the heading of each threatened species. The plaintiff disputes the figures in the table, submitting that they are difficult to reconcile with the evidence published in the State preliminary report. Ms Jiang did not provide an explanation for the discrepancies in her affidavit. However, the defendant submitted that the differences arise because the State preliminary report was based on data available as at 7 or 11 January 2020, although it was published later, and Ms Jiang's second affidavit makes it clear that the data from the Department on which she was relying was provided on 23 or 27 January 2020.

102 There is a lack of supporting material for Ms Jiang's findings, even at this interlocutory stage. She provides no underlying documents for the tables and figures she deposes to; in fact, she does not exhibit any documents to her two affidavits whatsoever.

103 What is most material to this application, however, is that the Court was not directed to evidence indicating that the defendant has taken account of, or intends to take account of, Ms Jiang's fire-related analysis in the planning of the coupes. Ms Jiang's affidavit gives the impression that much of the analysis therein was undertaken for the purposes of the proceeding.

Affidavit of Mr Andrew Prowse - correspondence between the defendant and Chief

¹⁰ In relation to the effects of timber harvesting on greater gliders, the SAC final recommendation for the greater glider found: '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.'

Conservation Regulator

104 Mr Prowse exhibits to his affidavit two letters which were the subject of submissions at the hearing and upon which both parties seek to rely. The letters are between the CEO of the defendant and the Chief Conservation Regulator ('CCR'). The CCR is the head of the Office of the Conservation Regulator ('OCR'), which is a body within DELWP. The OCR is responsible for monitoring compliance with regulatory requirements and the CCR is to be accountable for, inter alia, timber harvesting and biodiversity.

105 In the first letter, dated 6 February 2020, the defendant confirms that it:

will undertake a review of its assessed high conservation values as outlined in [its] forest management plan which will include all current threatened species and any species that may become threatened.

It then seeks a range of information to assist with this process.

106 The plaintiff points to this paragraph as evidence of the defendant's recognition that the impact of the fires does need to be taken into account, and that further information is required to undertake a review.

107 The second letter is the response from the CCR, dated 14 February 2020. The most relevant paragraphs are as follows:

I understand the importance of data gathered by [DELWP] in your consideration of likely impacts on biodiversity and your proposed management response. As you are aware, information available in relation to the 2019/20 fire impacts will continue to evolve as fire impacted areas become safe to enter and as further studies and assessments of species and vegetation communities are undertaken.

108 The CCR then states that DELWP will continue to provide the defendant with information and analysis as it becomes available, noting any information provided will reflect a point in time, and that information was provided as recently as 14 February 2020. The CCR then identifies a number of FMAs where she considers that further information is required to assess the potential for serious or irreversible damage and to reduce scientific uncertainty. All of the coupes the subject of the application are in FMAs other than those identified by the CCR, with the exception of

Mt Wills Creek and Wabby coupes, in which the defendant is not presently allowed to salvage harvest.

109 It then states:

Based on current intensity of harvesting, I do not expect that, in the short term, there will be the potential for serious or irreversible damage from timber harvesting activities in areas and FMAs not listed above. This is based on an expectation that existing prescriptions outlined in the Code and policy commitments to modified harvesting techniques are complied with. It is also based on the expectation that the intensity of harvesting in these areas will not increase in the short term. I note the state of knowledge on biodiversity conservation is continuously evolving and my position may change in relation to appropriate management activities as further information is available.

110 It is the defendant's case that the letter, written by an independent regulator whose role it is to monitor the defendant's regulatory compliance, reduces the scientific uncertainty of the potential for serious or irreversible environmental damage. It notes that in other FMAs, where there has been a significant fire impact, the defendant should wait until further information is at hand to assess whether there is such a potential.

111 The plaintiff emphasises the series of qualifications in the paragraph, in particular the final sentence, as further evidence of the current scientific uncertainty and submits that the letters assist its case in demonstrating that the current state of information and knowledge is incomplete.

Serious question to be tried

112 The principles relating to this requirement are well-established. The plaintiff must demonstrate that there is a serious question to be tried as to the plaintiff's entitlement to relief, rather than it being more probable than not that the plaintiff will succeed at trial.¹¹ That is to say, the plaintiff must demonstrate a sufficient likelihood of success to justify, in the circumstances, preservation of the status quo pending trial.¹² The requisite strength of the probability of ultimate success depends on the nature of the

¹¹ *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 68 [19] (Gleeson CJ and Crennan J), 82-84 [65]-[72] (Gummow and Hayne JJ).

¹² *Ibid.*

rights asserted and the practical consequences likely to flow if an injunction were granted.¹³ Unlike the balance of convenience limb, the serious question limb does not involve any discretion on the part of the Court.

113 The defendant, therefore, correctly submits that if it can establish that the relief sought would never be granted by a court in Victoria, then the Court should not grant an injunction on an interlocutory basis restraining the defendant from conducting timber harvesting whilst it waits for that proceeding to be prepared, heard and finally determined.

114 At the hearing, the plaintiff put its ultimate case at two levels:

- (a) First, the defendant must await the assessment and advice from the State and Commonwealth governmental responses; and
- (b) Second, the defendant must await the review and finalisation of the IPAs for the greater glider and the POMAs and SOMAs for the two species of owls.

115 In summary, the plaintiff submits:

- (a) A decision to harvest timber in a coupe that is known to contain or known to be likely to contain threatened species (or habitat of the same) is a management decision that will affect the environment, thereby engaging the precautionary principle.
- (b) The recent bushfires have had a devastating impact on flora and fauna, yet the full extent of the impact (including on threatened species) is not yet understood.
- (c) Governmental responses to date have indicated a high level of concern about the impact on threatened species. The species at issue in this proceeding have been identified by government as species of 'most immediate concern'.
- (d) Given the above, 'careful evaluation' of management options by the defendant

¹³ Ibid.

when contemplating harvesting timber in the coupes requires a 'wait and see' approach. In light of these events and the uncertainty of the impact, it is simply not presently possible for the defendant to say there will be no serious or irreversible damage caused by the timber harvesting.

- (e) To continue to harvest timber without waiting to understand the full impact of the bushfires and the recommendations made by government and experts cannot meet the 'careful evaluation' and 'proper assessment' requirements of the precautionary principle. This is a breach of s 2.2.2.2 of the Code, and therefore of s 46(a) of the SFT Act.
- (f) In circumstances where relevant expert advice and research is being given in the context of the ongoing governmental responses, but is not yet finalised, s 2.2.2.3 of the Code similarly requires a 'wait and see' response from the defendant, so it can properly consider the relevant advice and research in final form before taking any further steps.

116 In relation to s 2.2.2.2 of the Code, the first question that falls to be answered is whether the precautionary principle requires the defendant to consider the effect of the recent bushfires on the threatened species.

117 The defendant submits that this is an impermissible and unprecedented extension of the operation of the precautionary principle and that, in regards to any such expansion, this Court is bound by the previous decision of the Court in *MyEnvironment Inc v VicForests* ('*MyEnvironment*').¹⁴

118 It is not in dispute that the precautionary principle imposes enforceable obligations on the defendant.¹⁵

119 In construing the Code, the defendant directed the Court to the objects and purposes of the CFL Act and the SFT Act, as well as the purpose of the Code,¹⁶ and the Foreword

¹⁴ [2012] VSC 91 (*MyEnvironment*).

¹⁵ *EEG* (n 3) [15]-[16]; *MyEnvironment* (n 14) [263].

¹⁶ Code, s 1.1.2.

to the Code. It is not necessary to set out the contents of all these interpretative tools. It suffices to state that the precautionary principle exists within, and is informed by, a legislative framework that requires a balance between potentially conflicting economic, environmental, social and equity considerations, which all need to be weighed in the context of a decision-making process aimed at ecologically sustainable development.¹⁷

120 In *MyEnvironment*, Osborn JA quoted with approval the following statement of Stein J in *Leatch v National Parks and Wildlife Service*:

[T]he precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious.¹⁸

121 The notion of cautiousness was discussed by Wheeler J in *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* in a passage quoted in both *Brown Mountain*¹⁹ and *MyEnvironment*:

Adopting for the moment a very broad characterisation of the precautionary approach, a requirement that a decision maker “be cautious” says something about the way in which the decision must be made. There must be some research, or reference to available research, some consideration of risks, and a more pessimistic rather than optimistic view of the risks should be taken. However, such a requirement does not in any particular case specify precisely how much research must be carried out, or when a risk should be considered to be so negligible that it may safely be disregarded. Still less, does such an approach dictate what courses of action must be taken after the possibilities have been cautiously weighed.

No doubt there are extremes at either end of a spectrum, where one would be able to say that a decision maker had or had not been “cautious”. Where endangered species are concerned for example, one can see that where readily accessible and unambiguous research material pointed to a serious risk that numbers of the species would be dramatically reduced by a course of action, then the adopting of that course of action, in the absence of any evidence of consideration of alternatives, would seem to point inevitably to a finding that there had been no relevant “caution”. At the other extreme, an absence of any action, other than research and study, is clearly cautious but is not the only

¹⁷ *MyEnvironment Inc v VicForests* (2013) 42 VR 456, 469 (Tate JA).

¹⁸ (1993) 81 LGERA 270, 282.

¹⁹ *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1, 46 (Osborn J) (*‘Brown Mountain’*).

option available in most cases. Although there has been very little judicial consideration of the precautionary approach or “precautionary principle” (a similar or perhaps identical concept which appears in a number of intergovernmental agreements) the clear thread which emerges from what consideration has been given to the approach is that it does dictate caution, but it does not dictate inaction, and it will not generally dictate one specific course of action to the exclusion of others.²⁰

122 In *MyEnvironment*, after providing two illustrative examples, Osborn JA said:

[I]t will be easier to identify a threatened breach of the precautionary principle when a specific action threatens direct serious or irreversible damage to an aspect of the environment of extreme sensitivity and/or novel qualities. The more generalised the threat and the more indirect and less immediate the damage to a sensitive aspect of the environment, the more difficult it will be to be satisfied that the precautionary principle requires abstinence from a particular action.²¹

123 The relevant time for considering whether there is a proposed breach of the precautionary principle is now, upon the evidence available in this application, not at the time the defendant completed its planning for operations in the coupes.²² This is an important distinction, as the plaintiff directed a number of its submissions towards what the defendant considered, or could conceivably have considered, prior to the application being brought.

124 In *MyEnvironment*, the plaintiff sought that timber harvesting be restrained pending a review of the adequacy of the existing reserve system as a result of the 2009 bushfires.²³ In rejecting the plaintiff’s argument, Osborn JA made the following findings:

- (a) If it is accepted that the TRP relates to coupes which have themselves been produced by a balanced planning exercise which takes account of considerations of ecologically sustainable development and if it is further accepted that the logging will comply with the prescriptions designed to protect the threatened species’ habitat within such coupes, the plaintiff faces a difficult task in establishing that logging will breach the precautionary

²⁰ (1997) 18 WAR 102, 118–19 (citations omitted).

²¹ *MyEnvironment* (n 14) [286].

²² *Ibid* [269]; also *Brown Mountain* (n 19) [179].

²³ *MyEnvironment* (n 14) [325].

principle.²⁴

- (b) His Honour accepted on the expert evidence that there was a strong case for the overall strategic review of the current reserve/exclusion zone system as a result of the 2009 fires and their massive negative impact on the Leadbeater's possum.²⁵
- (c) The central issue in dispute was not whether substantial steps should be taken to prevent loss of living hollow bearing trees (being important habitat for the Leadbeater's possum), but what steps should be taken in respect of the single coupe in question.²⁶
- (d) The proposition that the overall system of reserves and exclusion zones should be reviewed did not compel the conclusion that the proposed harvesting of the coupe had the capacity to materially affect the overall adequacy of such a system.²⁷
- (e) Such review would necessarily involve an evaluation of factors bearing on the sustainable ecological use of the whole of the forest affected by the FMP. Such a review involves policy considerations not readily justiciable before this Court.²⁸

125 On the face of it, the similarities between *MyEnvironment* and this proceeding are striking. Both concern the impact of recent bushfires, not only on biodiversity, but also on the supply of timber and the viability of the timber industry. Equally, in both cases, it can be said that the bushfires had a severe negative impact on the particular threatened species in issue. The defendant points to these similarities and contends that the Court is bound by that decision in this case.

126 However, there are some important distinguishing features between *MyEnvironment*

²⁴ Ibid [271].

²⁵ Ibid [298].

²⁶ Ibid [301].

²⁷ Ibid [302].

²⁸ Ibid [303].

and this proceeding:

- (a) The *MyEnvironment* case concerned an application for a permanent injunction. Over the course of a two-and-a-half-week trial, the evidence was extensively explored and tested, particularly in cross-examination. By contrast, the hearing for this interlocutory application was heard over one day without any testing of the affidavit evidence. Consideration of facts and submissions in these circumstances are necessarily more impressionistic,²⁹ although of course that does not obviate the requirement for the plaintiff to make out a prima facie case.
- (b) In *MyEnvironment*, the plaintiff's argument relied on research being planned within a government department more than two and a half years after the relevant fires. Here, the governmental responses are immediate, well-resourced and large-scale, and describe the fires as 'an ecological disaster', 'extensive and severe', 'exceptional in size and impact', and requiring 'emergency', 'immediate' and 'urgent' response.
- (c) The Court in that case considered there to be inadequate evidence of any connection between the research and the coupe in issue. Here, the government response is being conducted at a broader level and looking at key populations outside the East Gippsland area, which will include populations in the Central Highlands. The State preliminary report found:

Multiple large-scale active fires and the increasing proportion of areas that have been burn multiple times since 2000, has expanded the context in which mitigation needs to be framed. For example, there is a need to consider the status of species in neighbouring states and mitigation will increasingly include options beyond the fire areas.

127 The Court in *MyEnvironment* also rejected the plaintiff's argument that timber harvesting should be suspended until finalisation of a review of the AS for the species in issue. In that case, however, there was no suggestion that the protections in the AS would be relevantly altered.³⁰ Here, by contrast, the area that was set aside as

²⁹ *Leadbeater's Possum* (n 4) [109].

³⁰ *MyEnvironment* (n 14) [324].

necessary for immediate protection in East Gippsland has been extensively consumed by the fires. The greater glider AS expressly states that the IPAs were 'indicative', with boundaries not yet finalised, and a finalised map was foreshadowed. This has not yet occurred. It will now require the government to consider whether additional areas where the greater glider is found should be set aside for immediate protection. The plaintiff submits that the coupes are obvious candidates for this immediate protection.

128 The Court in *MyEnvironment* did not find that it would be impossible or inarguable for there to be a breach of the precautionary principle where the coupes in question have been the subject of balanced planning and where the proposed logging will comply with the prescriptions designed to protect the threatened species' habitat within such coupes. It was found that the plaintiff in such circumstances would face a 'difficult task'. That does not bind the Court to a finding for the defendant in this interlocutory application. In fact, the Court in *MyEnvironment* provided two, albeit 'extreme', example scenarios where such circumstances would, on their face, justify a finding for the plaintiff.

129 Further, the plaintiff in this case submits that the prescriptions expressly require that the minimum areas of good quality or suitable habitat be 'maintained', not merely 'established'. The plaintiff points to several references in the planning standards and the POMA and SOMA prescriptions where such language has been employed. The plaintiff submits that the prescriptions therefore impose an ongoing obligation and requirement and that it is a 'logical and probable consequence' of the State and Commonwealth reviews that further habitat will need to be set aside to meet the prescriptions in place, and that unburnt coupes in the central highlands where the species are found will be obvious candidates. Ultimately, this is a question for trial.

130 In *Brown Mountain*, another permanent injunction trial, the Court found for the plaintiff on what appears at this interlocutory stage to be weaker evidence of substantial damage to sooty owl and powerful owl habitats. The situation in this proceeding with the greater glider IPAs is akin to the SOMA and POMA reviews in

that case. The plaintiff submits that the *Brown Mountain* case is a better analogy to this case than *MyEnvironment*. There are similarities in both cases, just as there are distinguishing factors. It is trite to say, but each case turns on its own facts.

131 Before concluding on the serious question limb, it is necessary to consider the effect of the letters between the defendant and the CCR. In a broad sense, the conclusions of the CCR support the defendant's case, whilst the qualifications preceding and succeeding those conclusions support the plaintiff's case. The CCR is not on affidavit. The reasoning and material underlying the opinion of the CCR is not clear. Further, that opinion has not been tested. The weight to be attributed to such an opinion at this interlocutory stage must be adjusted in light of these facts, and the Court does not consider the correspondence to so affect its decision that the plaintiff has demonstrated that there is a serious question to be tried.

132 In relation to prima facie case, the Court finds as follows:

- (a) It is arguable that there is a threat of serious and irreversible damage to the environment in respect of the threatened species.
- (b) That threat is attended by a material lack of scientific certainty. In particular, the adequacy of the current greater glider IPA, as well as the POMAs and SOMAs, is uncertain. In respect of the IPA, it is not yet finalised and the AS in its current terms contemplates an update to its content and the boundaries of protected areas.
- (c) With the exception of Wabby coupe, at least one of the threatened species is known to be present in each of the coupes in which timber harvesting is proposed.
- (d) In the circumstances, the plaintiff has satisfied the Court that there is a sufficient likelihood of success in its case that if the defendant were to proceed with the proposed timber harvesting, it would be doing so in breach of the precautionary principle. That prima facie case justifies the preservation of the

status quo pending trial.

133 Given the above, it is unnecessary to make any findings in relation to the plaintiff's case on s 2.2.2.3 of the Code, which requires the defendant to consider relevant research and advice related to the planning and conduct of timber harvesting operations. It suffices to say that it appears that the plaintiff is elevating this to a requirement on the defendant to wait until such advice and research is ready and exists, then to obtain and consider such advice.

Balance of convenience

134 The plaintiff must establish that the balance of convenience favours the grant of the injunction. It is trite that the two limbs are not entirely independent of one another.³¹

Mortimer J in *Leadbeater's Possum* found:

Where an applicant presents a strong prima facie case, it may be that the balance of convenience need not be so strong in its favour. The opposite is also true: a weaker prima facie case, but a stronger argument on balance of convenience, may still result in injunctive relief being granted.³²

135 As in similar cases, the defendant did not submit that damages would be an adequate remedy here; plainly, they would not.

136 The affidavit of Mr Deon Kriek is most relevant on the question of balance of convenience. The affidavit of Ms Monique Dawson, CEO of the defendant, relies largely on the evidence of Mr Kriek. The plaintiff made several submissions regarding Ms Dawson's evidence, but neither the original evidence nor those submissions affect the Court's decision.

137 As to the immediate impact, Mr Kriek deposes that the defendant's known current financial loss is at least \$76,154 and could reach around \$119,154. These sums, which are not disputed by the plaintiff, principally consist of amounts paid to contractors who are stood down and sums paid to contractors in respect of the cost of moving

³¹ *Leadbeater's Possum* (n 4) [106], citing *Samsung Electronics Company Ltd v Apple Inc and Another* (2011) 217 FCR 238, [67] (Dowsett, Forster and Yates JJ).

³² *Ibid.*

equipment from one coupe to another.

138 As to the longer-term impact, Mr Kriek assumes that any injunction flowing from this application would be for a period of up to 24 months. He then deposes that such an injunction would have the following consequences:

- (a) materially increase the risks of VicForests being unable to supply customer demand for the 2021/2022 Supply Year; and
- (b) further expose VicForests for its inability to meet harvest and haulage schedules;

Given the uncertainties around the availability of the fire impacted areas and whether, as a result, a new timber release plan is required to approve more coupes, I am presently unable to quantify those risks referred in the preceding paragraph other than to say they are material and real for VicForests.

139 Mr Kriek's affidavit states that, in fact, the defendant is already projecting a shortfall of approximately 120,000 cubic metres of timber, and that the 15 coupes the subject of this proceeding represent approximately 67,000 cubic metre. It therefore seems clear that the defendant was already going to suffer a shortfall, and that any injunction may exacerbate that shortfall.

140 In response to Mr Kriek's evidence, the plaintiff submits that the stated loss is premised on the notion of a fixed contractual obligation to supply a certain amount of timber, but that Mr Kriek does not exhibit any examples of the customer contracts. The plaintiff exhibits and relies on a press release dated 7 February 2020 in which the defendant refers to the impact of a force majeure notice in circumstances where:

fires have meant timber supply cannot be guaranteed in the foreseeable future from East Gippsland.

And further:

Force majeure is a legal and administrative step that VicForests is obliged to take if it knows that circumstances will prevent it meeting contractual obligations.

141 Given Mr Kriek's affidavit is silent as to force majeure, the plaintiff submits that the Court should put little weight on the defendant's evidence as to longer-term impact. The plaintiff also emphasises that the shortfall risks are estimates only. Lastly, the

plaintiff notes the possibility of governmental responses which have, in the past, included financial compensation for the defendant. For example, Mr Kriek's affidavit shows that, in 2019, the defendant received approximately \$11 million in compensation pursuant to a Leadbeater's possum recovery program. On these bases, the plaintiff submits that there is not before the Court a sufficient evidentiary basis to make any finding about the longer-term impact of injunctive relief on the defendant.

142 The defendant also submits that the Court should take into account the potential effects of an injunction on the defendant's contractors, and that for the plaintiff to, in effect, rely on the possibility of force majeure clauses, is to ignore those potential effects. Further, the Court should also take into account the communities that are supported by the defendant's activities.

143 The plaintiff submits that the Court granted an injunction against timber harvesting in similar circumstances in *EEG*.³³ It points to the following similar and relevant circumstances:

- (a) Although some financial loss will be caused, the asset will be retained and can be harvested at a later date.
- (b) Other coupes can be harvested – the TRP contains in excess of 2500 coupes, more than 800 of which are in the Central Highlands Area, only 15 coupes are subject to this application.³⁴
- (c) Preservation of threatened fauna is a paramount consideration in the regulatory regime, and accordingly the limited assets of the plaintiff is not a reason not to grant the injunction.
- (d) Timber harvesting causes irreparable damage to the habitat of fire-affected threatened species.

³³ *EEG* (n 3) [98]–[106].

³⁴ The defendant submitted that these figures were either misleading or incorrect and provided lower figures from the bar table. The plaintiff did not object to the lower figures but submitted that they were not so much lower as to affect the plaintiff's submission.

144 The balance of convenience weighs 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.

Undertakings

145 The plaintiff has agreed to provide the usual undertaking as to damages.

146 The defendant expressed concern regarding the plaintiff's capacity to satisfy any order as to damages pursuant to their undertaking, and that this should factor into the Court's consideration. The plaintiff submits that this is not a factor that should weigh heavily in the Court's determination of whether an interlocutory injunction is granted in the proceeding.

147 In *EEG*, Forrester J found as follows on this question:

VicForests correctly says that any undertaking as to damages which may be given by EEG is in effect close to meaningless. The estimate of EEG's assets vary between \$10,000 and \$45,000. If it is unsuccessful in the claim, presumably it will, at least, have out of pocket legal expenses, and I assume, there will be no money available to satisfy the undertaking as to damages. However, this is a public interest piece of litigation against a State corporation and I bear in mind that the preservation of endangered native fauna is a paramount consideration in the statutory provisions and documents I have referred to.³⁵

148 The above reflects the position of the Court in this proceeding. The Court will grant the injunction despite the plaintiff's admission at the hearing that it would not, in reality, be in position to satisfy an order as to damages. As such, a strict timetable should be set in relation to the trial and the Court will ensure compliance with all procedural orders in preparation for a final hearing.

³⁵ *EEG* (n 3) [101].

Conclusions

- 149 This case is finely balanced. The plaintiff has demonstrated a prima facie case and that there is a serious question to be tried. The plaintiff has not demonstrated a strong case. Were there any dispute that this were a case in which damages might be an adequate remedy, the plaintiff would likely not be successful on the balance of convenience.
- 150 The defendant submitted that if the Court were inclined to grant the injunction, it should only do so in relation to 13 of the 15 coupes – that is, omitting Wabby and Mt Willis Creek coupes. Harvesting in Wabby coupe commenced but later stopped due to the fire in Dargo. No timber harvesting activities have commenced in Mt Willis Creek coupe. Both coupes are in areas impacted by the fires. The defendant makes this submission on the basis that, at present, any future salvage harvesting of these coupes is dependent upon two processes: the completion of a landscape burn assessment and approval by DELWP. These are also the only two of the fifteen coupes in which there has not been a detection of the greater glider, being the threatened species in relation to which the plaintiff had the strongest evidence of a breach to the precautionary principle.
- 151 As such, the Court will grant an interlocutory injunction in relation to the 13 coupes.
- 152 The parties are to forward a proposed form of order reflecting these reasons.

CERTIFICATE

I certify that this and the 34 preceding pages are a true copy of the reasons for judgment of the Honourable Justice McMillan of the Supreme Court of Victoria delivered on 5 March 2020.

DATED this fifth day of March 2020.



SCHEDULE

List of coupes in this application*

Name	Geographic region	FMA	District	Number	Gross area (ha)	Species ref'd**
Castella East	North East	Central	Toolangi	297-501-0006	35.2	GG
Propeller	North East	Central	Toolangi	298-504-0001	49.7	GG, PO
Brumby	North East	Central	Toolangi	298-516-0002	51.9	GG
Pony	North East	Central	Toolangi	298-516-0003	39.5	GG
Rumba	North East	Central	Marysville	312-510-0010	39.4	GG, SO
Pumba	North East	Central	Marysville	312-510-0011	37.4	GG, SO
Kumba	North East	Central	Marysville	312-510-0012	44.0	GG, PO, SO, SM
Apu	West Gippsland	Dandenong	Powelltown	345-528-0001	40.3	GG
Dowse	West Gippsland	Dandenong	Powelltown	347-518-0005	42.8	GG
LaTrobe	West Gippsland	Dandenong	Powelltown	349-502-0014	43.7	GG, SO
Wales	North East	Benalla/ Mansfield	Benalla/ Mansfield	388-505-0002	55.1	GG
Princess Di	North East	Benalla/ Mansfield	Benalla/ Mansfield	388-505-0004	51.3	GG
Rock a Rhyme	West Gippsland	Central Gippsland	Noojee	458-501-0010	39.2	GG
Wabby	West Gippsland	Central Gippsland	Heyfield	535-504-0001	27.4	AT
Mt Wills Creek	North East	North East	Upper Murray	686-510-0012	47.9	SO

* This table draws selected information from the affidavit material. It is provided as an aid to the reader and does not reflect any basis for the Court's reasoning.

** This column notes the species that were referred to in relation to each coupe.