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TRANSCRIPT OF PROCEEDINGS

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S ECI 2020 00373

SUPREME COURT OF VICTORIA

COMMON LAW DIVISION

MELBOURNE

FRIDAY 27 MARCH 2020

BEFORE THE HONOURABLE JUSTICE McMILLAN

WOTCH INC

v

VICFORESTS

DIRECTIONS HEARING

MS J. WATSON appeared on behalf of the Applicant.

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

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4 or otherwise) be reproduced, stored in a retrieval system or  
5 transmitted without prior written permission of the Authorised  
6 Officer.

7 ASSOCIATE: Ms Watson, you'll need to unmute yourself.

8 MS WATSON: Sorry, Your Honour, I appear for the applicant.

9 HER HONOUR: Yes.

10 MR WALLER: Your Honour, in that matter I appear with my  
11 learned friends, Mr Redd and Ms Howe for the defendant.

12 HER HONOUR: Yes. Thank you, Mr Waller. Yes, Ms Watson?

13 MS WATSON: Your Honour, today we're seeking an injunction over  
14 an additional 13 coupes which would bring the total coupes  
15 over which an injunction has been sought to 28. Out of  
16 more than 800 on the timber release plan and out of 137  
17 that appear scheduled for logging in just two regions  
18 between February and July of 2020. Now, our primary  
19 submission is that the injunction should be granted over  
20 the additional coupes on the same basis as was granted in  
21 Your Honour's decision of 5 March 2020.

22 And we've addressed those matters in our written  
23 submissions which deal with the detections of bushfire  
24 threaten of species in each of the 13 coupes and I don't  
25 propose to take Your Honour through those detections or  
26 with the principles in that judgment, because Your Honour  
27 is of course, familiar with it.

28 HER HONOUR: Yes.

29 MS WATSON: What I propose to address in oral submissions are  
30 the arguments that have been put forward by VicForests as  
31 to why the injunction should not be granted.

32 HER HONOUR: Yes.

33 MS WATSON: In essence, they make five points as to why there's  
34 no serious case to be tried. And the first and the

1 primary submission is about the scope of the relief  
2 sought. And that's addressed at paragraph (17) to (31) of  
3 their submissions. The primary submission appears to be  
4 that the scope of the relief sought by the plaintiff will  
5 be so large as to effectively prevent VicForests from  
6 timber harvesting anywhere in the Central Highlands area  
7 and they say that the balance of convenience therefore  
8 requires that the injunction be refused.

9 And that submission is put on the basis of modelling  
10 supplied by the Department of Environment, Water, Land and  
11 Planning which predicts the presence of species throughout  
12 the Central Highlands. Now, I have four points to make  
13 about this primary submission about the scope of the  
14 relief that will be sought by way of interlocutory  
15 injunction.

16 First and most importantly, the plaintiff doesn't  
17 seek an injunction over all coupes in the Central  
18 Highlands. Or overall, by reference to DEWLP modelling.  
19 That is not the basis on which interlocutory relief is  
20 being sought. And there's absolutely no basis on which to  
21 assume that that will be the case. The plaintiff has only  
22 sought injunctions over specific coupes where there have  
23 been protections of bushfire affected threatened species  
24 and where timber harvesting is being conducted or is about  
25 to be conducted.

26 So it's very much based on actual detections of the  
27 species in the coupes, it's not done by reference to  
28 modelling and further, it's certainly not over all coupes  
29 in the Central Highlands. And our client has observed  
30 timber harvesting being carried out in at least nine other  
31 coupes in the Central Highlands and has not sought an

1 injunction over timber harvesting in those coupes. And  
2 we've provided to Your Honour's chambers this morning an  
3 unsworn affidavit that - in which the deponent deposes to  
4 having observed timber harvesting in those additional  
5 coupes and they are not the subject of the application for  
6 an interlocutory injunction.

7 HER HONOUR: Yes.

8 MS WATSON: So, the submission that the scope of the relief  
9 that will be sought - or the submission that the scope of  
10 the relief will be as large as VicForests says is  
11 inconsistent with the pleadings and the way in which the  
12 case has been conducted. And unless VicForests puts on  
13 evidence of all the coupes that they wish to log and  
14 evidence that demonstrates that all of those coupes  
15 contain bushfire affected threatened species, there's no  
16 evidential basis on which to accept VicForests' submission  
17 which is that an injunction will be sought over all coupes  
18 in the Central Highlands.

19 Now, a related point and my second point, Your  
20 Honour, is that VicForests' own evidence demonstrates that  
21 they are carrying out substantial timber harvesting  
22 without interruption. And I'll take Your Honour to an  
23 exhibit DJ137.

24 HER HONOUR: Which affidavit?

25 MS WATSON: I think that's the fourth affidavit, Your Honour,  
26 of 19 March.

27 HER HONOUR: Yes. Just a minute. And what number?

28 MS WATSON: If Your Honour scrolls - sorry, Your Honour.

29 HER HONOUR: Which number?

30 MS WATSON: DJ137.

31 HER HONOUR: Okay. 'Letter from me, JA to Baker McKenzie dated

1 10 March.'

2 MS WATSON: Yes, Your Honour.

3 HER HONOUR: Yes, I have that. That's - - -

4 MS WATSON: Your Honour, will see at - sorry, yes, Your Honour?

5 HER HONOUR: Yes, go on.

6 MS WATSON: Your Honour will see at paragraph (3) it says - - -

7 HER HONOUR: 'We're instructed that on Friday?'

8 MS WATSON: Yes.

9 HER HONOUR: Yes.

10 MS WATSON: 'Your client provided two coupe schedules which are

11 listing coupes for harvesting between February and July

12 2020. Now, those coupe schedules are attached to the

13 letter, if Your Honour scrolls down to p4.

14 HER HONOUR: Yes.

15 MS WATSON: Now, Your Honour this shows that a very large

16 number of coupes were scheduled for logging in February

17 and March, or sorry, Your Honour. In March. That have

18 not been the subject of the injunction application. Those

19 schedules list 46 coupes commencing in March. The

20 further, if Your Honour scrolls down, the further 44

21 coupes listed as contingencies.

22 HER HONOUR: Yes.

23 MS WATSON: Now, that is the best most specific evidence

24 presently before the court as to the proportion of

25 VicForests' current operations that are in fact effected

26 by the existing injunction plus this application. So

27 there are around 26 out of 90 coupes, which is very

28 different from the picture that VicForests seeks to

29 present.

30 HER HONOUR: Twenty-six out of - - -

31 MS WATSON: And if that - - -

1 HER HONOUR: How many was that? Twenty-six out of?

2 MS WATSON: Ninety, Your Honour.

3 HER HONOUR: Ninety. Yes?

4 MS WATSON: And so Your Honour our first point is that we don't  
5 seek an injunction over all the coupes in the central  
6 highlands, only those coupes in which bushfire effected  
7 threatened species have been found and timber harvesting  
8 is been carried out. And our second point is that  
9 VicForests is not being interrupted in the manner which  
10 they suggest they are carrying out substantial timber  
11 harvesting without interruption.

12 My third point relates to economic impact. Many  
13 (indistinct) accept that there will be economic impact.  
14 We say it remains the case that the extinction of species  
15 is more significant but that in any event, the submission  
16 is that VicForests puts about economic impact are put at  
17 two higher level of generality to be useful. There is no  
18 evidence about the impact of these 13 groups and we say  
19 the real economic impact is when you look at the evidence  
20 has to be more limited than what VicForests presents.

21 It seeks to rely on a report that it commissioned  
22 about the economic (indistinct words) of VicForests  
23 Operations generally and that's at the third (indistinct)  
24 affidavit, paragraphs (53) to (58), now that report is not  
25 independent evidence and if relevant at all, it would be  
26 relevant to the impacts of the final relief brought by the  
27 plaintiff. Not the interlocutory relief. And in those  
28 circumstances, it will be the subject of expert evidence  
29 at trial.

30 Now, VicForests has also said publically that it's  
31 relying on force majeure for its contracts - sorry, Your

1 Honour.

2 HER HONOUR: Just a moment, Ms Watson.

3 ASSOCIATE: I'm sorry to interrupt Ms Watson. One of the  
4 callers is not on mute. Could everyone except Ms Watson  
5 ensure that they are muted, please? We still have one  
6 person not muted. It's a non-named person. It's call-in  
7 user 4. Okay. Well - - -

8 HER HONOUR: I see, yes.

9 ASSOCIATE: The noise has stopped for the moment. So, maybe  
10 we'll keep going, but if everyone can just ensure that  
11 they're on mute. Thanks.

12 MS WATSON: I was just addressing why the economic impact is  
13 more limited than asserted by VicForests. VicForests has  
14 said publically, that it's relying on force majeure for  
15 its contracts in east Gippsland and that's in the third  
16 Jacobs affidavit at paragraph (19). But the way that it  
17 presents its contracted volumes to this Court now is to  
18 say that all volumes will now need to be met from non-fire  
19 affected areas. And that's at the Creek affidavit of  
20 VicForests at paragraph (52). In fact, it's relying on  
21 force majeure to relieve itself from the obligations under  
22 those contracts.

23 There is no evidence of economic impacts on third  
24 parties as VicForests alleges at 31 at the submissions.  
25 Those allegations are made on the basis of the imagined  
26 hypothetical future applications. Not the injunction  
27 application that is made today. In any event, VicForests  
28 pays those contractors who are stood down and that is set  
29 out at the third Paull affidavit at paragraphs (42) and  
30 (44) and the Creek affidavit at 67(a). And the government  
31 then pays VicForests' significant subsidies and that's at

1 the Creek affidavit at 57 to 58. Likewise, if the state  
2 can't meet its contracted supply under the Australian  
3 Paper Contract, it's the state that pays compensation not  
4 VicForests. So we say that the economic impact is far -  
5 the evidence of economic impact doesn't support the  
6 economic impact that's alleged in the submissions.

7 I move to the fourth point on the broader relief, on  
8 the scope of the relief point. We say that the  
9 plaintiff's hypothesis - sorry, Your Honour, I withdraw  
10 that. The defendant's hypothesising about the scope of  
11 the relief that will be sought raises an ongoing issue  
12 between the parties that has now got to a point where an  
13 order from the Court is required.

14 Since before the case was commenced in the Supreme  
15 Court, the plaintiff has been asking VicForests for an  
16 indication of the coupes that are being harvested or are  
17 about to be harvested. VicForests has repeatedly refused  
18 to provide that information. They have refused to provide  
19 that information by way of early discovery and have  
20 submitted that we must put on an application for early  
21 discovery, and we say that such an order should now be  
22 made for a number of reasons. First, the request should  
23 be easy to satisfy. Creek's affidavit refers to a rolling  
24 operations plan as a regularly updated document that lists  
25 those coupes schedules for harvesting in the next 18  
26 months. Production of that document would satisfy our  
27 request.

28 We say VicForests' refusal to provide early  
29 discovery by way of agreement is inconsistent with their  
30 obligations under the Civil Procedure Act, and in  
31 particular the obligation in s.26 of that Act which



1 includes an obligation to disclose all documents that are  
2 critical to the resolution of the dispute at the earliest  
3 possible time, or earliest reasonable time, and the effect  
4 of the provision of that document would be that these -  
5 the interlocutory injunctions would then be dealt with on  
6 the basis of the coupes over which the plaintiff will seek  
7 an injunction in their totality.

8 So there would no longer be a requirement for the  
9 plaintiff to adopt a piecemeal approach of coming to court  
10 to seek injunctions when it discovers timber harvesting  
11 equipment in coupes. It would allow an assessment of all  
12 the coupes that are proposed to be harvested and an  
13 assessment of the coupes in which the relevant species can  
14 be detected, and this issue could be dealt with in one  
15 hearing, and in that respect, Your Honour, we say that it  
16 is VicForests' own conduct of refusing to disclose that  
17 information that is causing the uncertainty and causing  
18 the disruptions to their own operations because they won't  
19 disclose, as they are obliged to, where they are intending  
20 to harvest.

21 So, Your Honour, in those circumstances we would  
22 seek an order for early discovery of the rolling  
23 operations plan, but that order will of course not be  
24 necessary if VicForests will agree to provide that  
25 document to the plaintiffs. Those are my submissions  
26 about the scope of the relief sought, and that does seem  
27 to be the primary submission that is made as to why the  
28 injunction should not be granted. If I move to the other  
29 more minor points in the submissions. The first relates  
30 to the immediate protection area for the Greater Gliders,  
31 that's addressed at paragraph 12 of VicForests'

1 submissions. VicForests submits that the immediate  
2 protection area has been finalised and is available on the  
3 DEWLP website, but there is no map and there is no  
4 document at all put in evidence which shows the location  
5 of that immediate protection area or whether any changes  
6 were made, or whether any of the coupes the subject of the  
7 application is affected, and the action statement has not  
8 been republished or updated. So really the basis for this  
9 submission is the hearsay of an officer at DEWLP who has  
10 told them that it's finalised and is available online.  
11 But the court cannot view the material they are referring  
12 to, cannot view the instrument which is the action  
13 statements. It is not in a form that the court can  
14 presently rely upon.

15 So, our primary submission about that is that simply  
16 it's just not progressed to a point where Your Honour can  
17 rely upon it, but even if Your Honour were to accept that  
18 submission the plaintiff's case seeks relief on three  
19 other broad bases. The two owls protected areas or  
20 management areas and the bases relating to the completion  
21 of the Government's bushfire diversity response and the  
22 incorporation of that assessment and recommendations into  
23 the forest operations. And that final incorporation or  
24 assessment may well include changes to prescriptions or  
25 the setting aside of other areas. So those parts of the  
26 proceeding are entirely separate from an independent to  
27 the immediate protection area.

28 Then I'll turn to VicForests' submissions about the  
29 opinion of the Office of Conservation regulation.  
30 VicForests has put in evidence four letters concerning  
31 three coupes; four letters from the Office of Conservation

1 regulation concerning three coupes that are the subject of  
2 the application, and that submission - their submissions  
3 in that respect are at 13 and 14 of their written  
4 submissions. They say that those letters are a matter  
5 relevant to the serious question to be tried concerning  
6 both coupes. Now, I make two points about that. The  
7 first is that the opinion of a regulator cannot obviate  
8 the need for the court to determine a legal issue, and  
9 this is addressed in Environment East Gippsland which is  
10 in the authorities at tab 8. I won't take Your Honour to  
11 any of those passages but I will give you some - Your  
12 Honour some paragraph references. In Environment East  
13 Gippsland v VicForests [2010] VSC 335 the court found that  
14 the precautionary principle rendered logging - sorry, Your  
15 Honour, I'll start that again. At paragraph 601 the court  
16 found that the precautionary principle rendered logging at  
17 Brown Mountain unlawful, notwithstanding that the  
18 department had said it was permissible and that existing  
19 prescriptions for owls did not require any further action  
20 of the relevant coupes.

21 So we say it's just simply - it doesn't - it's not  
22 relevant to the court. It doesn't obviate the need for  
23 the court to determine these issues. It doesn't displace  
24 the role of the court. And we say even if Your Honour  
25 were inclined to have regard to what the regulator has  
26 said, it's necessary to interrogate more closely the  
27 evidence that VicForests has adduced. Those letters are  
28 at the third William Paull affidavit, Exhibit 50, and the  
29 fourth exhibit, 64. If Your Honour goes to Exhibit  
30 WEP50.

31 HER HONOUR: Fifty, of the same affidavit; the Paull?

1 MS WATSON: Yes, William Paull.

2 HER HONOUR: Sorry, which affidavit? Number 4 - sorry, filed  
3 on the 19th?

4 MS WATSON: Sorry, Your Honour, I've lost it. Here it is, Your  
5 Honour. It's - - -

6 HER HONOUR: Sorry, I've got the wrong affidavit. Mr Paull's  
7 affidavit.

8 MS WATSON: It's referring to 19 March, so it's the fourth,  
9 Your Honour.

10 HER HONOUR: Right. And I'm going to the exhibits?

11 MS WATSON: Exhibit No.50. If Your Honour goes to page - the  
12 letter which is at PDF p.2 of the exhibit.

13 HER HONOUR: Just excuse me a minute. What page is it?

14 MS WATSON: Of the individual exhibit, Your Honour?

15 HER HONOUR: Of the exhibit, of the PDF version.

16 MS WATSON: Two.

17 HER HONOUR: I've got 283 pages here.

18 MS WATSON: Mine are individualised.

19 HER HONOUR: So it starts as - - -

20 MS WATSON: I might just get my instructor to turn up the page.  
21 The last page I'm told, Your Honour, of - - -

22 HER HONOUR: We start off with Exhibit 35 on that affidavit.

23 MS WATSON: Sorry, Your Honour, I'll just go back to the  
24 affidavit. Yes.

25 HER HONOUR: Right.

26 MS WATSON: And then it is the last page of that, it's the last  
27 - it will be the last page or the second last page of that  
28 document if it's together as one bundle.

29 HER HONOUR: Yes, I've got 283 pages, so go to the end. I see,  
30 it's sideways as we're looking at - - -

31 MS WATSON: I could take Your Honour to a different one which

1           might be the right way up, if that would assist.

2   HER HONOUR:   Well not if it's the same size, I think.   This one  
3           is headed 'Harvest unit 388-501-0005A'.

4   MS WATSON:    I think we have a different - - -

5   HER HONOUR:   So that's - - -

6   MS WATSON:    I can talk Your Honour through if it would be of  
7           more assistance.

8   HER HONOUR:   All right.   If you talk me through and I can find  
9           it in my own time.

10   MS WATSON:   It's quite short, Your Honour, which was one of the  
11           points I wanted to make.   So really each of these letters  
12           follow a very similar format, and the format is to say  
13           that the Office of Conservation regulator has received a  
14           report about a detection in a coupe.   The Office of  
15           Conservation Regulator has assessed the report.   That  
16           coupe is in a particular area as described in the Code of  
17           Practice Timber Production, and there's no protective  
18           prescription for the relevant observation or detection.  
19           So they're very short letters and they really just go to  
20           whether there is an existing prescription in place for  
21           that particular species in that coupe.

22   HER HONOUR:   Yes.

23   MS WATSON:   So the content of the letters is very limited and  
24           we say it entirely misses the point of this case to say  
25           that that content could meet any of the claims in this  
26           case or affect any of the claims in this case.   Because  
27           the plaintiff's case is that pending the bush fires or  
28           after the bush fires I should say, Your Honour, those  
29           prescriptions may need to be revisited, and until an  
30           assessment has been done of whether the prescriptions need  
31           to be revisited a precautionary approach should be taken

1 to preserve that habitat. So they do not go to the  
2 matters in issue and we say they simply miss the point of  
3 the case. But there's a number of other comments I'll  
4 make about these letters, which are they are simply  
5 letters from an officer within the office of the  
6 conservation regulator which are exhibited to a  
7 VicForests' affidavit. There is no affidavit from the  
8 Office of Conservation Regulator. We do not know what was  
9 said to them. We do not know what meetings were held. We  
10 do not know what documents the Office of Conservation  
11 Regulator was provided with. The opinion of the person  
12 writing the letter has not been tested and we say the  
13 observations of Your Honour, at paragraph 130, remain -  
14 Your Honour's judgment of 5 March remain equally  
15 pertinent. So these letters really don't take the case  
16 anywhere. They don't address the issues in the case and  
17 in any event they are of very little evidential value.

18 HER HONOUR: Yes.

19 MS WATSON: Your Honour, I just turn to the last of the  
20 submissions made by VicForests which relates to  
21 consideration - which is a submission that there is  
22 evidence of consideration by VicForests of the impact of  
23 bush fires on biodiversity values across the State. Now  
24 that submission is made at paragraph 15 of VicForests'  
25 written submissions, but if Your Honour turns to the  
26 evidence which is s.F of the fourth Paull affidavit.

27 HER HONOUR: So which affidavit?

28 MS WATSON: The fourth Paull affidavit, Your Honour - sorry,  
29 it's the third affidavit, Your Honour.

30 HER HONOUR: I was going to say, I've only got three.

31 MS WATSON: Sorry.

1 HER HONOUR: So the third affidavit and what paragraph?

2 MS WATSON: At Part F. Part F which is at - commences at p.16

3 - sorry, Your Honour, that's not the right part.

4 HER HONOUR: Is that not right, did you say? I've got 16

5 on - - -

6 MS WATSON: Sorry, Your Honour, it's Part D.

7 HER HONOUR: D.

8 MS WATSON: It's at the start of the page, 14.

9 HER HONOUR: D, 'Updated biodiversity risk assessment'?

10 MS WATSON: Yes, Your Honour.

11 HER HONOUR: Yes.

12 MS WATSON: Now the submission that's made, if Your Honour

13 stays with the affidavit but I'll just turn back to the

14 submission for a second. The submission that's made is

15 that there is evidence of VicForests' consideration of the

16 impact of fires for biodiversity values across the State,

17 which is relevant to the degree of cautiousness required

18 by the precautionary principle. But when Your Honour goes

19 to that affidavit you'll see that the evidence is that the

20 assessment remains underway. It was not completed. No

21 documents are exhibited that would tell you anything about

22 the nature of that assessment or the conclusions being

23 reached in that assessment. In paragraph 64 of the

24 affidavit a conclusion is asserted that nothing will be

25 required to change, without any evidence for that

26 conclusion. So they say, 'The result of the assessment is

27 expected to show that little to no threat to Greater

28 Glider, Powerful Owl and Sooty Owl - that there is - show

29 little or no threat to the relevant species in the Central

30 Highlands area'. Then the evidence for that conclusion

31 appears to be that that's because the Central Highlands

1 were not affected by the fires at East Gippsland. Now,  
2 Your Honour, it's - it almost rises - it is a very strange  
3 submission that the species is not affected because the  
4 animals that are present in Central Highlands were not  
5 affected by the fires in East Gippsland directly, and this  
6 is not evidence based on any scientific literature, it's  
7 not evidence based on any expert opinion. It's simply an  
8 assertion about where the fires were.

9 What this evidence shows is that VicForests is  
10 currently doing nothing to change its practices while it's  
11 in the process of considering impacts and has expressly  
12 said that the outcome of that consideration is that it is  
13 not going to change its operations, and in our submission  
14 that shows no cautiousness whatsoever. Really, there  
15 should be an assessment. The basis of that assessment  
16 should be made clear and then that assessment needs to be  
17 factored into VicForests' timber harvesting operations,  
18 and none of that is demonstrated by paragraph 63 - or 62  
19 to 64 in the Paull affidavit.

20 So, Your Honour, those are the four matters I wanted  
21 to address in the submissions, which I think addresses  
22 each of the matters in each of the reasons why VicForests  
23 has said that a submission should not be granted. There  
24 does remain the issue of timetabling orders for the  
25 hearing of the matter but I wonder whether Your Honour  
26 would prefer to deal with that after Your Honour has heard  
27 from Mr Waller.

28 HER HONOUR: The latter - sorry, I was a bit clumsy. I'll hear  
29 Mr Waller now and then we'll deal with the timetabling at  
30 the end. I do - - -

31 MS WATSON: If Your Honour please.



1 HER HONOUR: So I'll hear Mr Waller first. Thank you.

2 MR WALLER: If Your Honour pleases.

3 HER HONOUR: Yes.

4 MR WALLER: I hope you can hear me. You will recall from Your  
5 Honour's judgment delivered on 5 March that after  
6 considering all of the material then before the court and  
7 the submissions of the parties that Your Honour found that  
8 the application brought by the plaintiff was finely  
9 balanced, and that while they can identify a serious  
10 question to be tried and a prima facie case, we would  
11 describe it as not being a strong case. We say that the  
12 position that the applicant finds itself in today is even  
13 weaker, and I make - - -

14 HER HONOUR: Just a moment. Just a moment, Mr Waller. There  
15 is noise in the background, so.

16 TIPSTAFF: Ms Watson, if you wouldn't mind.

17 MS WATSON: Apologies, I will - apologies.

18 HER HONOUR: Right.

19 MR WALLER: Sorry.

20 HER HONOUR: Yes.

21 MR WALLER: Has Your Honour heard all I answered so far?

22 HER HONOUR: I've got what you've said so far.

23 MR WALLER: Your Honour, the plaintiff has repeatedly told this  
24 court and VicForests that it is not seeking a moratorium  
25 on timber harvesting in the State of Victoria. At the  
26 hearing on 28 January what the plaintiff said, and  
27 I quote, 'We were advised by VicForests that 34 coupes are  
28 presently active but we'd only sought an injunction in  
29 relation to ten, so we have not come to this court with a  
30 broad brush approach asking VicForests to hold' - - -

31 HER HONOUR: Are you speaking into the microphone, Mr Waller?

1 MR WALLER: I am trying to but I'll come - - -

2 HER HONOUR: You are going louder and softer.

3 MR WALLER: I'll come a little closer.

4 HER HONOUR: Thank you. Yes, so.

5 MR WALLER: So at the hearing on 28 January, Your Honour, it  
6 was made clear by counsel for the plaintiff that they were  
7 not seeking - they seem to come to the court with a broad  
8 brush approach, asking VicForests to hold operations  
9 completely. They said we are focused on and being very  
10 careful about the impact on threatened species. That's at  
11 p.25 of the transcript of 28 January, which can be found,  
12 but I won't go now, at Exhibit ACSP14 to Mr Prowse's  
13 affidavit of 17 March.

14 Then, Your Honour, in the hearing on 18 February,  
15 counsel for the plaintiff returned to the topic and said  
16 at transcript p.47 on that date, and this is at Exhibit  
17 ACSP16 to Mr Prowse's affidavit of 17 March, 'We have not  
18 sought injunctive relief in a broad brush fashion. We  
19 have sought it in relation to 15 coupes where logging is  
20 active or imminent and where there is evidence of a  
21 threatened species in the coupe. I want to be very clear  
22 about it', counsel said, 'We are not seeking by way of  
23 final relief a moratorium on logging forever in the  
24 coupes'.

25 Your Honour, that is at page, as I say, 47 of the  
26 transcript and again at pp.92 and 93 of the transcript of  
27 that day. However, Your Honour, in its letter to the  
28 plaintiff's solicitors, I'm sorry, to VicForests'  
29 solicitors on 10 March, and this is Exhibit ACSP30 to  
30 Mr Prowse's 17 March affidavit, the plaintiff's  
31 solicitors, we say, revealed the true position and what

1 they said there was 'To be clear, it remains our client's  
2 position that your client should not be logging in any  
3 coupe known to contain or known to be likely to contain  
4 fire affected threatened species of habitat of such  
5 species prior to the hearing and determination of this  
6 proceeding.

7 Now, pausing there, Your Honour, there is, we say, a  
8 slide in the submissions of our learned friend today where  
9 she spoke only of seeking injunctive relief in respect of  
10 coupes where there had been sightings of threatened  
11 species. But the case that has been made on the pleading,  
12 and which is revealed in the letter of 10 March, is that  
13 they are seeking to restrain VicForests from carrying out  
14 any timber harvesting in any coupe known to contain or  
15 known to be likely to contain fire affected threatened  
16 species or the habitat of such species and they seek that  
17 injunctive relief prior to the hearing and determination  
18 of the proceeding.

19 They go on to say in that letter that the  
20 interlocutory relief previously sought was limited to  
21 coupes where our client knew they were the subject of  
22 active or imminent timber harvesting. And as additional  
23 information comes to our attention, our client has needed  
24 to take action accordingly. 'As has previously been  
25 indicated to you and the court', they say, 'if your client  
26 could provide clear information about its current and  
27 proposed operations, it would avoid the need for our  
28 client to approach the court in this piecemeal fashion.  
29 Of course, if your client commits to not log in such  
30 coupes prior to the hearing and determination of the  
31 proceeding, there would be no need to approach the court

1 at all'.

2 And finally they say, 'This would not impact your  
3 client's operations in coupes that are not known to  
4 contain or not be likely to contain fire affected  
5 threatened species or the habitat of such species'.

6 Baker & McKenzie responded in substance to the ever  
7 increasing scope of the plaintiff's demands in its letter  
8 of 16 March, which is Exhibit ACSP41 to Mr Prowse's  
9 affidavit of 17 March. And said clearly 'By its latest  
10 proposed summons and the correspondence that has preceded  
11 it, your client is seeking to substantially enlarge the  
12 interlocutory relief it seeks in a manner which if  
13 granted, we are instructed, could have a devastating  
14 effect on our client's operations, its customers that rely  
15 on timber supply and the communities whose livelihood  
16 depend on a viable timber industry. The effect of the  
17 undertaking sought is particularly acute with the current  
18 social disruption occurring as a result of the COVID-19  
19 virus'.

20 Excuse me. Now, Your Honour, what the plaintiff has  
21 said in that letter of 10 March is that its proposed  
22 injunction would not impact VicForests' operations in  
23 coupes that are not known to contain or are likely to  
24 contain fire affected threatened species or the habitat of  
25 such species. And what the plaintiff fails to understand  
26 and what we say the evidence of Mr Paull in his second  
27 affidavit, that is the affidavit of 19 March, makes clear  
28 is that there are no such coupes available to be harvested  
29 by VicForests in the Central Highlands that are not known  
30 to contain or are likely to contain fire affected  
31 threatened species or the habitat of such species.

1           And Mr Paull, in that affidavit, refers Your Honour  
2           to habitat distribution models, or HDMs, which he explains  
3           are used to predict species' occurrence through the  
4           modelling of a range of environmental variables and when  
5           displayed on a map, they are used to provide a prediction  
6           of the likelihood of a species' occurrence. And that  
7           likelihood is measured or ranked on a scale of one to 99,  
8           where one is low likelihood and 99 is high likelihood.  
9           Now, Mr Paull, on oath, says that every coupe in the  
10          Central Highlands Regional Forest Agreement area is an  
11          area in which the habitat distribution models predict some  
12          likelihood presence of Greater Glider and Powerful Owl,  
13          represented, Your Honour, by the shaded brown areas on the  
14          maps applicable to those species.

15          And using the Greater Glider as an example, Mr Paull  
16          says that nearly all of the coupes that are marked aqua or  
17          pink and that is an indication on the maps of the exhibits  
18          of particular coupes on the TRP, that nearly all of those  
19          coupes contain a likelihood score of at least 32 to 49 and  
20          the vast majority of coupes contain habitat model with a  
21          likelihood score of 49 to 93.

22          And what Mr Paull says is that if VicForests is  
23          restrained from harvesting any coupes which are likely to  
24          contain at least one of the three species the subject of  
25          these maps, that is the Greater Glider, the Powerful Owl  
26          or the Sooty Owl, all contained or are likely to contain  
27          the habitat of such species, then it would, he says, shut  
28          down all of VicForests' operations in the Central  
29          Highlands RFA area.

30          And he says that if that were the case, VicForests  
31          would simply not be able to conduct timber harvesting

1 operations in any coupe on the TRP within the Central  
2 Highlands RFA area. So for my learned friend to being our  
3 submissions today by saying that what they are seeking now  
4 to do is simply to enjoin a further 13 coupes, making a  
5 total of 28 coupes over which injunctive relief has been  
6 sought, in circumstances where there are hundreds, if not  
7 more, other available coupes for which VicForests can  
8 harvest, we say it is simply not the case that when one  
9 has regard to the scope of the case put against us, with  
10 its emphasis not just on actual sightings but likely  
11 presence and presence not just of species but of the  
12 habitat of such species, and when one has regard to the  
13 evidence of Mr Paull.

14 Now, Your Honour, what Mr Paull says is that the  
15 Central Highlands is the most important economic region  
16 for VicForests. It is the most productive area in terms  
17 of the timber production. He says - and this is in  
18 paragraph 74 of his second affidavit, that's the affidavit  
19 of 19 March, that in the 2018-2019 financial year, the  
20 most recent financial year, the Central Highlands area  
21 supplied 76 per cent of VicForests' total revenue.

22 He goes on to say that VicForests cannot move into,  
23 for instance, East Gippsland in the near future because of  
24 the fires, but even if they were able to do that, that  
25 would not ameliorate the problem because the Central  
26 Highlands RFA area is the major revenue centre for its  
27 business. It is where most of the costs of the business  
28 are incurred and forest areas, whether on the TRP or to be  
29 included at some future time on the TRP outside of the  
30 Central Highlands area, are simply not productive enough  
31 in their own right to generate efficient revenue to cover

1 VicForests' business overheads such as wages for its  
2 staff.

3 Mr Paull goes on to say that the reality for  
4 VicForests if it is enjoined from conducting timber  
5 harvesting across those coupes which would be caught by  
6 the description in the plaintiff's statement of claim and  
7 which has been the basis of its injunctive applications,  
8 the reality is that VicForests' business would grind to a  
9 halt.

10 Now, we say, Your Honour, it is artificial, as the  
11 plaintiff does, to say this application is only about 13  
12 coupes because we say that one has to have regard to the  
13 context and the practical (indistinct) for VicForests, its  
14 contractors and its customers by the court granting this  
15 additional injunctive relief. Because in reality, what  
16 would inevitably occur should this application be granted  
17 is that there would be a series of ongoing applications  
18 seeking to restrain VicForests from harvesting in the  
19 Central Highlands RFA area as and when it attempted to do  
20 so.

21 It is, we say, simply not appropriate that  
22 VicForests should leave itself at the mercy of the  
23 plaintiff to determine in which coupes it may harvest and  
24 in which coupes it may not. Just because the plaintiff  
25 has, for whatever reason, determined to that there are  
26 nine coupes in the Central Highlands over which it does  
27 seek injunctive relief at the moment, we say that is at  
28 odds with its stated purpose in its letter from the  
29 solicitor, its solicitor, of 10 March, which says, 'To be  
30 clear, it remains our client's position that your client  
31 should not be logging in any coupe known to contain or

1 known to be likely to contain fire affected threatened  
2 species or their habitat'.

3 And Your Honour, that is the way the case is put and  
4 that is the case that we have responded to and we say that  
5 the ongoing pressure that is being placed on VicForests by  
6 the plaintiff's approach and through VicForests, obviously  
7 on its employees but on its subcontractors and on its  
8 customers and on the people who are employed by its  
9 customers and its contractors and incurred on the region  
10 as it depend so desperately for the native timber industry  
11 for their ongoing viability. For VicForests to be held  
12 hostage for the ongoing demands of the plaintiff, having  
13 drawn a case, as it has, in such wide terms, based, we  
14 say, on a legal proposition that the court has in its  
15 previous judgment determined to be weak, in circumstances,  
16 Your Honour, where the claim previously was described as  
17 finely balanced.

18 In circumstances now, Your Honour, where the - we  
19 say the inevitable consequence of this relief being  
20 granted is that VicForests will be put on notice that its  
21 continued financial viability is in jeopardy, as is the  
22 continued livelihood of those it employs and those with  
23 whom it contracts or to whom it supplies. And for that  
24 reason, Your Honour, we say that a line needs to be  
25 clearly drawn between what has occurred so far and what  
26 the plaintiff seeks now to occur by this application.

27 We say, in our submissions which we have filed, that  
28 Your Honour should have close regard to the decision of  
29 Justice Wheeler in the Bridgetown case in Western  
30 Australia. In that case, which Your Honour referred to in  
31 Your Honour's judgment on 5 March, albeit on a narrow



1 point, we say, Your Honour, that the approach the court  
2 took on that occasion should applied (indistinct) on this  
3 occasion as well. We've set out our analysis of that  
4 decision, Your Honour, from paragraphs 26 onward of our  
5 submissions, 26 to 40. And we say that there were  
6 parallels to that application, which was also an  
7 application for interlocutory injunctive relief to  
8 restrain timber harvesting in part of Western Australia,  
9 based on an alleged noncompliance with the precautionary  
10 principle that Her Honour's approach to the application of  
11 the precautionary principle, which was endorsed by Justice  
12 Osborn in both Brown Mountain and MyEnvironment, Your  
13 Honour, is an approach that we adopt and have adopted in  
14 our previous submissions.

15 Her Honour then focused on the balance of  
16 convenience and in doing so, Her Honour said that - and we  
17 referred to this at paragraph 30 of our written  
18 submissions, quoting or citing p.124 of the reported  
19 judgment at (1997) 18 WAR 102, that 'What is immediately  
20 striking about the balance of convenience', she said in  
21 that case, 'is the disparate ... (reads) ... interest over  
22 another'. Her Honour concludes 'Approached from a ...  
23 (reads) ... risk is slight'. We say, Your Honour, that  
24 even though the economic loss may be unqualified at this  
25 stage, the evidence from Mr (Indistinct) having regard to  
26 the DEWLP report, which is in evidence, and the very fact,  
27 as revealed in that report, that so much of the region is  
28 dependent on this industry, that if there was to be a  
29 shutdown of the industry that it is plan that innocent  
30 third parties will be affected, whether they be employees  
31 of the VicForests or their customers or contractors,

1 putting aside, even VicForests' own financial position.

2 Ms Watson made the point that VicForests' position  
3 may be affected by force majeure arrangements or by  
4 government guarantees, but Your Honour, even if that were  
5 the case that would not protect the jobs and livelihoods  
6 of its employees, or the businesses and livelihood of  
7 those working for the customers and contractors. So, Your  
8 Honour, we say this is not evidence of slight risk on our  
9 side. By contrast, we would say where the evidence shows  
10 that all of the necessary precautions, that is by way of  
11 prescription, are being adopted, and where the Office of  
12 Conservation Regulator has in correspondence both  
13 exhibited to previous affidavit and to the more recent  
14 affidavit, made it clear that in her view, and in the  
15 office's view, no regulatory requirement exists for  
16 VicForests to apply any additional prescriptions, that the  
17 balance, we say, while perhaps it was finely balanced on  
18 the last occasions is now, we say, balanced, or tipping  
19 I should say, in VicForests' favour.

20 To the extent that the serious question was not a  
21 strong one on the last occasion, we say the matters we  
22 refer to in our written submissions weaken (indistinct  
23 words) further, we say that the - in respect of the IPA  
24 areas, they are available and may be seen on the website  
25 of the Department. What the website reveals is that very  
26 detailed spatial data is provided, and it is clear, and  
27 I am instructed, Your Honour, that none of the 13 points  
28 the subject of this application falls within an IPA, but  
29 in any event Your Honour has, on oath, the undertaking  
30 from VicForests' Mr Paull that VicForests will not harvest  
31 in any area which is contained within any IPA.

1           Secondly, Your Honour, we say our learned friend has  
2 sought, again, to minimise the role of the Office of  
3 Conservation Regulator. Your Honour will remember that  
4 this office is a recently created office specifically  
5 designed to provide independent assessment and oversight,  
6 and its focus is solely on conservation, whereas in the  
7 past the Department - and this was a fact referred to in  
8 MyEnvironment or Brown Mountain, to which my learned  
9 friend referred - the Department was wearing more than one  
10 had. It was a conservation regulator but it was also  
11 involved in the areas of timber production as well,  
12 through its support of VicForests in that way.

13           The OCR, we say, is very different, and we say that  
14 its views should be given great weight, and for my learned  
15 friend to criticise the fact that we've not put anyone  
16 from within the OCR on oath we say rings hollow when Your  
17 Honour remembers that the plank upon which this case  
18 relies, in large part, is a State of Victoria interim  
19 report referred to in paragraph 18 of the statement of  
20 claim, and the author of which, or course, has never been  
21 put on oath either. We would say that just as Your Honour  
22 can have regard to that report, Your Honour can plainly  
23 have regard to correspondence under the letterhead of the  
24 Office of the Conservation Regulator.

25           Your Honour, the point made by Mr Paull concerning  
26 the bushfire - the effect of the bushfires, we say makes  
27 the very point that we are seeking to make, namely that  
28 Mr Paull says that - and this is referred to in paragraph  
29 15 of our submissions - that there is evidence that  
30 VicForests has considered the impact of fires to  
31 biodiversity values across the state, in conjunction with

1 the OCR and the Department. That is relevant to the  
2 degree of caution required by the precautionary principle.

3 In his affidavit he says that it is his  
4 understanding that no further prescriptions will be  
5 introduced to deal with those matters. Now, Your Honour,  
6 we said on the last occasion that what the plaintiff is  
7 seeking to do in relying on the precautionary principle is  
8 to in essence insert the role of the executive government  
9 and those who make promising decisions. It is now several  
10 months since the bushfires, and if the state government  
11 had wished to take further action to prevent wholesale  
12 harvesting across the central highlands of Victoria, then  
13 it had ample power to do that. It has not done that,  
14 knowing full well that the existing prescriptions that are  
15 in place will protect the position going forward.

16 What this case generally, and these injunctions -  
17 injunction applications in particular are seeking to do is  
18 to, we say, in circumstances where the government has  
19 chosen not to act, seeking to require the court to act in  
20 its place on a basis, we say, which is weak and in  
21 circumstances where the balance of convenience now plainly  
22 favours a line being drawn, we say, in the sand concerning  
23 further injunctive relief. Our learned friend has  
24 mentioned their request for early discovery of VicForests'  
25 rolling operations planning, which details VicForests'  
26 proposed harvesting for the next six months, and we say  
27 that that gives away, again, in a revealing way, what the  
28 plaintiff really seeks to do, and that is to effectively  
29 restrain and interfere with VicForests' harvesting  
30 arrangements for the foreseeable future.

31 This is in circumstances, Your Honour, where

1 pleadings have not even closed. We have not yet put on  
2 our defence, which is due to be filed next week. In  
3 circumstances where the issues have not even been  
4 clarified, our opponents seek discovery on a document  
5 which, on one view, may not be in issue because when  
6 (indistinct) pleads at paragraph 22 of the statement of  
7 claim, if we accept that all of the coupes in the Central  
8 Highlands on the TRP contain fire affected species - fire  
9 affected threatened species or are likely to contain such  
10 species, or contain or are likely to contain the habitat  
11 of some such species, then, Your Honour, that issue is no  
12 longer in question, but in anticipation of that we say our  
13 learned friends are pressing urgently for this document so  
14 they can effectively more easily manage their process of  
15 seeking, we say, ongoing injunction, or injunctive relief,  
16 from the court.

17 We say that this is not only about 13 coupes, Your  
18 Honour. This is, as we said on the last occasion, the  
19 thin edge of a very, very large and damaging wedge, and it  
20 is time now, we say, Your Honour, for the court to plainly  
21 decide the case having regard now to where the balance  
22 truly lies, and decide the case bearing in mind, of  
23 course, that although on the last occasion a serious  
24 question was identified, the case was determined to be not  
25 a strong one. So for those reasons, Your Honour, we say  
26 this application ought be refused. The parties should be  
27 pressed forward to trial, and the matter should be  
28 resolved at trial, and discovery should occur in the  
29 ordinary course once the issues are joined on the  
30 pleadings. Your Honour, those are our submissions.

31 HER HONOUR: Thank you, Mr Waller. Ms Watson, do you wish to

1 reply?

2 MS WATSON: Yes, Your Honour, just a couple of brief matters.

3 The first is just to say, globally, the - VicForests  
4 fundamentally fails to distinguish between the  
5 interlocutory relief that's being pressed for and the  
6 final relief. The applications for interlocutory relief  
7 are only pressed in respect of a subset of coupes where  
8 the species have in fact been protected, and that - it is  
9 that relief that must be the purpose of this application,  
10 not the broader relief, and it's plain that the way in  
11 which the case is being conducted is that the  
12 interlocutory relief sought is confined. It is more  
13 limited, and that's the basis on which we say Your Honour  
14 should decide this particular application.

15 A second matter, Your Honour, is just to make -  
16 address something my learned friend said about how Your  
17 Honour assessed the case. Counsel for VicForests said on  
18 a number of occasions that Your Honour has said that this  
19 case is weak, or the plaintiff's case is weak. Your  
20 Honour did not say that it was weak. Your Honour said, at  
21 149 of Your Honour's reasons, that it was not strong, but  
22 that is not the same as saying that a case is weak. Your  
23 Honour, just on the economic impacts, the evidence from  
24 Paull is about a hypothetical shutdown that is not  
25 occurring. They have not met the evidential burden to  
26 show that any significant loss will arise from granting an  
27 injunction over these 13 coupes.

28 Those are the matters to which Your Honour must have  
29 regard, and that is what this application is limited to,  
30 and the defendant's larger concerns, about more  
31 substantial interlocutory relief being granted, can all be

1 resolved on the evidence if the rolling operations plan is  
2 produced. There'll be no need for this court to make any  
3 hypothetical findings about the scope of the relief. It  
4 will be based upon the precise identification of coupes  
5 that are the subject of the proceeding, the detection of  
6 species in those coupes, and the defendant can then adduce  
7 specific evidence about the economic impact of the precise  
8 number of coupes identified by the plaintiff. That issue  
9 can be addressed if early discovery is made of the rolling  
10 operations plan.

11 One final matter, Your Honour, there's now a new  
12 submission that the state government inaction since the  
13 bushfires suggests that the state is not intending to take  
14 any action, and Your Honour simply cannot accept that  
15 submission. There is no evidence for it, and in any event  
16 the evidence is that it's been 2.5 months since the  
17 bushfires, significant reviews have been put in place that  
18 are in train, for at least two weeks the state government  
19 has now been gripped by Covid-19, and that is likely to  
20 continue, and absolutely no inference can be drawn that  
21 the state is proposing to take no action, and VicForests  
22 cannot be permitted to engage in timber harvesting in  
23 contravention of the law because - where the government is  
24 in the grips of a crisis created by an unprecedented  
25 pandemic. That is that no absolutely no inference can be  
26 drawn from, you know, 2.5 months of inaction, which in any  
27 event is not the case. Those are the four matters  
28 I wanted to address by way of reply, Your Honour.

29 HER HONOUR: Yes, all right. Could you address me on the  
30 timetable, and using the marked up version of the orders  
31 produced by you, that is to say Mr Waller's marked up

1 orders, because he's tracked the changes?

2 MS WATSON: Yes. I'll just open those, Your Honour.

3 HER HONOUR: Yes. While you're opening those, let me also tell  
4 the parties that we have available trial dates, being -  
5 that is on the estimate of, I think, you've got seven to  
6 10 days - on 13 August, which I understand may not be  
7 suitable for either party, 7 October. Otherwise, as we  
8 presently stand, the trial wouldn't be able to be listed  
9 until March 2021. So, I'm conscious of disposing of this  
10 proceeding as efficiently and quickly as possible, so I'd  
11 like the parties to consider both 13 August and 7 October,  
12 but put that to one side for the moment while we deal with  
13 the sequence of the proposed orders, looking at  
14 Mr Waller's orders with his changes, as well as the  
15 original draft.

16 So, as I understand it, Mr Waller's side would be  
17 available, I think, on 7 October, because he had a date no  
18 before 19 October - no, sorry, who had that? Not before  
19 the 11th. Perhaps October may not suit both sides.

20 MR WALLER: No, Your Honour, we are available, and - - -

21 HER HONOUR: On 7 October?

22 MR WALLER: Yes. If 7 October is the earliest available date  
23 after August, then we would embrace that.

24 HER HONOUR: Apparently it is. But with the present situation  
25 in terms of listings, it may be that other dates become  
26 available for reasons to do with the coronavirus as to how  
27 - what other people might do. I do expect that most  
28 people would want to keep their trial dates, but - - -

29 MS WATSON: Yes, Your Honour. I might just indicate that

30 7 October would be embraced by the plaintiffs as well.

31 HER HONOUR: All right. If you both are happy with 7 October



1 on an estimate of seven to 10 days?

2 MR WALLER: Yes, Your Honour.

3 HER HONOUR: So we could be - for a hearing on 7 October, and  
4 that would then play out - alter - if you work back from  
5 that you can work on the dates. Is it appropriate to do  
6 that now, or are you able to reach agreement on that? If  
7 not, if you don't think you can reach agreement, then I'll  
8 determine it now, because I want this to be finalised  
9 rather than any arguments about it my way of email. So  
10 that would mean, for example, one, two, and three, would  
11 those dates be suitable still, Mr Waller's dates? He's  
12 brought forward the date for the filing of a reply on  
13 20 April, having a defence delivered on 3 April.

14 MS WATSON: Your Honour, I think we'd like to try and maintain  
15 - sorry, I am just getting instructions, Your Honour,  
16 I will just be one second.

17 HER HONOUR: Yes, no take your time. That gives you two-and-a-  
18 half weeks.

19 MS WATSON: Sorry, Your Honour. The reply is currently?

20 HER HONOUR: You had 27 April.

21 MS WATSON: Yes.

22 HER HONOUR: Mr Waller is saying 20 April and I expect that is  
23 having something to do with the discovery as well but it  
24 is a reply, rather than a substantial document like a  
25 statement of claim.

26 MS WATSON: Sorry, Your Honour, I am just getting instructions,  
27 I won't be long at all. The problem I think with that  
28 time is that there is just the intervention of Easter,  
29 Your Honour.

30 HER HONOUR: We can all work over Easter.

31 MS WATSON: Yes, Your Honour. I think the dates can be

1 accommodated, thank you, Your Honour.

2 HER HONOUR: All right, so we will make Order 3, the date in  
3 that will be 20 April. Turning over to discovery,  
4 Mr Waller has crossed out your proposed order and made it  
5 that the parties are to confer and agree categories of  
6 discovery by the 17th.

7 MS WATSON: Which is three days - - -

8 HER HONOUR: Three days before the delivery of the reply.

9 MR WALLER: We didn't anticipate the reply will raise any  
10 matter of great - - -

11 HER HONOUR: You will have to speak up, Mr Waller.

12 MR WALLER: Sorry.

13 HER HONOUR: We will just turn your volume up. What was that?

14 MR WALLER: We didn't anticipate that the reply would inform  
15 the issue of discovery but if Your Honour - - -

16 HER HONOUR: One would think not but it may. By 17 April,  
17 I would have thought the plaintiff would know what they  
18 want to say by way of reply in any event.

19 MR WALLER: In fact the next order specifically deals with it.  
20 Any issues arising from the reply.

21 HER HONOUR: There we are.

22 MR WALLER: I think that was anticipated to be done in two  
23 stages and it does accommodate the date of the reply.

24 HER HONOUR: Would it be easier to combine the two discovery  
25 orders so that it be done by 24 April?

26 MR WALLER: Yes, we would I think be satisfied with that.  
27 I think we were hoping to move things forward in tranches.

28 HER HONOUR: Yes, so if we have, using the 4/5 or 5/4, so the  
29 parties are to confer and agree categories of discovery by  
30 24 April.

31 MS WATSON: Your Honour, could I just ask, if that is an order

1           that's to be made, could we press the order at Order 4 for  
2           early discovery in respect of the relevant operations plan  
3           and any other relevant such documents?

4   HER HONOUR:   Well I think not so because you will have the  
5           discovery reasonably quickly after pleadings close.

6   MS WATSON:    Yes, Your Honour, it is just discovery could be  
7           substantial and we just - - -

8   HER HONOUR:   It will be but it's better to have it all  
9           together. It is the 27th now and you will have the  
10          pleadings closed and then the discovery, you will be  
11          working on the discovery before the 24th and I would  
12          rather do it in one tranche than divide it up.

13   MS WATSON:   It is just, Your Honour, there may - if we could  
14          get the rolling operations plan sooner, that would prevent  
15          further interlocutory relief arising and further  
16          disruption of the trial timetabling. Then the parties  
17          could all focus on what are the actual issues in the case  
18          and resolve them more efficiently.

19   HER HONOUR:   What are you calling it, the rolling?

20   MS WATSON:    The rolling operations plan, Your Honour. It is  
21          referred to in the Creek affidavit and it simply says  
22          which coupes are to be logged over the next six months.

23   HER HONOUR:   Yes. Mr Waller, do you wish to say anything about  
24          that?

25   MR WALLER:    Yes, Your Honour. We say that that should await  
26          the closing of pleadings to determine which documents are  
27          relevant, for reasons I sought to explain in my  
28          submissions.

29   HER HONOUR:   Yes.

30   MR WALLER:    We see the plaintiff's continued and determined  
31          efforts to obtain this as really, seeking on their part,

1 to better plan their interlocutory steps and potentially  
2 plans for undertakings or seeking injunctive relief.

3 HER HONOUR: What I want to do is focus on getting the case to  
4 trial, rather than have all of these things. So I am  
5 inclined to not allow the early production of the rolling  
6 operations but everything that is discoverable will be  
7 ready and available on 24 April, after pleadings are  
8 closed, which is the normal course. I will make Order 4,  
9 Order 4 would be the parties are to confer and agree  
10 categories of discovery by 24 April.

11 The next order is make discovery of the following  
12 documents. When you say you - are you are conferring and  
13 agreeing categories of discovery, are you then discovering  
14 or - - -

15 MS WATSON: I think that was intended to refer to exchange of a  
16 list, Your Honour. But we would be content to receive  
17 discovery to be exchanged - produced by 24 April.

18 HER HONOUR: Just have discovery by the 24th and then everyone  
19 has got the relevant documents.

20 MS WATSON: Yes, Your Honour.

21 MR WALLER: I think the issue was that if there was likely to  
22 be any dispute about whether a document should be  
23 discovered or not, that would be resolved under Order 7  
24 prior to the actual making and I think that's why it was  
25 set out in that way. I am instructed by remote, I should  
26 say, that it is not going to be possible to make physical  
27 discovery available earlier than the 18th and that's why  
28 the timeframe of 18 May was determined. Initially this  
29 wasn't going to trial until October and we don't think  
30 anyone will be prejudiced by - - -

31 HER HONOUR: Yes.

1 MS WATSON: My instructions are for once completely ad idem  
2 with VicForests.

3 HER HONOUR: This is remarkable. All right, so I will make  
4 Order - I will cross out the order about supplementary  
5 categories and so the next order, which would be marked  
6 number 5, would be the original 6, which is the make  
7 discovery by 18 May. Are you all on the same page?

8 MS WATSON: Yes, Your Honour.

9 MR WALLER: Yes, Your Honour.

10 HER HONOUR: The next order, any application to be made by a  
11 party in relation to discovery to be listed for hearing  
12 before the judge managing - it will be rather than the  
13 judge, put the judicial officer, managing the proceeding  
14 on 28 April at 10.30. That is subject to the court's  
15 ability to be able to hear that. With the circumstances  
16 at present, if there is an issue, you may give thought to  
17 resolving any issue like that by filing your summons and  
18 then delivering short written submissions. I think that  
19 is going to be more efficient because we just are in a  
20 state of a new regime and we're encouraging the parties to  
21 at the moment, where it is possible, to resolve a lot of  
22 things by written submissions and I would have thought  
23 discovery could be done by that, if I am the judicial  
24 officer who hears it you won't have to go into the  
25 background. I will leave that any application to be made  
26 in relation to discovery would be made - we will make it  
27 to me - before McMillan J on 28 April.

28 Now the lay witness statements. The only change  
29 there is to 11, the change of bringing forward the date to  
30 10 July for affidavits in reply to be served by the  
31 plaintiff. Are you comfortable with that date, Ms Watson?

1 MS WATSON: Your Honour, sorry I was just getting instructions.  
2 Could Your Honour - sorry, I just was trying to.  
3 HER HONOUR: Going back to discovery.  
4 MS WATSON: So we are going back to discovery?  
5 HER HONOUR: No, what are you getting instructions on?  
6 MS WATSON: Sorry, about what Your Honour just put to me.  
7 HER HONOUR: 10 July?  
8 MS WATSON: No, on lay witness reply I think, sorry, Your  
9 Honour, it's difficult to get instructions - - -  
10 HER HONOUR: That is all right, we have got plenty of time.  
11 MS WATSON: I will just have a look at this order. We are  
12 really hoping to maintain the dates for reply evidence -  
13 for lay evidence, reply evidence and expert evidence as  
14 much as possible.  
15 HER HONOUR: Yes but you will get - so you've got discovery by  
16 the 24th. Then it is just bringing forward - so the  
17 preceding order is the defendant will file any further  
18 affidavits by 26 June and you would then respond by  
19 10 July. I would be surprised if you would need a month  
20 to respond.  
21 MR WALLER: This is lay evidence?  
22 HER HONOUR: Yes.  
23 MS WATSON: I think we agree with the date for us filing the  
24 main lay evidence.  
25 HER HONOUR: You do?  
26 MS WATSON: Yes.  
27 HER HONOUR: So are you happy with 10 July for your reply  
28 evidence?  
29 MS WATSON: Your Honour, would the 17th work, in the middle?  
30 HER HONOUR: What is the problem? You have got two weeks - - -  
31 MS WATSON: Your Honour, it won't affect later dates and it

1 will just give us a little bit more time to prepare the  
2 evidence.

3 HER HONOUR: But it is just at the tail end, it's your reply  
4 affidavit. Again, I would have thought most of the  
5 evidence would be in the first tranche of affidavits, that  
6 is, the evidence you rely on and the defendant's  
7 affidavit.

8 MS WATSON: Yes, well that is the case, it will mostly be in  
9 the first two sort of tranches of evidence.

10 HER HONOUR: Yes, so a further two weeks is probably - I think  
11 I will keep you to 10 July for the moment and if there is  
12 something unusual about it, then you can see if you can  
13 agree and if not, I will give you a hearing.

14 MS WATSON: Yes, Your Honour, I will just say at the moment we  
15 would anticipate receiving a substantial amount of  
16 evidence to be filed by the defendant, so that's the  
17 reason for the concern. But if we can approach Your  
18 Honour at that stage and having regard to the volume of  
19 the evidence that's filed, if it's very substantial we  
20 might seek another week at that time but we'll just have  
21 to wait and see what - - -

22 HER HONOUR: I want to encourage you on these interlocutory  
23 orders to try and reach agreement without bothering the  
24 court.

25 MS WATSON: Yes.

26 HER HONOUR: Having said that, if you do bother me I will hear  
27 you but I'll be probably getting - there has to be a  
28 spirit of co-operation on these sort of things.

29 MS WATSON: Yes, Your Honour.

30 HER HONOUR: Put aside the substantive issues but these  
31 timetabling issues should be able to be reached without

1 the assistance of the court.

2 MS WATSON: Yes, Your Honour.

3 HER HONOUR: So I will leave that to 10 July.

4 MR WALLER: Yes, Your Honour.

5 HER HONOUR: Number 12 is agreed, the maps, so I will leave

6 that as is. Then the expert evidence, the dates - - -

7 MS WATSON: Your Honour, we really need to press maintaining

8 four weeks from the date of giving their lay evidence

9 because we have to brief our experts and then they need to

10 do their field work and then write their reports in under

11 one month - and their field work will involve going to

12 each coupe - it's likely to involve going to each couple

13 and inspecting each coupe. That can be quite time

14 consuming.

15 HER HONOUR: You are talking about Order 13? The plaintiff

16 file and serve any expert evidence?

17 MS WATSON: Yes, Your Honour.

18 HER HONOUR: By 17 July.

19 MS WATSON: I think our initial date was 31 July, Your Honour.

20 HER HONOUR: Yes, well what sort of expert evidence are you

21 relying on?

22 MS WATSON: Your Honour, the experts in relation to the species

23 will need to go and inspect the forest and give evidence

24 about the likely impact - Your Honour, I am actually

25 not - - -

26 HER HONOUR: But they're not experts, are they, they are

27 observers, aren't they?

28 MS WATSON: No, Your Honour, there will be experts in relation

29 to the actual species and the impact of - it's a bit

30 difficult to say at present but previous experience in

31 matters of this kind is that the expert evidence in



1 relation to the particular species is quite substantial.

2 HER HONOUR: Yes. Mr Waller, do you object to the 31st?

3 MR WALLER: Your Honour, we would make a couple of points.

4 First, we would seek to hold the dates that we put in  
5 place for - to two weeks and first, in the event that some  
6 earlier date becomes available before 7 October, perhaps  
7 at the end of September, for the reasons Your Honour  
8 outlined. Secondly and perhaps even more importantly, to  
9 give time between the filling of the expert evidence and  
10 the trial to enable a joint report process to be  
11 undertaken - - -

12 HER HONOUR: What, a hot tub?

13 MR WALLER: Yes, either offline where the experts get together  
14 and see if they can agree, so as to reduce the area of  
15 dispute.

16 HER HONOUR: Yes.

17 MR WALLER: Online, where they would give their evidence, as it  
18 were, in court but arrangements would be made to  
19 facilitate that. So for that reason, Your Honour, we  
20 didn't want the expert evidence timing to run too close to  
21 trial.

22 MS WATSON: Your Honour, the appropriateness of a joint process  
23 can only be determined once the actual evidence is in and  
24 31 July is not in fact that close to the trial. We cannot  
25 set a timetable that is just too confined for the  
26 plaintiff to be able to put on proper expert evidence. It  
27 is - everything is getting crunched to a point where some  
28 of the dates might not be realistic and we'll simply be  
29 having to come back to the court and indicate that we  
30 haven't been able to get the reports in time.

31 HER HONOUR: Yes. The parties shouldn't discount the

1 possibility of a hot tub but considering what is involved  
2 in terms of the expert evidence in respect of both  
3 parties, I think probably having considered that, those  
4 dates 31 July and 28 August may be more appropriate. We  
5 have got 7 October and again, you might find that if  
6 you're able to do them earlier you could certainly agree  
7 to earlier dates but for the moment, I will make it the  
8 plaintiff's dates - that is, 31 July and 28 August.

9 MR WALLER: The difficulty we have then is the date that the  
10 plaintiff seeks for their reply - - -

11 HER HONOUR: I wonder is it necessary to have reply evidence if  
12 you have got both of your reports and you're proposing a  
13 hot tub or whether a hot tub is applicable?

14 MS WATSON: Your Honour, we are not opposed to the idea of a  
15 hot tub but we are not proposing it and we have had a hot  
16 tub situation fall over in the Federal Court and a lot of  
17 time was spent in a similar proceeding last year. A lot  
18 of time was spent trying to develop a joint expert process  
19 and a hot tub process and in the end, the evidential  
20 issues were too complicated to agree a set of questions  
21 and to make efficient use of a hot tub. So we are open to  
22 that idea but we have seen this process fall over before.

23 HER HONOUR: Yes.

24 MS WATSON: We would like to press for a sufficient amount of  
25 time to file reply evidence because the defendant is  
26 likely to file, we predict - it may not be proven to be  
27 true - but we predict copious volumes of evidence to which  
28 a reply will be necessary.

29 MR WALLER: Your Honour, could I just say - - -

30 HER HONOUR: But how is it going to work? You have got - it  
31 will be competing factual basis by the experts in that

1 case. Some agreement must be able to be reached.

2 MS WATSON: Some agreement may be able to be reached, Your  
3 Honour but it is just important that the evidence, that  
4 there's sufficient time for the expert evidence to be put  
5 in advance of a hot tub and then - if a hot tub can be  
6 arranged, then that would be ideal. I am just speaking  
7 from experience in a previous case last year where we  
8 spent a lot of time trying to make it work and it did not  
9 work.

10 HER HONOUR: Yes.

11 MR WALLER: One way through this impasse, maybe as we  
12 foreshadowed in, I think the last directions hearing, that  
13 there be a directions and perhaps that could - - -

14 HER HONOUR: After 14 August?

15 MR WALLER: Yes, - - -

16 HER HONOUR: Once you've - I think that's a good idea. So once  
17 you've both filed your expert reports, come back for a  
18 directions hearing and tell me whether you can reach some  
19 agreement or you're still hotly opposed.

20 MR WALLER: Yes. And a hot tub arrangement or joint report  
21 arrangement might be a better option than sending the  
22 experts away to do replies.

23 HER HONOUR: Yes.

24 MS WATSON: Your Honour, is Your Honour proposing not to make  
25 an order for reply evidence?

26 HER HONOUR: That's right, at the moment.

27 MS WATSON: We will anticipate we will be pressing at any  
28 directions hearing that is listed at that stage, we will  
29 be pressing very strongly for an opportunity to file reply  
30 evidence.

31 HER HONOUR: I understand that but once the experts reports are

1 filed by - the defendant's side would file it by  
2 14 August, there could be a directions hearing seven days  
3 after that and you can press for that if you wish, and we  
4 can have an argument about that.

5 MS WATSON: Well, Your Honour, if that is to be the case, what  
6 if the parties' evidence was to be filed on the same day,  
7 rather than the defendant having an opportunity to respond  
8 to our evidence that we don't have an opportunity respond  
9 to their evidence?

10 HER HONOUR: But you will if you ask for one. Because what  
11 will happen - - -

12 MS WATSON: Sorry, Your Honour.

13 HER HONOUR: You will have that because, as you've  
14 foreshadowed, you will ask for that and - - -

15 MS WATSON: Yes, Your Honour.

16 HER HONOUR: But it really depends on how the evidence falls in  
17 terms of the first two reports. So I'm not locking you  
18 out, I'm just trying to facilitate and managing the case  
19 so it is more efficient than the way it has been  
20 proceeding at the moment because it is very difficult for  
21 both of you to reach agreement on quite a lot of things.

22 MS WATSON: Yes, Your Honour.

23 MR WALLER: Yes.

24 HER HONOUR: So you are not locked out, you're just pulled up a  
25 little bit in explaining - being asked to explain what the  
26 evidence means and what would result from it. Now, as  
27 you're foreshadowing, you'll say, 'Well, we want to file  
28 reply evidence' and Mr Waller will be saying, 'We think  
29 this is appropriate for some sort of agreement or a hot  
30 tub or whatever that can be done'.

31 MS WATSON: Yes, Your Honour.

1 HER HONOUR: We will leave that open. So I will cross out the  
2 reply order. So just remind me we've got to do a  
3 directions hearing after - that would be after the 14th  
4 but we'll come back to that. So you want objections to  
5 it. And then the other orders are objections to evidence  
6 prior to the trial date.

7 MR WALLER: I've worked out 10 business days prior to  
8 7 October, it is 23 September.

9 HER HONOUR: That's for 16?

10 MR WALLER: Yes.

11 HER HONOUR: So that's 23 September, yes.

12 MR WALLER: And then the next one - - -

13 HER HONOUR: Five business days prior. Would it be sensible to  
14 do - - -

15 MR WALLER: Five business days prior is 30 September, I think.  
16 I am sorry, I mucked up my dates. 30 September is, yes,  
17 is five business days prior, that's for Order 17.

18 HER HONOUR: Right.

19 MR WALLER: And for Order 18, the court book (indistinct)  
20 business days prior, that's 8 September.

21 HER HONOUR: Yes.

22 MR WALLER: And (indistinct) dates, 15 would be - - -

23 HER HONOUR: So can the parties work out those dates between  
24 them?

25 MR WALLER: We can work out that - - -

26 HER HONOUR: Because they're simply - they're all reliant on  
27 the trial date.

28 MR WALLER: Yes, they are.

29 HER HONOUR: Being the 7th so you can work those out.

30 MR WALLER: That leaves just the directions hearing.

31 HER HONOUR: So if the - we will schedule a directions hearing

1           - what if we - - -

2 MR WALLER: 15 October is a Friday - sorry, 14 August is a  
3 Friday - - -

4 HER HONOUR: I think we need a fairly - is 14 August a Friday?

5 MR WALLER: Yes, Your Honour.

6 HER HONOUR: So what about 21 August for a directions hearing.

7 MR WALLER: Anytime that week would be fine with us. Anytime.

8 HER HONOUR: Ms Watson?

9 MS WATSON: Yes, that's fine, Your Honour.

10 HER HONOUR: 21 August?

11 MS WATSON: Yes, Your Honour.

12 HER HONOUR: All right. So that probably should be put in -

13 well, the last one No.25. Just amend that to - just if

14 you can adapt that, so make that 21 August, not

15 necessarily the same wording. All right. Can I leave it

16 to the parties to confer and put in an agreed - not an

17 agreed necessarily, but orders in the form that we've

18 discussed?

19 MS WATSON: Yes, Your Honour.

20 MR WALLER: Your Honour, can I just say moving away timetabling

21 that I've just received instructions that - overnight, the

22 plaintiff submitted two further reports to the department

23 and to the Conservation Regulator in respect of two

24 further coupes, Gulmark and Subdownies where Greater

25 Gliders have reportedly been detected. The report from

26 the plaintiff now seeks (indistinct words) within those

27 coupes or within the coupes which contain Greater Glider

28 habitat.

29           This is obviously not in evidence before the court,

30 but we say it is another, we say, indicator of where this

31 is heading and why we've this submission today.

1 HER HONOUR: Yes. Very well. So for the moment, pending  
2 written reasons, I will do as I did on the earlier  
3 occasion which is to grant the interim injunctions and  
4 then deliver written reasons as soon as I can.

5 MS WATSON: Thank you, Your Honour.

6 HER HONOUR: Does anyone wish to say anything else before we  
7 sign off?

8 MR WALLER: No, Your Honour. Thank you and the court for  
9 facilitating this hearing in these circumstances.

10 HER HONOUR: Yes, thank you.

11 MS WATSON: Yes, thank you, Your Honour.

12 HER HONOUR: Very well, thank you.

13 - - -